

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5905

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

)
) Case No. 17
)
) Award No. 17
)

Martin H. Malin. Chairman & Neutral Member
D. D. Bartholomay. Employee Member
D. M. Gevaudan. Carrier Member

Hearing Date: March 23, 2001

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned an extra gang to install switches on the Amax Lead at East Morris, Illinois on July 14, 2000, instead of assigning said work to the section forces headquartered in Calling Area 2 (System File GC-11-00/UM-12-00).
2. The Agreement was further violated when the Carrier assigned the same extra gang to complete the switch and track work associated with the switch installation on July 17, 2000 at Amax Lead, instead of assigning said work to section forces headquartered in Calling Area 2 (System File GC-12-00/UM-13-00).
3. As a consequence of the violation referred to in Part (1) above, the Calling Area 2 employees shall be compensated as follows:

Track Foremen

A. Diaz #50286 - 7 hours overtime
E. Gutierrez #51070 - 6 hours overtime

RMO

M Travis #51090 - 6 hours overtime

Trackmen

R. Guzman #63955 - 7.5 hours overtime
B. Homberg #52133 - 6 hours overtime
M. Mitok #52133 - 6 hours overtime
K. Hilley #52138 - 6 hours overtime

R. Tamez #52139 - 6 hours overtime

The Joliet Division employees shall be compensated as follows:

Track Foremen

E. Martinez #50945 - 4 hours overtime
A. Fadrowski #83149 - 4 hours overtime
E. Vargas #81621 - 4 hours overtime
M. Kranz #51097 - 4 hours overtime

RMOs

A. Almanza #50596 - 6 hours overtime
G. Woodward #51057 - 6 hours overtime
R. Gallardo #52093 - 6 hours overtime

Trackmen

R. Almazen #51081 - 6 hours overtime
S. Ragin #52070 - 4 hours overtime
B. Whitt #52086 - 4 hours overtime
D. Schoon #52111 - 4 hours overtime
J. Cordoba #52141 - 4 hours overtime

Super Truck Operators

K. Carstensen #52025 - 4 hours overtime
J. Slisz #52027 - 4 hours overtime

4. As a consequence of the violation referred to in Part (2) above, the Calling Area 2 employees shall be compensated as follows:

Track Foremen

A. Diaz #50286 - 8.5 hours overtime
E. Gutierrez #51070 - 6 hours overtime

RMO

M Travis #51090 - 6 hours overtime

Trackmen

R. Guzman #63955 - 8.5 hours overtime
B. Homberg #52133 - 6 hours overtime
K. Hilley #52138 - 4.5 hours overtime
R. Tamez #52139 - 2 hours overtime

The Joliet Division employees shall be compensated as follows:

Track Foremen

E. Martinez #50945 - 4.5 hours overtime
F. Fadrowski #83149 - 1 hour overtime
E. Vargas #81621 - 1 hour overtime
M. Kranz #51097 - 1 hour overtime

RMOs

A. Almanza #50596 - 4.5 hours overtime
G. Woodward #51057 - 8 hours overtime

Trackmen

R. Almazen #51081 - 4.5 hours overtime
S. Ragin #52070 - 4.5 hours overtime
B. Whitt #52086 - 1 hour overtime
D. Schoon #52111 - 1 hour overtime
J. Cordoba # 52141 - 1 hour overtime

Super Truck Operators

K. Carstensen #52025 - 1 hour overtime
J. Slisz #52027 - 1 hour overtime

FINDINGS:

Public Law Board No. 5905, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On July 13, 2000, the extra gang unexpectedly completed welded rail installation work on the Western Subdivision. Its next scheduled job was at Plainfield on July 18, 2000. Carrier had made arrangements with Plainfield officials for the work to begin on that date. Rather than reposition the extra gang for July 14 and 17, Carrier used the extra gang to perform the turnout installation work that is the subject of the instant claims.

The Organization contends that Carrier utilized the extra gang to perform work reserved to section forces in violation of Rules 3(a) and 3(f). Rule 3(a) provides:

All work in connection with the construction, maintenance or dismantling of roadway and track, such as rail laying, tie renewals (except on open deck bridges); ballasting, lining and surfacing track, including the dismantling and replacing of highway crossings and walks required by such surfacing; maintaining and renewing frogs, switches and railroad crossings; oiling switches; ditching, sloping and widening cuts; erecting, maintaining and dismantling right-of-way fences and snow and sand fences; mowing and cleaning; brush cutting; patrolling and watching; loading, unloading and handling all kinds of track

material (or assisting Heavy equipment Sub-department employees in such work); and all other work incident thereto, shall be track work.

