

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5651

John C. Fletcher, Chairman & Neutral Member
D. D. Bartholomay Organization Member
E. N. Jacobs, Jr., Carrier Member

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
NORFOLK & WESTERN RAILWAY COMPANY

Docket No. 2
Award No. 2

Date of hearing December 16, 1995
Date of Award June 19, 1995

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when, beginning July 20, 1993, and continuing, it changed the starting time of Trackman L. D. McKenzie and S. W. Smith from 7:00 A.M. to 7:00 P.M. to avoid the payment of overtime (Carrier's File MW-DECR-93-24).
2. As a consequence of the violation referred to in Part (1) above, Trackmen L. D. McKenzie and S. W. Smith shall be allowed, in addition to what they have already been paid, eight (8) hours pay at their straight time rate for each day, Monday through Friday, beginning July 20, 1993, that they were not allowed to work their regularly assigned hours. They shall also be allowed compensation at their overtime rate of pay for all hours worked from 7:00 P.M. to 3:00 A.M. beginning July 20, 1993 and continuing until the violation ceased.

FINDINGS:

Public Law Board No. 5651, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

As a result of severe flooding along Carrier's lines within the State of Missouri during July 1993, Claimants' Section Gang was split, with some of the members working 7:00 A.M. to 7:00 P.M. and other members (the two Claimants) working 7:00 P.M. to 7:00 A.M. Carrier has argued that the changed assignments where, Claimants were assigned to work a 12-hour shift starting

at 7:00 PM were warranted, both by the specific provisions of the Agreement and the special license it retains to invoke extraordinary measures in response to emergency situations. The Organization has argued that the 7:00 PM starting time of Claimants was established to avoid the payment of overtime. It maintained that Rule 36 covers only regular operations and that Claimants were performing special work, which should have been done on overtime.

Rule 36 of the Agreement is the operative rule involved. That Rule provides:

RULE 36 - HOURS OF SERVICE

(a) The starting time of the regular work period of regularly assigned service will be designated by the supervisory officer and will not be changed without first giving employees affected thirty-six hours notice.

(b) Employees working single shifts, regularly assigned exclusively to day service, will start work period between 6:00 A.M. and 8:00 A.M.

(c) Employees working single shifts, regularly assigned exclusively to part day service and part night service, will start work period between 3:00 P.M. and 6:00 P.M.

(d) Employees working single shifts, regularly assigned exclusively to night service, will start work period between 6:00 P.M. and 9:00 P.M.

(e) For regular operation necessitating working periods varying from those fixed for the general force, the hours of work will be assigned in accordance with the requirements.

First it should be noted that the use of "regular work period" and "regularly assigned service" in paragraph (a) cannot be read so as to exclude the tasks that were being performed between 7:00 P.M. and 7:00 A.M. by Claimants, as the Organization suggested in its appeal letters on the property. The Rule obviously pertains to work schedules of employees and not to the duties performed by employees within these work schedules.

Next it should be noted that starting times for these work periods may be changed by a supervisor upon 36 hours notice (paragraph (a)). It has not been suggested that this provision of the Rule was not followed in Claimants' case.

Also, it is noted that Rule 36 does not require that all members of a gang work the same schedule. If the Organization contends that all of the members of a gang work the same hours it must point to a provision in some rule establishing this requirement. This has not been done, indeed not attempted.

Further, the rule allows starting times between 6:00 P.M. and 9:00 P.M. for employees regularly assigned to night service (paragraph (d)). Because of special operating considerations Claimants were regularly assigned to night service to repair damage caused by flooding.

Finally, considerable license is conveyed to Carrier by the rule to make "assignments in accordance with requirements" when "operation[s] necessitating working periods varying from those fixed for the general force" (paragraph (e)). When this is read with extraordinary privileges Carrier may exercise in emergency situations, it is difficult to envision a contract breach when an around-the-clock operation is instituted to get tracks repaired, especially in a situation when the starting times of the assignments are in harmony with the parameters developed in Rule 36.

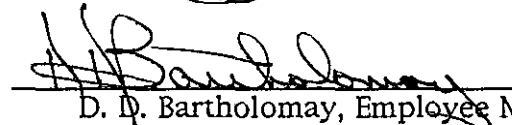
Accordingly, it is the finding of the Board that Carrier was privileged to effect the complained of changes in Claimants' assignments. Their claims for additional compensation are without merit. They will be denied.

A W A R D

Claim denied.



John C. Fletcher, Chairman & Neutral Member



D. D. Bartholomay, Employee Member



E. N. Jacobs, Jr., Carrier Member

Dated at Mt. Prospect, IL, this 19th day of June, 1995