

PUBLIC LAW BOARD NO. 3460

Award No. 57
Case No. 57

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employes
and
Burlington Northern Railway Company

STATEMENT
OF CLAIM

- "1. The Carrier violated the effective agreement commencing April 6, 1981 and continuing each work day thereafter when Bulletining and Assigning Tie Gang 723-900 with a starting time of 4:00 AM.
2. That claimants of Tie Gang 723-900 assigned a starting time of 4:00 AM, W. Worley, D. Erie, R. Reasor, R. Fister, W. Lamey, P. Chamberlin, B. Bruce, W. Spoonmore, N. Piene, A. Krone, C. Christ, D. Anderson, L. Oestreish, E. Braun, D. Glasgow, W. Hogue, D. Young, L. Wright, G. McClaine, D. Tinsley, and S. Olsen and anyone assigned to commence work at 4:00 AM not listed on Gang 723-900 and any member of Gang 723-900 assigned a 4:00 AM starting time at a later date, are to receive two (2) hours time and one-half and two (2) hours straight time for each work day until violation discontinues, as their respective time and one-half and straight time rates of pay."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

The record indicates that on March 9, 1981, Carrier issued a series of bulletins (Nos. 16 through 28) which established

working hours for Tie Gang 723-900 to be 7:00 AM to 3:30 PM and 4:00 PM to 12:30 AM starting April 6, 1981. By bulletin dated March 11, 1981, the 4:00 PM to 12:30 AM starting time was changed to 4:00 AM to 12:30 PM. The Organization protested these bulletins on March 18, 1981, claiming that the schedule was a violation of the rules, in particular with respect to rule 27-A, since the organization noted that the crew starting at 4:00 AM and 7:00 AM are the same shifts but with different starting times. Furthermore the Organization noted that there was but one foreman named in the bulletin. Beginning April 6, 1981, the Tie Gang worked the specified hours with part of the crew working from 7:00 AM to 3:30 PM and the remainder from 4:00 AM to 12:30 PM. Following the Union's protest, a second foreman's position was bulletined. This was continued until May 11, 1981, when according to Carrier conditions of the traffic situation became such that the entire crew could work from 6:00 AM to 4:00 PM, which was then made the schedule. These facts are not in dispute.

The relevant rules provide as follows:

- " Rule 27. Starting Time
 - A. When one shift service is employed, the starting time will not be earlier than 6:00 AM, and not later than 8:00 AM, except as hereinafter provided, and will not be changed without first giving employees affected thirty-six (36) hours' notice.

It is understood that at points where one-shift fuel service is maintained and the train service is such as to require practically all-night service, exceptions to the restrictions as to starting time of fuel service employees may be made by mutual agreement between the General Chairman and the Company.

B. When movement of trains or boats is such that necessary work (other than that performed by crews engaged in B&B or Track maintenance, and fuel service and pumpers), can be done within the spread of a single shift but cannot be done between 6:00 AM and 5:00 PM, the hours of such service may be assigned to meet the conditions, but no such shift shall have a starting time between 12:00 o'clock midnight and 4:00 AM.

C. When two or more shifts are employed, the starting time may be regulated in accordance with requirements of work, except that no shift shall start between 12 o'clock midnight and 4:00 AM."

Rule 33. Absorbing Overtime

Employees will not be required to suspend work during any regular assigned work period for the purpose of absorbing overtime. "

The Organization takes the position that it was the intent of the Carrier to absorb overtime in the establishment of the new hours of work for the early group. The organization maintains that the bulletins as corrected, advertised for one Tie Gang with a 3-hour starting time spread. The Organization maintains that this was not a two-shift operation since the gang had the same gang number and one foreman. All the work involved was in connection with tie replacement and tie removal and was only a one-shift operation en toto. It is argued by Petitioner that rule 27A mandates that the gang hours cannot be staggered

and furthermore, there is a violation of rule 33 because Carrier was requiring claimants to absorb overtime in view of their starting before 6:00 AM. The Organization also notes that Carrier recognized its error in changing the starting time to 6:00 AM for the entire group effective May 11th. In sum, the Organization argues that by starting claimants at 4:00 AM, these claimants should have been compensated at time and one-half for the hours worked between 4:00 and 6:00 AM under the provisions of rule 29A, which provides:

