

PUBLIC LAW BOARD NUMBER 1837

Case Number 55
(MW-MUN-76-8)

PARTIES TO DISPUTE:

Norfolk and Western Railway Company

and

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

1. The carrier violated the Current Scheduled Agreement dated February 1, 1951 of the New York, Chicago and St. Louis Railroad Company, beginning April 12, 1976 through April 29, 1976 (except for certain employees as noted on the employees claim dates listed) when it changed the hours of service of Surfacing Gang S-12, Muncie Division (former LE&W District) in violation of Rule 26(c).

(a) April 12 through April 29, 1976

Chester Young - Extra Gang Foreman
Operators:

Victor Steinbrunner - Ballast Regulator

William Walker - Electromatic Tamper

Michael Neice - Track Liner

Michael Young, Jr. - Tamper

Laborers:

Thomas McDaniels

Densil Diggman

(b) April 29, 1976

Dennis Hobbs - Tamper Operator

(c) April 12, 13, 14, 15, 19, and 21, 1976

Richard Bonvillian - Senior Tamper Operator

2. The carrier further violated the Agreement on dates mentioned in No. 1 above when it compelled the employees assigned by bulletin to Surfacing Gang S-12 to change their regular hours of service, including lunch period to avoid payment of overtime.

3. Claimants, as identified above, now be made whole at their respective rates of pay for the difference between straight time for which compensated and punitive time to which they were entitled for one hour each day for the violation.

4. Claimants, as identified, be further made whole at their respective rates of pay for one hour at pro-rata rate each day of claim for the hours they were deprived of their regular bulletin quitting time for the violation.

5. Claimants, as identified above, be further compensated at their respective rate of their position one-half hour pro-rata pay when the Carrier failed to allow the lunch period between 12 noon each day until 1 P.M. but instead worked the employees during the bulletin lunch period.

FINDINGS: This Board, upon the whole record and all evidence, finds that:

The carrier and the employee involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein

OPINION:

As indicated in the Claim, members of the S-12 Surfacing Gang had been assigned regular work hours of 8:00 a.m.-12 noon and 1:00 p.m. - 5:00 p.m. with 12 noon to 1:00 p.m. lunch; such assignment had been made by bulletin. Apparently

by proper notification (36 hours in advance as per Rule 26 (d)) the gang was advised that its work/lunch hours would be 7:00 a.m. - 3:00 p.m. with a 30 minute discretionary lunch break; such conditions were to extend from April 12 through April 29, 1976.

The Organization protested such change to the Carrier, contending a violation of Rule 26 (c) which reads: "Employees regularly assigned hours will not be changed for short periods of time to avoid the application of overtime rules." The Carrier denied the Claim without responding to the specific violation asserted by the Organization. Further answer by the Carrier merely reiterated its earlier denial of violation until response by the highest officer who contended the change of work/lunch hours for the period involved was necessary "to avoid delays in train operations."

Unlike a violation of Rule 26 (d) which this Board adjudged to have occurred in Case 54 (MW-MUN-76-7), a violation of Rule 26 (c) cannot be discerned by mere review of the events that took place. In other words, failure of the Carrier to give a 36-hour notice prior to change of work/lunch hour is a prima facie violation of Rule 26 (d) as written. But a change in an employee's regular assigned hours for a period of time does not per se involve an intent to avoid application of

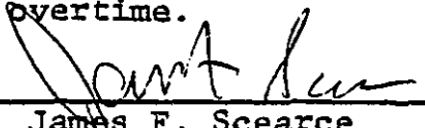
overtime rules; that aspect of the Claim must be demonstrated. Obviously, the Carrier is deserving of admonishment for altering such time periods without offerring any feasible explanation for doing so; this is borne out by its lack of rationale for its actions until the last step in the handling process on the property. Such non-response at the early steps can only act to enhance questions as to the validity for such changes. Various decisions by other Boards and Divisions cited by the Organization address this lack of response and conclude that management's failure to do so augurs favorably for the party raising the Claim.. In other words, the time for the Carrier to raise the basis for need to change the work/lunch hours to the Organization was at the time of implementation or certainly at the earlier steps of processing the Claim; it is not before this Board as was done in detail or generally at the last step of the handling process on the property.

We are then left to determine if the record supports the Organization's contention that the change in assigned hours (1) was for a short time period and (2) to avoid the application of overtime as proscribed by Rule 26 (c). On the first point it is clear that such change was for a short period of time. The problem arises in discerning intent to support the second. We are obliged to rule out consideration of punitive damages for

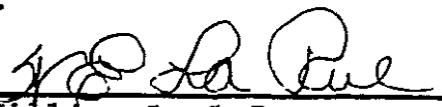
violation of the Rule itself: Rule 26 (c) is quite explicit in requiring a showing of intent to avoid application of over-time rules. It is here that the Organization fails. The fact is that the record of this case demonstrates no particular reason for such action -- a shortcoming placed squarely at the foot of the Carrier if a reason did exist. We have insufficient data, contrariwise , however, to support a conclusion that such action was taken to avoid overtime. Thus, while we can conclude that the Carrier committed a technical violation of the Agreement, we find insufficient basis to find for an award of compensation lost due to avoidance of overtime. We must add, parenthetically, that repetition of the events in this case, i.e. without a showing of intent to avoid overtime but inexplicable changes might become the basis for an award of punitive damages.

AWARD:

While a technical violation of the Agreement may be said to have occurred, an insufficient showing has been made that it was to avoid overtime.


James F. Scearce
Neutral Member


E. N. Jacobs, Jr.
Carrier Member


William L. LaRue
Organization Member

Dated MARCH 27 1982 at

Philadelphia Pa