PUBLIC LAW BOARD NO. 5651

AWARD NO. 4
CASE NO. 4

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes
and
Norfolk & Western Railway Company

ARBITRATOR: Gerald E. Wallin

DECISION: Claims sustained in accordance with the Findings.

DATE: December 17, 1999.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it failed to properly compensate Machine Operator D. B. Adams for work performed by him on July 23, August 4 and 14, 1997 and continuing (Carrier's File MW-DECR-97-89-LM-525).

2. The Carrier violated the Agreement when it failed to properly compensate Machine Operator R. Jones for work performed by him on December 4, 15 and 23, 1997 (Carrier's File MW-DECR-97-114-LM-754).

3. As a consequence of the violation referred to in Part (1) above, Claimant D. B. Adams shall be:

   '... paid at his applicable time and one-half machine operator's rate for 1 hours and 00 minutes. This is a continuing claim until this is resolved.'

4. As a consequence of the violation referred to in Part (2) above, Claimant R. Jones shall be:

   '... paid for a call on December 4, 1997 for the entering payroll at his home as per instructions from the Carrier. Also be paid for 25 minutes on December 15, 1997 and 15 minutes for December 23, 1997 for a total of 40 minutes at his applicable machine operator's time and one-half rate for entering his payroll before and after his normal working hours at Taylorville, Illinois.'

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

These two Claims arose on the former Wabash territory and seek overtime compensation for having to submit payroll information via computer outside of regular working hours. The continuing nature of the Adams Claim is not in dispute. The Board also understands additional claims exist that are being held in abeyance pending the Board's determination here.

The Organization principally makes claim under Rules 39 and 40 of the parties' effective Agreement, which read, in pertinent part, as follows:

RULE 39 - OVERTIME

* * *

(a-1) - Former WAB only - Time worked preceding or following and continuous with a regularly assigned eight (8) hour work period shall be computed on actual minute basis and paid for at time and one-half rates, * * *

* * *

RULE 40 - CALLS

(a) Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of 2 hours and 40 minutes at the overtime rate for 2 hours and 40 minutes or less * * *

Although subsequent negotiations between the parties converted monthly pay rates to hourly rates effective February 1, 1998, the change was without prejudice to the instant Claims and others similarly situated. In addition, their conversion agreement provided that "... other rules or practices that may presently apply to monthly-rated positions remain applicable ..." For purposes of this dispute, therefore, the instant Claimants were monthly rated machine operators who were required to keep track of their payroll time and submit it periodically via the Carrier's computer system.

The Carrier's use of electronic gathering of payroll data began in 1995. Neither party's submission, however, pinpoints the date of implementation. It is also undisputed that Claimants were not allowed time during regular working hours to compile and transmit the required payroll information.

In the Organization's view, the question in dispute is a relatively simple one. Are Claimants entitled to compensation for work they perform outside of their regularly assigned hours? The Organization contends that no Agreement rule exempts the disputed payroll work from the operation of Rules 39 and/or 40.

Carrier, on the other hand, contends the payroll work is a prior practice regarding service and compensation of monthly rated employees which continues under the effective Agreement. In its first and second responses to the Claims on the property[1], the Carrier contended that Rule 27 of the former Wabash agreement dated December 1, 1963 remained in effect under the parties' July 1, 1986 combined Agreement. Carrier also contended that historically monthly rated employees have typically filed their payroll after normal hours. Finally, on the Jones Claim, Carrier contended the compensation sought was excessive. It made no such contention on the Adams Claim.

On the record before us, the Organization's evidence and contentions establish a *prima facie* case in support of the Claims. On the Adams Claim, the assertions of 10 minutes each on July 23 and August 14, 1997 and 20 minutes each on August 4 and 14, 1997 were not refuted by the Carrier during the on-property handling. For our purposes, such unrefuted assertions of material matters become established as fact in the record. We must accept, therefore, that Claimant Adams was required to spend those amounts of time on the dates indicated to compile, gain access to the computer system, and submit his data. Thus established as actual time parameters in the Adams Claim, they provide credibility for the 15, 20 and 25 minute claims sought by Claimant Jones. In addition, it is undisputed that Claimants were required to expend these amounts of time outside of their regular working hours. Finally, Rule 39 (a-1) rather clearly appears to apply to such time periods.

