

PUBLIC LAW BOARD NO. 5606

**PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO)
DISPUTE) SPRINGFIELD TERMINAL RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1. The Agreement was violated when the Carrier assigned a junior employee to perform planned overtime service on Saturday, December 2, 2000 instead of assigning senior Equipment Operator Stephen P. Keniston.**
- 2. As a consequence of the violated referred to in Part (1) above, Equipment Operator Stephen P. Keniston shall be allowed seven (7) hours of pay at the equipment operator's time and one-half rate. (Carrier's File MW-01-08)**

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 claim on appeal arises in a contention that Claimant, a member of a B&B crew that was performing work on the Fore River Bridge during the week preceding Saturday, December 2, 2000, was denied opportunity of overtime work on Saturday, December 2, 2000, a rest day of his regular assignment, in violation of Article 10, Overtime, of the Rules Agreement. A junior employee worked in his stead.

As concerns application of Article, 10, Overtime, to the dispute, the Organization especially cites paragraph 10.3, wherein it states in part: "Time worked on rest days and holidays will be paid for at time and one-half rate ..." The Organization also directs attention to Agreed-Upon Question and Answer No. 1 to Article 10 in an assertion that Claimant met the criteria stipulated therein. In part here pertinent Q&A No. 1 reads:

Q1. How is overtime (Article 10) to be assigned?

(a) Overtime immediately following the regular assigned work period will be given to the incumbent(s) of the position or crew.

(b) * * * * *

(c) Planned overtime, rest day, and holiday work will be given in seniority order to available qualified employees in the territory of the work involved who ordinarily and customarily perform such work.

It is the position of the Organization that although comments had been made during the work-week that the B&B crew might work on Saturday, December 2, 2000, that supervision did not make a decision to do so until Friday, December 1, 2000. In this respect, the Organization maintains that instead of calling Claimant, who had taken a vacation day on Friday, that the Carrier wrongly used an employee junior in seniority to Claimant for the Saturday overtime work.

The Carrier argues that since Claimant requested and was granted a vacation day for Friday, December 1, 2000, that he was not subject to call for overtime in keeping with what it says has been the past practice of the Carrier to consider employees to be unavailable for overtime on the rest days immediately preceding and following any vacation days, unless specifically notified by the employee of their availability for overtime work. In this connection, the Carrier says that Claimant did not notify the Carrier that he would be available for overtime on his rest days. It says that it appears that Claimant simply laid back, waited for the call to be made, and then submitted his claim. Further, the Carrier submits that Claimant was scheduled to serve a five-day disciplinary suspension from Monday, December 4, 2000 through Friday, December 8, 2000.

The Organization disputes the Carrier contention of past practice. Furthermore, it submits that no probative evidence of record has been submitted in support of the Carrier assertion of past practice. The Organization also says that even assuming, *arguendo*, the Carrier was able to show some form of a past practice that the agreed upon language of above referenced Question and Answer No. 1 to Article 10 would have to be viewed as superceding any practice contrary to the agreed-upon interpretation of Article 10.

In support of its position that an absence from work during the work-week does not make an employee unavailable for rest day overtime, the Organization directs attention to Third Division, NRAB, Award Nos. 9436, 19260, 22446, 23071, 24332, 29536, 29538 and 29570.

The Carrier also directs the Board to awards that it maintains supports its position in the dispute, i.e., Third Division, NRAB, Award Nos. 15797, 16584 and 18295.

The Board has given extensive study to the arguments of the parties and the findings of the awards cited. In doing so, the Board finds sufficient reason to hold that it was the responsibility of the Carrier to have extended to Claimant the opportunity to declare whether or not he would be available for what appears to have been pre-determined overtime, if not rest day overtime work. Above Answer (b) to Agreed-Upon Q&A No. 1 clearly states that planned overtime and rest day work will be given in seniority order to available qualified employees in the territory.

The Board will also note that it finds no support for the Carrier contention that Claimant had asked to have the Friday vacation day coincide with what it says was the scheduled serving of a five-day disciplinary suspension that was to commence the following Monday. To the contrary, a letter from the Manager, Engineering Personnel and Safety, in denial of the claim, suggests that it was the Carrier who made such an assumption and, in doing so, "felt" that Claimant was responsible for not being available for call. The Carrier letter reads in part:

On Friday, December 1, 2000 you took a vacation day that you requested. On Monday through Friday, December 4 through December 8, 2000, you were under suspension for a previous violation of rules. You had already notified your supervisor that you would be on vacation, and he also knew about your suspension but you never informed him about your availability for weekend work. Therefore, it is felt that you were responsible for not being available for this call.

The Board also finds that the record is devoid of probative support for the Carrier assertion of a recognized past practice involving employees not being considered available for work on rest days that coincide with vacations. In any event, this case involves an employee who was only taking a one-day vacation. Claimant was not going on one or more weeks of vacation, or a circumstance where the findings in certain past awards have held that rest days in conjunction with a week or more of vacation time is cause to hold that an employee was not available for rest day work, unless that employee had notified a supervisor that he or she would be available for rest day work either preceding or following an extended vacation.

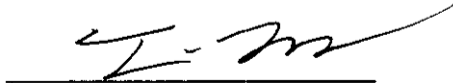
Although the Carrier urges that should the Board find reason to sustain the claim, that compensation be at the straight time rate of pay as a penalty payment for work not performed, the Board concurs with Organization argument that this is not an issue that was raised or advanced during the handling of the claim on the property, and thus not an issue that the Board may here address. Accordingly, the claim will be sustained for one day's pay at the time and one-half rate of pay.

AWARD:

Claim sustained.



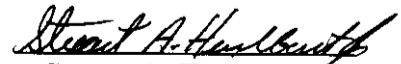
Robert E. Peterson
Chair & Neutral Member



Anthony F. Lomanto
Carrier Member
Timothy McNulty

North Billerica, MA

Dated 12-9-03



Stuart A. Hulburt, Jr.
Organization Member