BEFORE PUBLIC LAW BOARD NO. 6915

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CN – WISCONSIN CENTRAL RAILROAD

Case No. 23

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement on April 1, 2007 when it established a crew at Kimberly, Wisconsin with assigned rest days other than Saturday and Sunday, when there was no crew to relieve with rest days of Saturday and Sunday as required by Rule 17 (System File C-360-01/WC-134-107-023).

2. As a consequence of the violation referred to in Part 1 above, Claimants Angelo Pulido, Steve Snow and any other member performing serve on the weekend crew at Kimberly, WI shall now each be compensated for eight (8) hours at the applicable pro rata rates of pay for each Monday and Tuesday they were denied the opportunity to work and eight (8) hours at the time and one-half rate of pay for each Saturday and Sunday they were required to work beginning April 1, 2007 and continuing."

FINDINGS:

The Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated Rule 17 of the parties' Agreement when it established a crew with fixed headquarters in Kimberly, Wisconsin, with assigned rest days other than Saturday and Sunday, when there was no fixed headquarter crew at that location with rest days of Saturday and Sunday. The Carrier denied the claim.

The Organization initially contends that the Carrier's objection with regard to time limits has no merit. The Organization asserts that the instant claim is continuing in nature. Moreover, even if the instant claim was not considered continuing, then it still was filed within the time limits in that the May 29, 2007, letter refers to violations

beginning on April 1, 2007, and continuing.

The Organization emphasizes that the instant claim cites a Rule 17 violation, not a Rule 6 violation. The Organization points out that this claim does not challenge a bulletin or abolishment under Rule 6, but instead alleges that a Rule 17 violation occurred because there was no Kimberly crew having rest days on Saturday and Sunday at the same location as, and that could be relieved by the weekend Kimberly crew with rest days other than Saturday and Sunday. The Organization argues that Rule 17 requires that all positions established thereunder shall have rest days on Saturday and Sunday, and that positions may have rest days other than Saturday and Sunday if those positions relieve the duties of positions with Saturday and Sunday rest days.

The Organization maintains that the headquartered weekend crew at Kimberly had no fixed headquartered crew with Saturday and Sunday rest days at that location to relieve, which violates Rule 17 of the Agreement. The Organization emphasizes that it is not claiming that the mere existence of a crew without Saturday and Sunday rest days violates the Agreement. Instead, because there was no headquartered crew at Kimberly with Saturday and Sunday rest days to be relieved, the Carrier was in violation of Rule 17. This violation continued each time the weekend Kimberly crew was denied the opportunity to work on Monday and Tuesday and was required to work on Saturday and Sunday, while there was no Kimberly crew with rest days of Saturday and Sunday to relieve.

The Organization contends that it is undisputed that beginning April 1, 2007, and continuing, the Carrier had a weekend crew at Kimberly, Wisconsin, that was not

relieving another crew with rest days of Saturday and Sunday. The Organization asserts that the triggering date for this claim was April 1, 2007, when the first violation occurred.

The Organization emphasizes that it could not grieve a Rule 6 violation in connection with the Carrier's action of abolishing, advertising, or awarding a job. The Organization also points out that there is no dispute that the Rule 17 violation began on April 1, 2007. The Organization insists that there is no foundation for the Carrier's affirmative defense that that the abolishment or bulletin in March 2007 triggered the time lines, so this affirmative defense must fail.

The Organization submits that for many of the same reasons, the instant claim was timely regardless of whether the claim is continuing in nature. The Organization contends that the bulletining and assignments did not constitute the date of the Rule 17 violation, and there was an undisputed violation on April 1, 2007, the first date on which the weekend Kimberly crew worked with rest days other than Saturday and Sunday, and without relieving a crew at that location having assigned Saturday and Sunday rest days.

The Organization contends that Rule 17 governs positions with fixed headquarters, and this Rule is clear and not subject to misinterpretation. The Organization argues that the Carrier violated Rule 17 when it failed to have a fixed headquartered crew at Kimberly, with Saturday and Sunday rest days, for the fixed headquartered weekend crew at Kimberly to relieve beginning April 1, 2007, and continuing. The Organization submits that when there was no crew at the fixed headquarters to be relieved with Saturday and Sunday rest days, then Rule 17 was violated beginning on April 1, 2007.

