

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5651

JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
E. N. JACOBS, JR., CARRIER MEMBER
D. D. BARTHOLOMAY, ORGANIZATION MEMBER

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NORFOLK WESTERN RAILWAY COMPANY

Award No. 3
Case No. 3

Date of Hearing - October 17, 1996
Date of Award - April 21, 1997

Statement of Claim:

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier failed and refused to allow Mr. B. Graham to displace the junior employee holding the foreman track inspector position at North Kansas City, Missouri on February 13, 1995, because he did not live within thirty (30) miles of the headquarters of the position.
2. As a consequence of the aforesaid violation, Claimant B. Graham shall be paid at the applicable foreman track patrolman's rate of pay for all straight time and overtime hours worked by Mr. G. A. Burks, beginning February 13, 1995, and continuing until the violation ceases.

Carrier's File MW-DECR-95-05-LM-58

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, that 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.

Claimant resides in Carrollton, Missouri. On Friday, February 10, 1995, he was displaced from his backhoe operator position. On Monday, February 13, 1995, he attempted to displace a junior employee working the foreman track inspector position, in North Kansas City, Missouri. Carrollton is approximately 70 highway miles distance from North Kansas City. Claimant was not allowed to displace because Carrier, at the time, had imposed a unilateral requirement

that all occupants of track inspector positions reside within 30 miles of the headquarters of the position. The instant claim was filed challenging Carrier's refusal to allow Claimant's displacement. While this matter was being progressed under the grievance procedures of the Agreement, a different dispute contesting the 30 mile residency requirement was considered by this Board. In Award No 1, dated June 19, 1995, the Board concluded that:

[The] actual location of [a track foreman's] residence is not material if they are able to report for work at the starting times assigned and are able to respond for emergency call-out within a reasonable response time.

Following the release of Award No. 1, Carrier continued to deny Claimant a displacement onto the track foreman's position at North Kansas City, on the basis that the distance involved would require an emergency response time of one hour and fifteen minutes, which it did not consider to be reasonable under the circumstances. Carrier has not indicted what it considers a reasonable response time to be, nor has offered any evidence on what response times are in place elsewhere. The Organization notes that Claimant was denied the opportunity to displace, therefore he was unable to demonstrate if he could respond to emergency call-out within a reasonable time.

Thus the real issue in this matter is what is a reasonable response time for emergency call-out. In our award No. 1 we concluded that an employee, that did not live within 30 miles of the headquarters point, could not be denied a track foreman's position, if he were able to respond for emergency call-outs within a reasonable time. That conclusion is reaffirmed here. It is obvious that it would be patently unfair for Carrier to require that an employee live within a few minutes of the headquarters point of a track foreman's position to be eligible for assignment to that position. On the other hand, Carrier can expect that employees assigned to a track foreman's positions reside within a reasonable distance so as to be able to respond to an emergency call-out without inordinate delay. A fixed mileage requirement between the residence and the headquarters point is inappropriate because vast variations in travel speeds exist, depending upon the area involved. A time factor, though, is not inappropriate, because, regardless of the distance involved, the elapsed time from notification of the emergency to reporting at the site is what is important. The question is, then, what time factor should be used.

In answering this question, the Board looks to practices in the industry. In train service operations it is almost universal that employees are entitled to a minimum 1 hour and 30 minutes notification, when being called for work. (We are aware of several rules that call for a minimum of two hours, but 1 hour and 30 minutes is almost the universal standard.) Therefore, the Board concludes that a 1 hour and 30 minute response time should be the standard applied to this case. This standard should be applied in normal conditions. A good test would be the average commuting times between the employees residence and the headquarters point. If on a daily basis the employee is able to travel to work for his regular scheduled starting time in 1 hour and 30 minutes or less, he should not be denied assignment to a track foreman's position on the basis that he would be unable to timely respond for emergency call-out.

