

PUBLIC LAW BOARD NO. 6832

PARTIES TO THE DISPUTE:

MASSACHUSETTS BAY COMMUTER RAILROAD

- and -

BROTHERHOOD OF MAINTENANCE OF WAY DIVISION,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

STATEMENT OF CLAIM:

(a) Carrier violated the rights of Claimants Ronald Lynch and Richard Chaves under the provisions of Rule 11 of the current agreement between the BMW and MBCR when it failed to allow Claimants the ability to work overtime on January 20, 23 & 26, 2005 as provided for in the Rule.

(b) Claimants Lynch and Chaves shall be compensated a total of eight (8) hours overtime at the B&B Foreman's and B&B Mechanic time and one-half rate respectively for this violation.

OPINION OF BOARD:

Massachusetts Bay Commuter Railroad ("MBCR" or "Carrier") succeeded Amtrak as operator of the commuter railroad system for the Massachusetts Bay Transit Authority. As part of that transaction, effective July 1, 2003, B&B Foreman Lynch, B&B Mechanic Chaves and three (3) other former employees of Amtrak's Northern District B&B Department, transferred their seniority to become "prior rights" employees of MBCR on the "Shore Line" territory, which runs from South Street Station at Boston to the Massachusetts/Rhode Island State Line at South Attleboro. The Claimant's were accorded such "prior rights" status as beneficiaries of Side Letter No. 6 between MBCR and BMW, dated May 14, 2003, which reads, in pertinent part, as follows:

In Part 1, Section 5.A. of the Agreement the parties acknowledged that positions would be established by MBCR to perform the Attleboro Line station maintenance and advertised to employees on the applicable Amtrak Northern District B&B Department rosters. It is agreed that the successful applicants for such positions will be assigned a new seniority date of July 1, 2003, on the applicable

MBCR Commuter Service Seniority District rosters. The successful applicants will be placed on the applicable MBCR Commuter Service Seniority District rosters according to their relative ranking on the applicable Amtrak Northern District B&B Department rosters. The successful applicants will have prior rights to positions so established.

The instant claims assert that Carrier violated the Side Letter No. 6 "prior rights" of the named Claimants on several days in late January 2005, by allegedly misinterpreting and misapplying Rule 11-OVERTIME §4 of the controlling Agreement, when it assigned "planned overtime" at South Street Station (*i.e.*, non-emergency routine snow shoveling work) to junior Shore Line employees, rather than giving these "prior rights" employees first priority to the planned overtime.

Rule 11-OVERTIME, which is cited and relied upon by both Parties, reads as follows:

1. Time worked preceding or following and continuous with the employee's assignment on regular eight-hour work periods shall be computed on the actual minute basis and paid for at the time and one-half rate, with double time on an actual minute basis after sixteen (16) hours of work in any twenty-four hour period (computed from the starting time of the employee's regular shift), except that overtime shall automatically cease and the pro rata rate shall apply at the starting time of the employee's next regular assigned work period.
2. Employees called to perform work not continuous with the regular work period will be allowed a minimum of two hours and forty minutes (2'40") at the time and one-half rate and, if held on duty in excess of two hours and forty minutes (2'40"), they will be paid on a minute basis at the time and one-half rate for all time worked.
3. Time worked on rest days and holidays will be paid for at the time and one-half rate with double time on an actual minute basis after sixteen (16) hours of work until relieved or until commencement of the employee's next regular assigned work period, whichever occurs first. Such continuous time worked after commencement of the next regular assigned work period shall be paid at the pro rata rate, pursuant to Section 1 of this Rule 11.
4. When necessary to work employees under this Rule, the senior available qualified employees will be called according to the following:
 - (a) Preference to overtime work on a regular work day which precedes or follows and is continuous with a regular assignment shall be to the senior available qualified employee of the gang or the employee assigned to that work.
 - (b) Preference to overtime work other than in (a.) above, shall be to the senior available qualified employee at the headquarters who ordinarily and customarily performs such work.
5. Employees will be compensated as if on continuous duty in all cases where the release from duty does not exceed one (1) hour.

6. In the application of this Rule to furloughed employees temporarily brought into service in emergencies, the starting time for such employees will be considered as the time they are required to report for work.

The Organization maintains that since July 2003 the Parties applied Rule 11 according to a mutual understanding that the five (5) "prior rights" employees had first preference to "planned" overtime call-outs on the Shore Line territory, including at South Station; but not to "continuous" and/or "emergency" call-outs. According to the Organization both Parties agreed and understood that if the South Station crew started the project during regular working hours and continued into overtime that the crew headquartered at South Station would work that time. However, if the work was to be planned for overtime then it would go in seniority order to those employee with Shore Line "prior rights". For its part, Carrier maintains that Side Letter No. 6 "prior rights" grant no express entitlement at all to any overtime and that it had the right to call the South Station crew for South Station overtime on the January 2005 claim dates, irrespective of what may have been done previously.

When conflicting interpretations of a contract are plausibly demonstrated, the language in dispute must be considered to be ambiguous. Armstrong Rubber Co., 17 LA 741 (Gorder, 1952). If the language of a collective bargaining agreement is ambiguous, an arbitrator may rightly consider parol evidence of mutual intent to resolve a dispute as to the meaning of the unclear contract language. Brigham Apparel Corp., 52 LA 430 (1969). Several sources of evidence may be utilized in order to determine the intent of the parties when entering into a contract, including the language of the agreement, statements made during negotiations, bargaining history and past practice. *See*, Milk Producers Ass'n, 95 LA 1184 (Kanner, 1990). Intent may also be determined from the meaning of the language at the time the agreement was written. Shop Rite Foods, Inc., 75 LA 625 (Gowan, 1980).