After careful consideration of the opposing evidence, we must find that Carrier's defenses lack merit. Carrier's past practice contention is an affirmative defense. As such, the Carrier bears the burden of proof to establish every essential element of the defense. On the record before us, we have the statements of several supervisors to the effect that employes were not allowed to submit payroll information during regular working hours historically. Several of the statements, however, note that this was not always the case -- sometimes the employes were allowed to do it during work time. In addition, the Board has before it the statements from over one hundred employes who assert they were always allowed time during regular working hours to submit such payroll data until these Claims arose. Taken together, this evidence presents an irreconcilable conflict of material fact. It is also well settled in railroad dispute resolution that Public Law Boards cannot resolve such factual disputes. Having received the evidence as part of a record developed by others, we have no basis for weighing it or determining its credibility. The inexorable result of such factual conflicts is to make a finding against the party that shoulders the burden of proof. On this record, therefore, we must conclude that Carrier has not proven its past practice contention.

[1] In the second response on the Jones Claim, the Carrier official incorporated the contention by reference to the first response.

The same is true of the practice since electronic payroll data gathering has been in effect. According to the Organization, the Carrier has only recently disallowed submission during regular working hours. The change is what prompted the Claims. Carrier, on the other hand, maintains that employes have never been allowed work time to submit computerized data. Once again, we find ourselves with essentially offsetting positions unsupported by probative evidence. In addition, Carrier presumably has records that would resolve the conflict with convincing finality. Normally computer records capture the time of submission of payroll data. Such data would provide Carrier with a ready means to show whether employes were submitting the data inside or outside of their assigned working hours. Unfortunately, the instant Claim handling record before us does not address this aspect of the case whatsoever. Given that the computerized practice is also an affirmative defense raised by the Carrier, it has, once again, the burden of proof. Under the circumstances of the instant evidentiary records, we must find that Carrier's burden has not been met. Indeed, since Carrier is in possession of whatever computerized records exist and has not used them to prove its contention, the Organization is entitled to the adverse inference that the computer records would not support the Carrier's position on the electronic practice.

Carrier's other substantive defense consists of the contention that Rule 27 of the former 1963 Wabash agreement continued in effect after July 1, 1986. Our reading of old Rule 27 shows that monthly rated employes were, indeed, expected to perform unspecified duties incidental to their assignments outside of regular working hours without added compensation. Upon careful reading of the effective Agreement, however, we must conclude that old Rule 27 was not continued in effect. As the Organization noted in the on-property record, Rule 59(p) of the July 1, 1986 Agreement explicitly superseded the former 1963 Wabash agreement. Carrier's reliance upon Rule 59(n) to the contrary is not persuasive for two reasons. It reads as follows:

> (n) All rates of pay in effect the effective date of this Agreement will remain unchanged until amended in accordance with the Railway Labor Act.

First, by its clear terms, paragraph (n) pertains only to rates of pay. It does not also encompass pay *rules*. Old Rule 27 is a pay rule and not a pay rate. Examination of the text of old Rule 27 shows the parties recognized a distinction between the *monthly rate* and pay rules such as old Rule 27. Second, old Rule 27 was no longer in effect on the effective date of the July 1, 1986 Agreement. It had been superseded by Rule 59(p). Thus, by the rather clear language of Rule 59, old Rule 27 was no longer operative after June 30, 1986. Moreover, to the extent that the Carrier contends the negotiating parties intended that old Rule 27 remain operative under the 1986 Agreement, the Carrier has, once again, the burden of proof to establish such negotiated intent. The record before us contains no evidence of negotiating history to support the contention. We are compelled to find, therefore, that old Rule 27 was superseded as the Organization maintains and did not continue in effect under the 1986 Agreement. Carrier has not sustained its burden of proof to the contrary.

For the foregoing reasons, we find the Carrier's insistence that employes must submit payroll data outside of regular working hours without proper compensation is a violation of the

Agreement as alleged in the Claims. Accordingly, Carrier is directed to either provide proper compensation per the Agreement or allow employes a reasonable amount of time during regular working hours to submit the requisite payroll data.

For the remedy on the instant Claims, we find that the Adams Claim must be sustained for 1 hour at his applicable overtime rate per Rule 39(a-1). Regarding the Jones' Claim, we do not find Claimant Jones to be eligible for a Rule 40 call for December 4, 1997. Nothing in the record shows that he was required to submit the data from home while on vacation. It appears, therefore, that submission on that date was pursuant to his personal choice and not Carrier's direction. There is no evidence he could not have submitted the requisite data in connection with his last regular work day. Consequently, Claimant Jones should be paid only the 20 minutes for that date at his overtime rate per Rule 39(a-1). The same is true for his claims of 25 minutes and 15 minutes for December 15 and 23, 1997.

AWARD: The Claims are sustained in accordance with the Findings.

Gerald E. Wallin, Chairman
and Neutral Member

Roy C. Robinson,
Organization Member

D. L. Kerby
Carrier Member