As applied to the instant case, while Claimant lived 70 miles from the headquarters point, it was conceded that his response time would only be 1 hour and 15 minutes. This is less than the accepted minimum call time in the industry. Carrier in effect was holding Claimant to a shorter response time than it provides thousands of other of its employees that are subject to calling to report for their assignments. As such it was an unreasonable denial of his displacement unto the track foreman's position he sought. His claim is valid. It will be sustained.

Claimant shall now be allowed to displace unto the track foreman's position at North Kansas City, Missouri. He shall be made whole for wage losses sustained between that what he received in other employment and that what he would have received in the track foreman's position he sought to displace onto.

A W A R D

Claim sustained.

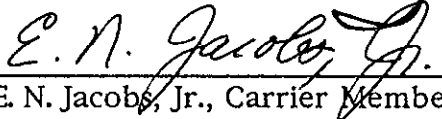
O R D E R

Carrier is directed to comply with this award and make any payments due within thirty days of the date indicated below.

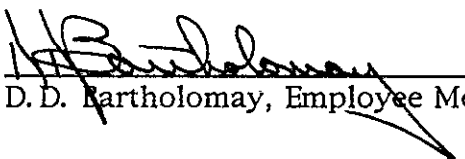
I dissent



John C. Fletcher, Chairman & Neutral Member



E. N. Jacobs, Jr., Carrier Member



D. D. Bartholomay, Employee Member

May 29
Dated at Mt. Prospect, Illinois., ~~April 21~~, 1997

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INTERPRETATION NO. 1

Date of Hearing - October 17, 1996
Date of Award - April 21, 1997

Date of Interpretation - September 26, 1997

Following the release of Award No. 3, which provided a monetary remedy, a dispute developed as to the proper compensation to be paid Claimant B. Graham during the period he was not allowed to displace unto the Track Foreman's position at North Kansas City, Missouri. Both parties filed written statements of position on their contentions as to proper compensation in the remedy. Further, an executive session was held by telephone, at which the parties representatives were permitted to explain their reasoning, and respond to arguments made by the other side.

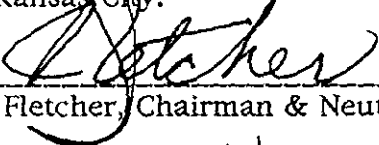
From these arguments and written statements the Board understands that the Organization is asking that the compensation earned by the specific individual that Claimant was not allowed to displace be used as the benchmark, even though some of these earnings were received from service other than that as a Track Foreman at North Kansas City.

Carrier, contends that Claimant is only entitled to be paid what the occupant of the position earned, during the period that Claimant was denied the displacement. Carrier maintains that Claimant is not privileged to be credited with earnings that the individual he was not allowed to displaced received from other service. While that individual was not working the foreman's job, someone else was, and it is these earnings that are the benchmark during this period.

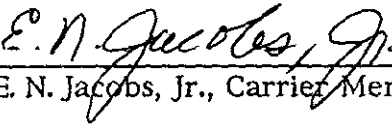
It is the Board's view that the position of Carrier is correct. In our Award we stated that Claimant:

"shall be made whole for wage losses sustained between what he received in other employment and that what he would have received in the track foreman's position."

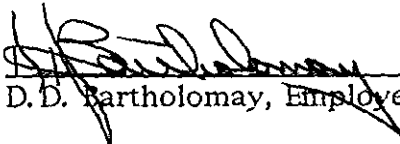
Accordingly, a correct computation of the remedy would be to determine what the occupant(s) of the track foreman's position earned, while working as a track foreman at North Kansas City, Missouri, during the period of time that Claimant was entitled to work the job, and use this result as the benchmark to determine wages lost. The Award did not contemplate inclusion of earnings accruing to a particular individual that resulted from service other than as the track foreman at North Kansas City.



John C. Fletcher, Chairman & Neutral Member



E. N. Jacobs, Jr., Carrier Member



D. D. Bartholomay, Employee Member

Dated at Mt. Prospect, Illinois., September 26, 1997