Rule 3(f) provides:

Extra gang trackmen's work shall consist of work not customarily done by section or maintenance gangs, such as reballasting, rail relaying (including tie renewals therewith), tie renewal programs involving 10,000 ties or more, and field welding (joint elimination) programs, bank widening, grade and line changes and emergency work occasioned by inclement weather.

Carrier argues that the work in question is not reserved to section forces because Rule 3(a) refers to frogs and switches but not turnouts; because Rule 3(a) refers to maintaining and renewing, not installing, switches; and because the Organization has failed to establish that installation of turnouts has been performed exclusively by section gangs. Carrier also argues that the claim is excessive because Rule 58 limits time claims to actual pecuniary losses.

Carrier's argument that Rule 3(a) encompasses frogs and switches but not turnouts is based on the definition of "turnout" found in *The Track Encyclopedia* (10th edition), which indicates that a turnout consists of components that include a switch and a frog. During handling on the property, however, the Organization asserted that the terms "turnout" and "switch" were used interchangeably on the property. Carrier did not dispute this assertion. Furthermore, the record of handling of the claims on the property supports the Organization's assertion. The claims, as filed by the General Chairman, referred to the work as the installation of two switches. In denying the claims, the Chief Engineer also referred to the work as "new switch installation." He did not distinguish between switches and turnouts. Similarly, when the General Chairman appealed the claims denials, he referred to the work as installation of switches, as did the Director Labor Relations in denying the appeals. It was only at the claims conference that Carrier asserted that a turnout is something different from a switch. The record of handling fully supports the Organization's undisputed assertion that on this property a switch includes a turnout.

Carrier, however, is correct in its observation that Rule 3(a) expressly refers to maintaining and renewing switches but does not use the word installing in connection with switches. Rule 3(a), however, does refer initially to "[a]ll work in connection with the construction, maintenance and dismantling of roadway and track," and lists maintaining and renewing switches as an example of such work. The crucial question raised by the claims is whether the work of installing switches is, in the language of Rule 3(f), "customarily done by section . . . gangs." If it is, then Carrier violated Rule 3(f) by assigning the work to the extra gang.

In this regard, the General Chairman submitted a list of ten turnout installations performed by section gangs between September 25, 1997, and October 24, 2000. Carrier responded that on four of the occasions submitted by the Organization road gangs also worked on the switch installations, and maintained that the section gangs did not exclusively perform the

work. The Organization responded with an analysis of the Foreman's daily reports for the dates questioned by Carrier which showed that the road gangs involved were engaged in road surfacing, replacing bolted rail, and one hour working under a code for "guess report." Carrier did not dispute the Organization's analysis.

Thus, it appears from the record developed on the property, that the Organization proved that the installation of turnouts was work customarily done by section gangs and that, by assigning the work to an extra gang, Carrier violated Rule 3(f). Accordingly, we turn to the remedy.

Carrier maintains that the remedy sought is excessive and barred by Rule 58 which limits recovery to actual pecuniary loss. We addressed Rule 58 in Case No. 14, Award No. 14, where we held that actual pecuniary loss includes lost work opportunities but does not allow for penalty payments. The instant claims present specific lost overtime opportunities on two specific dates. Thus, those Claimants who were available for overtime on the two dates in question and were not called suffered actual pecuniary losses and must be compensated therefor. However, Claimants who were already working overtime or were otherwise unavailable to work overtime on the dates in question suffered no actual pecuniary loss and any compensation paid them would be a penalty barred by Rule 58. Therefore, we shall sustain the claims, but only as to those Claimants who were available for overtime on the dates in question. As to other Claimants, the claims shall be denied.

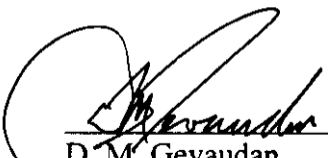
AWARD

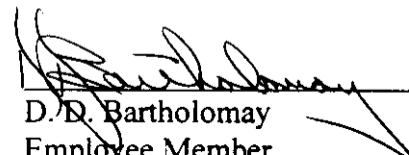
Claims sustained in accordance with the Findings.

ORDER

The Board, having determined that an award favorable to Claimants be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


Martin H. Malin, Chairman


D. M. Gevaudan
Carrier Member


D. D. Bartholomay
Employee Member

Dated at Chicago, Illinois, May 19, 2001.