As for the Carrier's assertion that the situation at issue complied with Rule 17

because the weekend Kimberly crew was relieving a crew headquartered at Appleton that had Saturday and Sunday rest days, the Organization maintains that an analysis of Rule 17 confirms that the Carrier's position cannot prevail. The Organization insists that a common-sense interpretation of rule 17 establishes that if a crew was to "relieve the duties" of another crew, it would be at the same fixed headquarters. The Organization emphasizes that Rule17 addresses only fixed headquarters, and it would make absolutely no sense that the application of Rule 17 would expand beyond one fixed headquarters.

The Organization goes on to contend that there also is no sense to the Carrier's suggestion that a relief crew for Appleton would be established at Kimberly, which covers another subdivision. The Organization insists that common sense indicates that if the Carrier needed a crew to relieve the duties of another crew, both crews would be established with the same fixed headquarters on the same subdivision. The Organization insists that the Carrier's contention that the fixed headquartered weekend crew at Kimberly was relieving the fixed headquartered weekday crew at Appleton is not the "relieve" contemplated by the Agreement. The Organization emphasizes that not only do these gangs cover two distinct and separate subdivisions, but there was a crew at Kimberly with Saturday and Sunday rest days that was abolished. The Organization submits that these facts demonstrate that there are separate subdivisions and that the weekend Kimberly crew is not relieving the Appleton crew.

The Organization goes on to argue that there is no truth to the Carrier's assertion that Rule 17 does not specify that the headquarters of the pertinent crews must be the same, but only that one crew relieves the other. The Organization insists that if a crew

with fixed headquarters is created under Rule 17, then it can only be concluded that relief crews established under Rule 17C would have to have the same fixed headquarters. Moreover, the fixed headquarters crew at Kimberly is not relieving "the duties and positions" of the fixed headquarters crew at Appleton. The Organization submits that it is nonsensical to allege that the Kimberly Crew was relieving the Appleton Crew when they do not share the same headquarters and they do not cover the same territory.

As for the Carrier's suggestion of a practice of assigning positions in the manner it did in this instance, the Organization contends that the Carrier must provide probative evidence in support of this affirmative defense. The Organization submits that the only evidence in the record is that beginning on April 1, 2007, and continuing, there was no fixed headquartered crew at Kimberly with assigned rest days of Saturday and Sunday for the Kimberly weekend crew to relieve.

The Organization asserts that when the Carrier required the Claimants to work a shift, the Carrier was improperly paying the Claimants by not paying them overtime for certain hours worked and then suspending hours from what should be their normal tour of duty. The Organization argues that because there was no fixed headquartered crew at Kimberly to relieve on the claim dates, the Carrier violated Rule 17C. Moreover, the Claimants' crew should have been assigned work hours in accordance with Rule 17B. The Organization emphasizes that the Claimants were denied the opportunity to perform eight hours' work during each Monday and Tuesday during the claim period, and they also should be compensated at the time and one-half rate for each Saturday and Sunday that the Carrier required them to work.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the subject positions were posted on February 16, 2007. The date of posting, which was the Organization's first knowledge of what it now asserts to be a violation of the Agreement, was 116 days prior to the date that the instant claim was presented. The award date of March 2, 2007, was 108 days prior to the date the instant claim was presented, while the successful bidders actually began working under the terms and conditions of the bulletin on March 9, 2007, eighty-one days prior to the date the claim was presented.

The Carrier asserts that Rule 30 specifies that claims must be presented within sixty days of the date of the occurrence upon which the claim is based. The Carrier submits that it disputed the issue of timely presentation from the outset and throughout the on-property handling of this matter. The Carrier argues that based on the clear and unambiguous language of the Agreement, the claim unquestionably was not presented within the applicable time limits. At best, the claim was presented more than eighty days after the Organization had knowledge of what it alleges to be a violation of the Agreement; at worst, the claim was presented 116 days after first knowledge.

The Carrier submits that the date that the bulletin was posted, February 16, 2007, constitutes the occurrence upon which the claim is based. The Carrier argues that even if the Organization could fabricate some plausible argument to the contrary, which it has not done, the date on which the bidders were awarded the positions, March 2, 2007, would certainly constitute the occurrence. The date when these employees began

working those positions with rest days on Monday and Tuesday certainly would constitute the latest date of occurrence even by the narrowest of interpretations.

The Carrier emphasizes that under Rule 30G, claims that are not progressed by the Organization within the appropriate time limits will be barred from further consideration. The Carrier asserts that the Organization has attempted to gain unwarranted leverage with respect to the time limit issue by attempting to define the instant claim and dispute as constituting a "continuing claim." The Carrier submits that this is an obvious attempt to bring back this matter into the legitimate parameters of the sixty-day time limit. The Carrier argues to allow the Organization's attempt to succeed would invite a new and unilateral definition of "continuing claims." This also would incite the presentation of late claims, under the guise that they are "continuing," to try to legitimize the Organization's failure to comply with the agreed-upon time limits.

