PUBLIC LAW BOARD NO. 5606

PARTIES) BROTHERHOOOD OF MAINTENANCE OF WAY EMPLOYES
) DIVISION OF THE INT'L BROTHERHOOD OF TEAMSTERS
TO)
DISPUTE) SPRINGFIELD TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated Articles 9.2 and 10 of the Agreement when it allowed junior equipment repairman Mr. M. Young to work Saturday, July 10, 2010 instead of work equipment repairman Mr. R. Chamberland.

2. As a consequence of the violation referred to in Part 1 above, Mr. Chamberland shall be allowed ten (10) hours pay at the work equipment repairman overtime rate of pay, i.e., $320.10. (Carrier File MW-10-09)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The dispute at issue involves Organization contentions that in violation of current Agreement rules the Carrier changed the five-day assigned work week for the positions of Work Equipment Repairmen here at issue, and that in doing so resulted in a junior employee (M. R. Young) working Saturday, July 10, 2010 at the straight time rate of pay and denying senior available Work Equipment Repairman R. L. Chamberland the opportunity of rest day overtime work on that date (Saturday, July 10, 2010).

Four positions of Work Equipment Repairmen at Waterville, ME, with a Monday through Friday work week, and rest days of Saturday and Sunday, were abolished by Carrier notice dated June 23, 2010 to be effective the close of work on Friday, July 2, 2010. One other position of Work Equipment Repairmen at Lawrence, MA, and six other like positions at East Deerfield, MA were also abolished by similar notice. At the time the positions were abolished, Claimant Chamberland held Job Number WER-05; M. R. Young WER-08, G. L. Batchelder WER-09; and C. J. Pantermoller WER-10, all at Waterville, ME.

The same date the abolishment notices were posted (June 23, 2010), the Carrier advertised the same number positions as being available at the same locations. As concerns Waterville, ME, and the instant claim, the Work Equipment Repairmen positions were posted with assigned work weeks of other than Monday through Friday and with rest days other than Saturday and Sunday. The newly advertised positions at Waterville, ME were identified as WER-03 and WER-17, with a work week of Sunday through Thursday, and rest days of Friday and Saturday; positions WER-18 and WER-19, Tuesday through Saturday with rest days of Sunday and Monday. The new positions were advertised to become effective on Monday, July 5, 2010.

As set forth in the above Statement of Claim it is the position of the Organization that the change in assigned work weeks and rest days are in violation of Article 9.2 and Article 10 of the Agreement.

Agreement Article 9.2, a part of Article 9, which is entitled "Beginning and Ending Day/Hours of Service," reads as follows:

> Except as provided herein or in Article 27, employees will be assigned to positions scheduled to work eight (8) hours per day, five (5) days per week with two (2) consecutive rest days. On positions the duties of which can reasonably be met in five (5) days, the rest days will be Saturday and Sunday.

Article 10, "Overtime," of the Agreement reads in part here pertinent as cited by the Organization as follows:

> 10.1 Time worked preceding or following and continuous with a regularly assigned work period 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 (24) 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. (Underscoring as in the rule.)

The Organization says that Article 9.2 of the Agreement creates the same heavy presumption as has numerous times been upheld in decisions of boards of arbitration involving interpretation of the 1949 National Forty-Hour Work Week rules that a work week will be established with Monday through Friday work days and Saturday and Sunday rest days.

In this respect, the Organization says the actions of the Carrier in the instant dispute constitute a violation of Agreement rules not unlike those which grew out of the National Forty-Hour Work Week rulings because the Carrier made the work week changes without establishing any probative evidence that an operational factor or necessity prevented it from assigning Saturday and Sunday as rest days for the positions at issue.

The Organization says that while the Carrier asserts the changes followed a refusal of the employees to work overtime, it does not agree with such Carrier argument and such a contention is not a proven matter of record. Moreover, the Organization says, even assuming, *arguendo*, such was the case, the re-advertised Work Equipment Repairmen positions were assigned to work the same total number of days each week and the same number of total hours per day as the positions before re-advertisement. The Organization thus says that the Carrier merely changed the assigned work days and rest days on a baseless contention that there was a heavy workload. The only thing established, the Organization says, is that the Carrier had a "preference" to having the work performed on a Saturday and Sunday, and that such preference is not an operational prohibition preventing the assignment of Saturday and Sunday rest days; the subject positions were assigned five days a week before the change in assigned work weeks and continued to be assigned to positions that worked five days a week after the change in assigned work weeks.

It is the position of the Carrier that the referenced language of Agreement rules is clear and unambiguous and does not support the contention that Claimant was entitled to an overtime call for work performed by another Work Equipment Repairman as a part of that employee's assigned work week at the straight time rate of pay on the date of claim, Saturday, July 10, 2010.

The Carrier says Article 9.2 provides it with the ability to change an employee's work week and rest days when an objective analysis of the facts shows that it was operationally prohibited from keeping Saturday and Sunday as rest days of the positions at issue.

