NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6182

BROTHERHOOD OF LOCOMOTIVE ENGINEERS	)	
	)	Case No. 1
and	)	
	)	Award No. 1
GRAND TRUNK WESTERN RAILROAD, INCORPORATED	)	

Martin H. Malin, Chairman & Neutral Member
J. M. Karakian, Employee Member
K. R. Knox, Carrier Member

Hearing Date: October 27, 1998

QUESTION AT ISSUE:

Has the Carrier demonstrated a bona fide need, as required by Article IX of the 1996 BLE/GTW Agreement, to vary the starting times of Yard Assignments 113YC, 213YC, 313YC and 108PMC at Pontiac, MI and 117AP BRT at Flint, MI, outside the bounds of Article 19 of the Schedule Agreement, pursuant to their notices served January 14 and 15, 1997?

FINDINGS:

Public Law Board No. 6182, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Article 19(B) of the Schedule Agreement provides:

When three eight hour shifts are worked in continuous service, the time for the first shift to begin work will be between 6:30 a.m. and 8:00 a.m., the second 2:30 p.m. and 4:00 p.m. and the third 10:30 p.m. and 12 midnight.

On January 14, 1997, Carrier served notice that, pursuant to Article IX of the 1996 BLE/GTW Agreement, it planned to vary the start times for four position at its Pontiac yard. Carrier stated that three of the changes were necessary "to meet the customer's switching times of 0600, 1000, 1400, 1800, 2200, and 0200." The fourth was necessary "to meet the customer's request

for a daily late switch." On January 15, 1997, Carrier served notice that it planned to vary the start time of one position at its Flint yard, "to provide more timely service at Flint in order to make CSX connections." Subsequently, Carrier rescinded the Flint change and one of the Pontiac changes. At the hearing the parties agreed that only three positions at Pontiac remain for decision by this Board.

The Organization contends that Carrier had the burden to prove that the changes were predicated upon a bona fide need to meet customer requirements by servicing the shipper outside of existing work rules related to start times. The Organization argues that Carrier maintains a twenty-four hour switching operation and has the ability to service the customer, General Motors, without changing start times. The Organization urges that the real reason for the changes in start times was to reduce overtime. In the Organization's view, Carrier failed to prove its bona fide need. The Organization argues that Carrier offered no documentation to support its assertions that a bona fide need existed.

Carrier contends that the Organization had the burden to prove that Carrier lacked a bona fide need and that the Organization failed to carry its burden. Carrier argues that the changes were dictated by the needs of its customer, General Motors. Carrier maintains that General Motors had threatened to take its business elsewhere if Carrier did not improve the service. Carrier argues that without the varied start times, Carrier had to pay penalties for air freight when it did not make the proper connections from the plant to the proper trains. Carrier denies that the changes were motivated by a desire to eliminate overtime. Instead, in Carrier's view, they were dictated by the needs of a customer.

Initially, we note that both parties have submitted material that was not considered on the property. This Board is limited to consideration of matters raised on the property. We base our decision on the evidence exchanged on the property and not on the material submitted by either party after the close of the record on the property.

Article IX provides:

1. (a) When GTW can show a bona fide need to meet customer requirements by servicing that shipper outside of the existing work rules related to starting times and yard limits for yard crews, such service may be instituted on an experimental basis for a six-month period.

(b) Prior to implementing such service, the carrier will extend at least 14 days' advance written notice to

the General Chairman of the employees involved. The notice will include an explanation of the bona fide need to provide the service, a description of the service, and a listing of the work rules related to starting times and yard limits for yard crews which are at variance with existing agreements.

(c) A Joint Committee, comprised of an equal number of carrier representatives and organization representatives, shall be constituted to determine whether a bona fide need exists to provide the service. If the Joint Committee has not made its determinations by the end of the 14 day advance notice period referenced in Paragraph (b), it shall be deemed to be deadlocked, and the service will be allowed on an experimental basis for a six-month period. If, after the six months have expired, the organization members of the Joint Committee continue to object, the matter shall be referred to arbitration. Pending decision by the arbitrator, the service may continue to be operated on an experimental basis.

(d) If the parties are unable to agree upon an arbitrator within seven days of the date of the request for arbitration, either party may request the National Mediation Board to appoint an arbitrator.

(e) The determination of the arbitrator shall be limited to whether the carrier has shown a bona fide need to provide the service requested or can provide the service without a special exception to the existing work rules related to starting times and yard limits for yard crews being made at a comparable cost to the carrier.

Each party contends that the other party had the burden of proof with respect to the existence of a bona fide need to vary the starting times. Generally, in rules cases, the Organization bears the burden of proof. However, such a general rule merely reflects the probable intent of the parties in most rules cases. Where the parties have expressed a contrary intent in the agreement, the Board must respect that intent.