The Party urging a dispositive custom or practice has the overall burden of proving the existence of that "past practice." In a frequently-cited decision, Arbitrator Jules Justin observed: "In the absence of a written agreement, 'past practice' to be binding on both Parties, must be 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." Celanese Corp. of America, 24 LA 168, 172 (1954). *See also* Great Atlantic & Pacific Tea Company, 46 LA 372, 374 (Scheiber, 1966). No less an authority than Elkouri & Elkouri observed that the use of "past practice" to give meaning to ambiguous contract language is so common that no citation of arbitrable authority is necessary. How Arbitration Works, Fourth Edition, 1984, page 451.

The facts giving rise to these consolidated grievances do not appear to be in material conflict and substantiate that the merits of the Organization's claims are well-founded in a mutually recognized past practice. In that regard, the record shows from the time of their employment/transfer to MBCR in July 2004 until the instant claims arose in January 2005, the five "prior rights" employees were given preference and priority for planned overtime calls on the Shore Line. That practice continued even after new positions for a MBCR maintenance crew headquartered at South Station were bulletined and filled in early 2004. The Organization's testimonial assertion of this "past practice" is substantiated by the "Bridge and Building Call Out Roster"; which was posted by Roadmaster Patty Mallon and Bridge Inspector Chris Ward in March 3, 2004 and apparently adhered to by those Carrier managers until the instant claims arose. On that Carrier-produced document, there appears a listing of all the other "non-prior rights" employee names and telephone contact numbers [including B&B Foreman Rob Kelly and B&B Mechanic Chris Geezil, who were called

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in place of the named Claimants on claim dates], followed by this instruction, printed in bold format capital letters and underlined (emphasis in original):

**THE FOLLOWING NAMES ARE TO BE CALLED FOR SHORE LINE STATIONS FIRST
THEN REVERT TO THE ABOVE LIST AFTER THIS LIST HAS BEEN EXHAUSTED:**

Ron Lynch,	Foreman	401-885-8223/1-401-480-6463	N. Kingston, R.I
Richard Chaves		401-884-3797	East Greenwich, RI
Thomas Melvin		401-351-6124/1-401-640-4125	Providence, R.I
John Saunders		401-738-1308/1-401-3164910	Warrick, R.I
Tyler Cooper		508-944-0263	Brockton, MA

The first of four (4) claims now before this Board arose on January 20, 2005, when a Carrier manager deviated from the foregoing instructions and failed to offer "prior rights" Shore Line B&B Foreman Ron Lynch the planned overtime work of snow removal at South Station before calling out South Station B&B Foreman Rob Kelly to perform that work at the overtime rate between 2:00 am and 7:00 am. In a telephone conversation of January 21, 2005, the Chief Engineer and the Assistant Chief Engineer discussed what they had done with BMW General Chairman Winter and apparently obtained some kind of verbal concurrence. On that basis, the Carrier again called South Station B&B Foreman Rob Kelly in preference to Shore Line B&B Foreman Ron Lynch for such planned overtime work at South Station on January 23 and 26, 2005 and also called South Station B&B Mechanic Chris Geezil in preference to Shore Line B&B Mechanic Richard Chaves for planned overtime work at South Station on January 23 and 26, 2005. About one week later, by letter dated February 6, 2005, the BMW General Chairman advised the Assistant Chief Engineer, as follows (emphasis in original):

Recently (January 21) we had a conversation regarding planned overtime at South Station and I have now realized I gave you some bad information as to who should be called first. This matter was previously discussed involving planned overtime versus continuation and I would like to put this question to rest in writing:

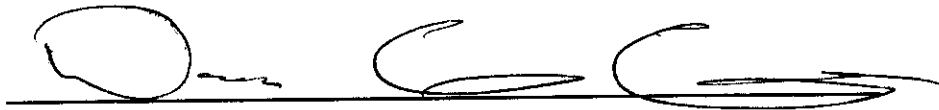
"When planned B&B overtime is set up for work on the "Shore Line" from South Station to South Attleboro and the MassJR1 state line the call is first made in seniority order to those employees who possess "prior rights" to work in that territory. This prior right was given to those former Amtrak employees who transferred effective July 1, 2003. The prior rights employees are asked first then all other employees in seniority order".

I apologize for any confusion this may have caused recently.

About one month later, Claimants Lynch and Chaves filed claims for the overtime pay earned by the South Station crew employees on January 20, 23 and 26, 2005. Based on the record evidence, we conclude that these claims have *prima facie* merit in that these "prior rights" Claimants should have been offered the planned overtime in accordance with the established past practice of so interpreting and applying Side Letter No. 6 and Rule 11, as evidenced by the "Call Out Roster" instructions, dated March 3, 2004, *supra*. However, the monetary damages claimed as remedy by the Organization for January 23 and 26, 2005 are grossly excessive and/or barred on fundamental equity grounds of estoppel because of the General Chairman's so-called "bad information" and because the Claimant's actually earned more overtime pay on January 26, 2005 than did the South Station employees. As for the January 20, 2005 violation, which preceded the January 21, 2005 conversation between the Assistant Chief Engineer and the General Chairman, B&B Foreman Lynch's claim for five (5) hours at the overtime rate is granted.

AWARD

- 1) Claim sustained in part and denied in part, as indicated in the Opinion.
- 2) Carrier shall implement this Award within thirty (30) days of its issuance.
- 3) Jurisdiction is retained for the sole purpose of resolving any disputes over the interpretation or application of this Award.



Dana Edward Eischen, Chairman



Union Member



Company Member