In the instant case, the Carrier says that a need existed to have its track, tie and surfacing crew rail jobs in its Work Equipment Department work seven days a week, and, in turn, a need arose to have Work Equipment Repairmen work on a staggered seven-day basis so as to continually and timely repair track equipment for use by the track, tie, and surfacing crew rail jobs. The Carrier thus says that it could not keep up with the workload demands when it was faced with a number of instances where Work Equipment Repairmen were refusing to perform needed repair work on Saturdays and Sundays at the overtime rate of pay.

The Carrier says it got to the point where it attempted to force Work Equipment Repairmen to work overtime, and that the response of Organization representatives

was that it would respond with claims and possible legal action. In this respect, the Carrier says, it decided against forcing the employees to work overtime and instead availed itself of the provisions of Article 9.2 and changed the rest days of the employees so as to cover the needs of its operational requirements.

Contrary to Organization contentions that it was not aware of the Carrier's stated operational needs and the refusal of employees to work overtime, the Carrier submits that the record shows that the Organization was well aware of the situation and had intervened on behalf of the employees about the Carrier wanting to force employees to work overtime. The Carrier says despite this Organization knowledge of the situation, the Organization did not work with the Carrier to resolve the matter; the Organization instead objecting to the Carrier's attempt to force overtime, and then objecting to the changes made to the employees rest days in the filing of this and other claims of record.

In the opinion of the Board, we find it evident from correspondence of record that local representatives of the Organization were fully aware of Carrier concerns related to a number of employees refusing to work overtime and that the Carrier intended to force some junior Work Equipment Repairmen to work overtime on weekends. It also appears from the record that the local representatives were in contact with Carrier representatives about such matter, but were not able to resolve the matter by mutual agreement.

There is no question that numerous decisions of boards of arbitration have applied somewhat like operative contract language as that here cited by both parties, Article 9.2, as creating the presumption that to the extent possible positions be assigned a Monday through Friday work week, with Saturday and Sunday rest days, and that such positions not be unilaterally changed to staggered seven-day work weeks with other than Saturday and Sunday rest days, except where there is clear and convincing evidence of a necessity to do so because of a bona fide change of operational requirements.

In this latter respect, it is noted that the Organization has mentioned in an appeal letter on the property where due to an operational need a change was made in the work week and rest days of certain other employees. Here, the Organization said:

> In the past there was a problem in a tunnel with ice building up over the rails and the Carrier needed to have employees work on weekends to remove the ice from over the top of the rails. The Carrier contacted the Organization and explained the problem and the Organization agreed to have this gang change their work week to cover Saturday and Sunday as their normal work week.

Upon study of argument in the instant dispute, it seems evident to the Board that the Carrier has shown a sufficient operational necessity for its changing of the work week and rest days of the positions at issue so as to provide Work Equipment Repairmen positions to work temporarily in conjunction with its track, tie, and surfacing crew rail jobs who were already working on Saturday and Sundays. Accordingly, the Board finds that the work week and rest day changes at issue were necessitated by material operational changes and the inability of the Carrier to obtain necessary Work Equipment Repairmen through overtime or by means of forced assignment of junior employees holding such positions without being faced with claims of another nature or legal proceedings.

The Board will also note that while the Organization references one instance in the past where a change of work weeks and rest days was made by mutual agreement, the Board does not find Article 9.2 to require the Carrier obtain the concurrence of the Organization before making a change in work weeks and rest days through a staggered work week scheduling when sufficient evidence exists of a necessary change in operational requirements.

Lastly, the Board finds it significant that upon completion of the need for the Work Equipment Repairmen to work in a timely manner with the track, tie, and surfacing crew rail jobs, that the positions of the Work Equipment Repairmen reverted back to a Monday through Friday work week with Saturday and Sunday rest days.

In the light of the above considerations and overall study of the record, the claim will be denied.

AWARD:

Claim denied.

Robert E. Peterson
Chair & Neutral Member

Anthony F. Lomanto
Carrier Member

Kevin D. Evanski
Organization Member
Dissent to Follow

North Billerica, MA
Dated 7/27/12

LABOR MEMBER'S DISSENT
TO
AWARDS 76, 80 AND 81 OF PUBLIC LAW BOARD NO. 5606
(Referee Peterson)

Award 76 is referenced as controlling in Awards 80 and 81 of PLB No. 5606. Consequently, the following dissent refers to the correspondence surrounding Award 76 of PLB No. 5606, but should be applied with full force to Award 76, 80 and 81 of PLB No. 5606.

The Majority's arrival at its decision in the subject cases is premised on facts not established in the record. While the Majority correctly stated that the Carrier must show an operational necessity for changing the assigned rest days of five (5) day positions, it incorrectly determined the Award's ultimate findings based on facts not established in the record. Thus, the findings of this Award is erroneous and should be given no precedential value.