" Except as otherwise provided in this Agreement, time worked preceding or following and continuous with a regularly assigned eight (8) hour work period shall be computed on an actual minute basis and paid for at time and one-half rate, with double time computed on an actual minute basis after 16 continuous hours of work...."

The Carrier insists that it simply divided the gang into two shifts in order to keep the mainline track open. This was done in order to allow maximum track occupancy and permit the time-sensitive freight trains to continue to run between Spokane and Sand Point during the late morning and afternoon hours. The Carrier argues that the bulletins for Maintenance Gang 723-19 explicitly showed two separate and distinct shifts were established. The fact that both groups were identified with the same gang number did not demonstrate that only one shift was involved. The Carrier maintains that there were two shifts,

with different employees and different working hours. Furthermore, the Carrier argues that there is nothing in the Agreement which requires Carrier to start a second shift only after the first shift has completed its work. It is not the practice necessarily in this industry. In this instance the use of two shifts happened to overlap for several hours due to the requirements of the work. The Carrier insists that there is nothing in rule 27 which precludes Carrier from establishing two overlapping shifts from one gang when the requirements of the work so mandate. Rule 27C is applicable, according to Carrier. The claimants worked their full eight-hour shifts during the regular bulletin hours and were not required to suspend work for the purpose of absorbing overtime according to Carrier.

The issue in this matter is in essence whether the new hours established by Carrier established two separate shifts or was it merely a change in the starting time of part of the regular shift. The Carrier relies in part on Third Division Award 15372 which deals with a closely-related circumstance. In that Award the Board stated that Carrier was justified in establishing a two-shift operation to satisfy service demands. Further, the Board stated that Petitioner had not sustained the burden of rebutting the showing that the change of starting time was not reasonable or necessary, or an unusual situation.

That language and that concept is applicable to this matter.

In the case involved the Board notes that the two alleged independent shifts worked under one foreman until the Organization protested the arrangement. Furthermore, even after that the two groups worked together after 6:00 AM with but one foreman and two supervisors. Further, they were followed up within the same flag protection throughout the rest of their tour of duty. (after 6:00 AM). In addition to this fact, there appears in this record no evidence whatever of the change in traffic conditions which first caused the new assignment; and second change in those conditions reflected in the May 11 new starting time and ending of this arrangement.

For the reasons indicated above, it is apparent that the circumstances in this dispute must be evaluated on their own without regard to their being necessarily in conformity with Third Division Award 15372. The facts herein are different than those expressed and indicated in Award 15372 in that Carrier has not established the reasonableness of its changes. Further, the effective operation of the two groups with different starting times does not persuade this Board that they were indeed two separate and distinct shifts. Rather the facts would appear to indicate that there were two starting times for the same shift. For that reason, the claim must be sustained.

AWARD

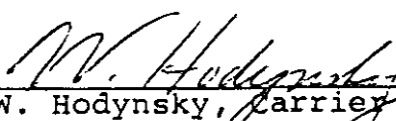
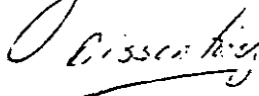
Claim sustained; claimant's will be reimbursed for two hours at time and one-half for the period from April 6, 1981, to May 11, 1981.

ORDER

Carrier will comply with the Award herein within 30 days from the date hereof.



I.M. Lieberman, Neutral-Chairman


W. Hodynsky, Carrier Member
F.H. Funk, Employee Member
F.H. Funk, Employee Member

St. Paul, Minnesota

December 12, 1986