

PUBLIC LAW BOARD NO. 7661

Case No. 5

PARTIES
TO THE DISPUTE:

(Brotherhood of Maintenance of Way Employes
(Division
(
(and
(
(Union Pacific Railroad Co.

STATEMENT OF CLAIM:

**Claim of the System Committee of the Brotherhood of Maintenance of Way
Employes that:**

(1) Employees assigned to System Tie Gangs 9063, 9083 and 9076, (herein after referred to as the Claimants) because the Carrier violated the Agreement, specifically, but not restricted to Rules 1, 20, 26, 27, 28, 31, 33 and 35 when management unilaterally changed the gangs' starting time to 17:30 pm commencing January 9, 2014. This start time is outside of the hours allowed by Rule 31 and, absent an agreement, is in violation of our Collective Bargaining Agreement.

(2) As a consequence of the violation referred to in Parts (1) above, the Claimants shall be compensated "fourteen (14) straight time hours on January 9th, seventeen (17) straight time hours on January 10th, seventeen (17) January 11th, seventeen (17) straight time hours on January 12th, seventeen (17) straight time hours on January 13th, seventeen (17) straight time hours on January 14th, seventeen (17) straight time hours on January 15th and two and one half (2 1/2) straight time hours on January 16th. This time paid at their respective rates of pay." (BMWED File D-1431U-303 / Carrier File 1600536)

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Organization within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

The basic facts of the case are generally uncontested. The Carrier needed to replace ties with a BMWED production tie gang and because Amtrak, United Parcel Service (UPS) and other priority "Z" trains (premium intermodal and automotive trains) running during the day on the Carrizozo Subdivision, the Carrier believed

that it was required to complete the work at night, or otherwise lose a substantial amount of right of way time. The Carrier notified the BMWED by letter dated November 21, 2013 and made the proper notification to the General Chairman informing him of the requirement. The notice offered a proposal and if not accepted, offered Appendix "A" (party pay) Arbitration. An agreement was not reached and neither party advanced party pay Arbitration.

Rule 31(h) states:

(h) Other starting times may be agreed upon by the parties for production crews* or for regular assignments involving service which is affected by environmental conditions or governmental requirements or for work that must be coordinated with other operations in order to avoid substantial loss of right of way access time; however, no production crews* or regular assignment will have a starting time between midnight and 4:00 a.m. If the parties fail to agree on such other starting times, the matter may be referred to arbitration in the manner described in Appendix "A". Similar notice requirements regarding starting times, as described in (g) above, will apply.

The proposed agreement explained that the Carrier would be utilizing TRT/Wood Tie work groups in and around the Carrizozo Subdivision to install ties. The proposal further explained "the track cannot be shut down during the day due to multiple Z trains on this corridor." The agreement requested that the gangs observe a start time of 05:30 p.m., beginning January 9, 2014. The Carrier concluded the proposal with the following:

If agreement is not reached the Carrier is agreeable with the Organization referring the matter to arbitration in the manner described in Appendix "A".

The start time was implemented on January 9, 2014. General Chairman Below rejected the proposed agreement by a letter dated January 3, 2014, contending that the Carrier had not set forth sufficient reasons for the start time change.

Though the Carrier had offered the Organization to address the matter through party pay Arbitration as described in Appendix "A", pursuant to the provisions of Rule 31(h), the Organization filed a Claim on February 19, 2014 under the traditional Arbitration provision of the Agreement. In its Claim, the Organization alleged that Claimants' start time was improperly changed to 5:30 p.m. beginning

January 9, 2014. On April 8, 2014, the Carrier rejected the Claim, indicating in relevant part:

The Carrier offered an agreement to the Organization which detailed the necessity for the change in the work groups start time. The Organization failed to agree to the change in start time. The Carrier moved forward with the new start time as allowed and outlined in Rule 31 (H) of the agreement. The Carrier is agreeable to the provisions of Appendix A, as described in Rule 31 (H).

On May 14, 2014, the Organization appealed the matter to the Carrier and on June 13, 2014, the Carrier rejected the appeal, which led to the instant matter.

According to the Organization, the Carrier violated the Agreement when it unilaterally changed the schedule of the relevant crew without the agreement of the Organization. According to the Organization, based on Rule 31 (h) and Award 41565, the matter should be resolved in favor of the Organization. It was the Carrier's obligation to request party pay Arbitration pursuant to Appendix "A" in Rule 31(h). When the Carrier did not so request, the matter was concluded and the result should have been in favor of the Organization.

Conversely, it is the Carrier's position first that the matter is inarbitrable. It is the Organization's burden to request Arbitration under Appendix "A" within the prescribed time period and when it did not do so, it waived its right to contest the matter. Assuming, *arguendo*, however, that the Organization had the right to pursue the matter through regular Arbitration, the Carrier contends that it has proven, unequivocally, that it was proper to change the schedule of Claimants pursuant to Rule 31. Therefore, the Carrier contends that the matter is inarbitrable, but that even if arbitrable, the Carrier was acting within its rights under the Agreement.

This Board has reviewed the language of Rule 31 as well as the language of Award 41565. We have determined that the Arbitration provision set forth in Rule 31(h) is voluntary, and either party may take advantage of the provision for party pay Arbitration as set forth in that section. In this case, the Carrier indicated that it was amenable to Arbitration pursuant to Appendix "A". However, the Organization did not agree to invoke the provisions of Appendix "A". When it did not do so, the Organization ultimately did invoke the provision of the traditional Arbitration procedure. The Carrier contends that if the Organization did not invoke the provisions of Appendix "A", the matter was inarbitrable. This Board does not agree. Rather, based on the language in Section 31(h) involving the word

“may”, the Union has the right to request traditional Arbitration under Rule 49. We note that Appendix “A” involves a party pay approach and we do not believe that either party should be bound to accept such an arrangement. The Union is free to request traditional Arbitration, which it did in this case. Further, we find that in the event that the parties do not agree to the provision of Appendix “A” of Rule 31(h), the Carrier is free to invoke the schedule change, but ultimately must abide by the ruling of the Public Law Board. Based upon the Board’s rejection of the arbitrability claims, we have proceeded to the merits of this case.

After a review of all the relevant evidence, this Board finds that the Organization has been unable to meet its burden of proof to show that the Carrier was in violation when it changed the schedule of the relevant crew. The Carrier has shown that it was acting within its rights pursuant to Rule 31 when it changed the schedule of the relevant crew. It has not been proven that the Organization has been able to rebut the Carrier’s evidence. Therefore, the Carrier had the right to change the schedule of the crew. The Claim is denied.

The Claim is denied.

AWARD

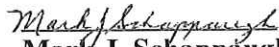
Claim denied.

**Steven
Bierig**

Digitally signed by Steven Bierig
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Date: 2017.07.26 11:49:16 -05'00'

Steven M. Bierig
Chairperson and Neutral Member


B. W. Hanquist
Carrier Member


Mark J. Schappagh
Organization Member
I dissent

Dated at Chicago, Illinois this 26th day of July 2017.