The pertinent part of Award 76 of PLB No. 5606 findings read:

> "Upon study of argument in the instant dispute, it seems evident to the Board that the Carrier has shown a sufficient operational necessity for its changing of the work week and rest days of the positions at issue so as to provide Work Equipment Repairmen positions to work temporarily in conjunction with its track, tie, and surfacing crew rail jobs **who were already working on Saturday and Sundays**. ***" (Emphasis added)

The problem with the above-quoted findings is that none of the Carrier's track, tie, rail, or surfacing crews were working Saturday and Sunday. Even more baffling, and notwithstanding the fact the Carrier's assignment of track, tie, surfacing and rail crews to Saturday and Sunday work does not create an operational necessity that cannot be met by the work equipment repairmen Monday through Friday, nowhere was it even asserted by the Carrier that its track, tie, surfacing or rail crews were working Saturdays and Sundays. The Carrier's September 7, 2010 denial letter did assert the following:

> "With workload for the AWE Department being so high this year, Mr. Carves and Mr. Paradis needed to have the Work Equipment Department running seven days a week in order to fix all the track equipment for the rail jobs, tie jobs and surfacing crews. ***" (Employes' Exhibit "A-5")

The above-quoted statement is the only reference to seven (7) days a week during the entire handling of this case. To reach a finding that the above-cited Carrier contention is an assertion that the track, tie, surfacing and rail crews were working Saturday and Sunday simply boggles the mind. It clearly states that the Carrier Managers wanted the Work Equipment Department running seven (7) days a week in order to fix track equipment, but it absolutely does not state that the track, tie, surfacing or rail crews were working Saturdays and Sundays, or that the track equipment for the rail, tie and surfacing jobs were working seven (7) days a week. The Carrier's denial does

not provide any substantive reason that the mechanics were needed seven (7) days a week because work could not have been performed Monday through Friday (the issue that was the basis for the Organization's claim).

Even if the Majority found some ambiguity in the Carrier's above-cited statement in whether it asserted that track, tie, surfacing and rail crews were working seven (7) days a week (which it clearly does not assert), it is well established that ambiguity within letters are interpreted most favorable to the recipient. In this regard, Third Division Awards 2064 and 13126 held:

AWARD 2064:

> "*** Moreover, the letter ... was written by the Carrier, and the rule of law is well established that where a written instrument is susceptible of two meanings, it should be construed in favor of the party who did not prepare it. ***"

AWARD 13126:

> "Both parties contend that the meaning of the May 3 out-of-service notice is clear. Carrier says that it clearly states that Claimant was being held out of service only until he was found physically fit, by the Medical Examiner, to perform the duties of his position. With equal certainty Clerks say the notice clearly states that Claimant was being held out of service for 'recent conduct,' a disciplinary action requiring compliance with Rule 24 of the Agreement. We find the notice is susceptible to both interpretations. **Since the notice was drafted by Carrier and subject to both interpretations we apply the rule that under such circumstances the applicable interpretation is that most favorable to the addressee**. ***" (Emphasis added)

No matter how the issue is broached, the Majority's conclusion that the track, tie, surfacing and rail crews were working Saturday and Sunday does not flow from established facts and that is why this decision is fundamentally flawed. Thus, this award has zero precedential value. Therefore, I dissent.

Respectfully submitted,

Kevin D. Evanski
Employe Member

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SUSTAINING AND SUPPORTING OPINION
AWARD NOS. 76, 80 AND 81

Although I believe the majority findings and award speak for itself, there are certain statements in the labor member's dissent which should not go unanswered.

The dissent states: "While the majority correctly stated that the Carrier must show an operational necessity for changing the assigned rest days of five (5) day positions, it incorrectly determined the Award's ultimate Findings based on facts not established in the record." The dissent then goes on to say: "The problem with the above quoted findings [of the majority members] is that none of the Carrier track, tie, rail, or surfacing crews were working Saturday and Sunday."

If the Organization had reason to question statements in the Carrier letter of September 7, 2010 to the General Chairman of the Organization from the Personnel Officer for the Engineering and Mechanical Department that due to the workload being high that year it needed to have its Work Equipment Department running seven days a week, or the Organization had probative support that the Carrier's track, tie, rail, or surfacing crews were not in fact working seven (7) days per week, it was incumbent upon the Organization to have expressed such argument during the handling of the claim on the property. The Organization did not do so. Nor did it even seek to do so in written or oral argument to the Board. The Organization may not therefore be heard, for the first time, to put forth such unsubstantiated argument in an attempt to buttress its contention that the decision of the majority is fundamentally flawed.

As the Organization stated in its ex parte submission to the Board in directing attention to the following excerpt from Award No. 73 of this PLB 5606 that proof must be beyond mere statements and allegations: "Numerous times in awards of boards of adjustment it has been held that mere assertion, self-serving declarations, and general statements are of no real probative value in consideration of a dispute."

Robert E. Peterson
Chair & Neutral Member