We find it significant that Article IX(1)(a) did not simply state that Carrier may vary the starting times where a bona fide need to service a customer exists. Rather, the provision specified that the starting times may be varied "[w]hen GTW *can show* a bona fide need to meet customer requirements . . ." (Emphasis added.) This language plainly places an initial burden on Carrier to show the existence of a bona fide need. At a minimum, to carry its burden, Carrier must come forward with evidence of a bona fide need to meet customer requirements.

Our interpretation that Carrier must come forward with evidence of a bona fide need is reinforced by the language of Article IX(1)(e), which provides that the arbitrator determine "whether Carrier *has shown* a bona fide need . . ." (Emphasis added.) In other words, the arbitrator must decide whether Carrier has met its burden to show a bona fide need, the burden imposed on Carrier in Article IX(1)(a). Similarly, the question presented to this Board is, "Has the Carrier *demonstrated* a bona fide need . . ." (Emphasis added.)

Before the Board, Carrier has argued that it changed the starting times in response to complaints from General Motors and threats by General Motors to take its business elsewhere. Carrier has argued that under the schedules mandated by Article 19, it was forced to pay penalties for air freight when it did not make the proper connections. Carrier has argued that the starting times mandated by Article 19 did not allow it to match employees with the needed switches which General Motors demanded be made when its employees were on break and during its shift changes. If Carrier demonstrated these points it would have shown a bona fide need under Article IX.

The record developed on the property, however, is quite sparse. A Joint Committee conference was held, apparently on or about January 20, 1997. On April 9, 1997, the Organization's General Chairman wrote to Carrier's Director, Human Resources appealing based on the deadlocked status of the Joint Committee. The General Chairman maintained:

> [W]hile in Joint Committee session, conferencing developed and revealed the fact that you are already providing service in accordance with the existing starting time rules, and that the customers' service needs are better met under the existing starting time arrangement. . . .

On May 15, 1997, Carrier's Manager Labor Relations replied:

> We feel that Article IX Section 1B has been complied with in that a joint meeting was held and the Carrier's plan was discussed. Subsequent to the meeting, the yard assignments that had been identified were changed to better service the customers. . . .

On July 15, 1997, the General Chairman wrote to the Manager Labor Relations advising that Carrier's decision was not satisfactory to the Organization. A conference apparently was held on February 5, 1998. On February 18, 1998, the General Chairman wrote to the Director Labor Relations, stating:

> [W]hile in Conference you did not provide any evidence-of-the-fact that the Carrier needed to provide the Service in a way that would require changes in yard starting times. . . .

While in Conference the Carrier contended that they (the Carrier) have a right to change yard starting times, per Article IX, in order to eliminate overtime costs so as to be able to keep the business from being lost to a competitor and continue Servicing the customer. The Organization argued in Conference that you (the Carrier) offered absolutely no evidence that you could lose the business to a competitor or that a competitor was going to undercut you. . .

On February 24, 1998, the Manager Labor Relations responded:

During conference . . . Assistant Superintendent of Pontiac stated that prior to the change in the starting times there were late switches, the cars failed to make connections on the proper trains which resulted in unnecessary overtime and complaints and threats from the customer. Your assertions that overtime was the only reason the starting times were changed is in error. However, subsequent to the changes in the starting times the operation has improved greatly, as the cars are making the proper connections, the overtime has decreased and the customer complaints have diminished.

On March 2, 1998, the General Chairman replied: "It has been the constant position of the Organization, from the outset, that when requested to show a bonafide (sic) need to change yard starting times, you were not forthcoming with any evidence whatsoever (i.e. complaints, letters, etc.)."

Our review of the record reveals no evidence that penalties for air freight were ever discussed on the property. The only matters revealed by the record as considered on the property were assertions by the Assistant Superintendent of Pontiac that prior to the changes there were late switches, cars failed to make connections, resulting in threats and complaints from the customer, and that the operation had improved since the changes were instituted. However, assertions are not evidence. There is nothing in the record developed on the property by way of evidence supporting those assertions. Although the Organization requested documentation, none exists in the record. There is no evidence of the specific complaints or threats, who made them, when they were made, or how they were linked to the starting times provided for in Article 19. Without any supporting evidence, Carrier cannot show a bona fide need to meet customer requirements by servicing General Motors outside of existing work rules related to starting times.

PLB NO. 6182
AWD NO. 1

AWARD

The question presented in answered in the negative.

Martin H. Malin, Chairman

K. R. Knox
Carrier Member

J. M. Karakian
Employee Member

Dated at Chicago, Illinois, November 25, 1998.