The Carrier insists that under paragraphs A and C of Rule 30, the instant claim is barred, and the Board is compelled to deny this claim without considering the merits.

The Carrier then asserts that this claim also must fail on the merits. The Carrier submits that the conditions set forth in Rule 17 for the establishment of positions with rest days other than Saturday and Sunday have been met in this case. The Carrier argues that there is no question that the crews were paid the differential as mandated by the Agreement, and the Carrier notes that the Organization has not disputed the Carrier's position that the Kimberly Weekend Crew relieves the duties of positions at Appleton, which have Saturday and Sunday rest days. The Carrier contends that these undisputed and relevant facts establish that the Carrier is in full compliance with the spirit, intent,

and clear language of the governing rule.

The Carrier further argues that the Agreement does not contemplate the Organization's position that only if positions with Saturday and Sunday rest days are headquartered at Kimberly can there be positions having rest days other than Saturday and Sunday headquartered at Kimberly. The Carrier suggests that if the parties had intended for such a restriction to apply, then they very simply could have included language such as "at that location," or a similar phrase, after the phrase "relieve the duties of positions." The Carrier contends that the parties obviously did not desire or intend to include such a restriction in connection with Paragraph C of Rule 17, and this restriction does not exist.

The Carrier points out that the parties did include such a location restriction in Paragraph D of Rule 17, which governs the establishment of Night Section Gangs. The Carrier therefore maintains that where and when the parties intended to confine a Carrier privilege to the same location, they did so with language that achieved the purpose. The Carrier insists that no similar restrictive language may be read into Paragraph C of Rule 17 to suit the Organization's desire.

The Carrier goes on to argue that even if some remedy were appropriate here, the remedy sought by the Organization is excessive and would produce a significant windfall. The Carrier emphasizes that the Claimants were paid for the days they worked, on the assignment they had bid and were awarded. The Claimants also were paid the applicable differential for each hour worked on a Saturday and/or Sunday in relief on another crew's rest days.

The Carrier asserts that if there was a proven violation, which is not the case, then the only amount that could be contemplated as a remedy would be the difference between what the Claimants earned and what they would have earned had they been assigned to positions with rest days of Saturday and Sunday. The Carrier points out that in the instant case, the difference would be a negative amount by virtue of the hourly differential paid to the Claimants for their work on Saturday and Sunday.

The Carrier points to the period of April 1 through April 30, 2007, only a portion of the claim presented, as an example of the windfall that would be produced by the requested remedy. The Organization has claimed eight hours at the straight-time rate for April 2, 3, 9, 10, 16, 17, 23, 24 and 30, plus eight hours at the straight-time rate for each Monday and Tuesday during the same period, plus eight hours of overtime for each Saturday and Sunday. The Carrier emphasizes that this amounts to eighteen days of straight-time pay, plus at least eight days at the overtime rate in April alone. The Carrier maintains that the Claimants already were paid for nineteen days of work performed during that same month of April. The Carrier argues that to accede to the outlandish remedy demanded would produce at least the equivalent of twenty-eight days of straight-time pay, plus eight days of overtime, for a total equivalent of forty days for a position that is bulletined to work, at most, twenty-three days per month. The Carrier asserts that this would indeed be a windfall.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The parties being unable to resolve their dispute, this matter came before this

Board.

This Board has reviewed the record in this case, and we find that the claim must be denied because the Organization failed to file the claim in a timely fashion as required by the rules.

The record reveals that the positions at issue were posted on February 16, 2007. Those positions were then awarded on March 2, 2007. The Organization had knowledge of the company action at that point. The Organization did not file a claim until May 29, 2007. That claim was one hundred sixteen days after the February 16, 2007, posting.

Rule 30 states the following:

> All claims and grievances must be presented in writing by the employee or the duly authorized representative to the officer of the company designated to receive same within sixty (60) days from the date of the occurrence on which the claim or grievance is based . . .

As the Carrier points out "at best, the claim was presented more than eighty (80) days after the Organization had knowledge of what it alleges to be a violation of the agreement, and, worst, the claim comes one hundred sixteen days after first knowledge."

This Board has held on numerous occasions that if the claim is not filed in compliance with the timeliness requirements set forth Rule 30, the claim must be denied.

Since the Board has reached its decision on the timeliness issue and denied the claim, there is no need for a discussion of the merits.

AWARD:

The claim is denied.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: May 10, 2010

CARRIER MEMBER

DATED: May 10, 2010