

PUBLIC LAW BOARD NO. 6676

**PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO)
DISPUTE) NORFOLK AND SOUTHERN RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1. The Agreement was violated when the Carrier failed and refused to allow Machine Operator Larry Swanagan a \$1,000 lump sum payment when it required him to work on two or more managerial territories on July 18, 2000.**
- 2. As a consequence of the violation referred to in Part (1) above, Machine Operator Larry Swanagan shall now be allowed the \$1,000 lump sum payment. (Carrier File: MW-DECR-00-43-LM-462)**

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.

Basically, it is the position of the Organization that the contract language of Section V, Paragraph (C), of the former Nickle Plate Railroad (NKP) Seniority Realignment Agreement of February 21, 2000 and Article XVI, Section 4, of the September 26, 1996 National Agreement, support this claim for a lump sum payment of \$1,000.

Paragraph (C), Section V, "Other Applicable Agreement Provisions," of the NKP Seniority Realignment Agreement reads as follows:

In the event that the Carrier opts to establish non-DPG gangs that work between two or more current managerial division territories of the realigned NW-WAB Eastern or Western Region during any twelve month period measured between January 1 and December 31, employees assigned to such gangs will be eligible to receive the lump sum payment (maximum of \$1,000) as provided for and subject to the

conditions of Article XVI, Section 4 of the September 26, 1996 National Agreement, for any such period.

The aforementioned Section 4, Article XVI, of the 1996 National Agreement reads:

Each employee assigned to a regional or system-wide production gang established by a covered carrier under this Article who does not leave the gang voluntarily for a period of at least six (6) months shall be entitled to a lump sum payment annually equal to five percent of his or her compensation earned during the calendar year on that gang. Such compensation shall not exceed \$1,000 and, it shall be paid within 30 days of the completion of the employee's service on the gang. If the carrier disbands the gang in less than six months, the carrier will be responsible for payment of the production incentive earned as of that date.

Claimant, a Machine Operator on a non-DPG (Divisional Production Gang) of the Illinois Managerial Division, a position that he exercised seniority to on May 8, 2000, was required by the Carrier to work for eight hours on July 18, 2000 on the adjacent former NKP line at Lafayette, a location on the Lake Managerial Division, to assist in installing a switch.

The Organization argues that since Section V, Paragraph (C) of the NKP Seniority Realignment Agreement provides that employees on non-DPG gangs who work between two or more managerial division territories *during any twelve month period*, will be eligible to receive a lump sum payment that Claimant, having done so, is, therefore, entitled to the contractually provided lump sum compensation.

The major thrust of Carrier argument is that the claim be denied because Claimant had not held his current Machine Operator position at the beginning of the calendar year; he had exercised seniority to the position on May 8, 2000; and, he was on the position for just over two months at the time required to work for one day on an adjacent managerial division.

The Carrier maintains that in addition to crossing managerial boundaries, the Agreement sets forth the measurement period from January 1 to December 31 of each year and specifically made such payment conditioned on the employee fulfilling the qualifying requirements of Article XVI, Section 4, of the 1996 National Agreement. Thus, the Carrier says that the conditions for DPG employees as set forth in the National Agreement, and as consistently applied on its property since the inception of this rule, are as follows:

The employee must be assigned to the Gang; that is, the employee must be appointed to the bulletined position when established at the beginning of the Gang's work season.

The assigned employee must not voluntarily leave the DPG position for at least six months.

In this case, the Carrier says, the only criterion Claimant satisfied was that he was on a non-DPG position on the day that it crossed managerial boundaries. The Claimant was not, the Carrier submits, on this particular Machine Operator position on January 1, 2000. The occupant of that position on January 1, 2000 was R. G. Miller. Claimant, as the record shows, did not become the occupant of this position until May 8, 2000. Therefore, the Carrier urges, Claimant could not fulfill the other qualifying condition that he be continuously on this position from January 1, 2000 for at least six months from such date.

In addition to the above argument, the Carrier says, without waiver of its principal position, even if Claimant had fulfilled all the conditions for the lump sum payment that he would not have been entitled to the full \$1,000 payment. Here, the Carrier says, that while assigned to the excavator that Claimant earned \$17,341.39, and 5% of that compensation would be \$867.06, not \$1,000 as claimed. Accordingly, the Carrier says that the claim as submitted, besides being without contractual merit, is also excessive.

The Board does not find merit in the Carrier contention that its administrative guidelines for tracking employees assigned to production gangs for lump sum compensation purposes be recognized as having the force of a recognized practice. As the Organization submits, nothing of record shows that it had endorsed or was fully aware of the Carrier guidelines. Further, that the Carrier guidelines were apparently not applied in a uniform manner is evidenced by Carrier recognition that lump sum payments "may have been collected by some employees who fulfilled the qualifying criteria even though they were not actually assigned to the type of position contemplated by the realignment agreement," albeit the Carrier would seek to down play such matter in saying that "gratuitous payments do not expand the contractual coverage of the lump sum payment both as to qualifications and the type of assignments."

Nor does the Board find meritorious Carrier argument that Claimant is not entitled to the lump sum compensation because he was not initially assigned or appointed to a position in the production gang on January 1. Nothing in applicable agreement rules prescribes that an employee must be assigned to a position in a production gang at the beginning of the work season to be eligible for or entitled to lump sum compensation. Claimant became a member of the production gang in an exercise of seniority to an established position in the gang. Further, Claimant was occupying

the position when it crossed over to the adjacent managerial district. And, nothing of record shows that he voluntarily left the position in the production gang for a period of at least six months.

In study of the record, the Board finds it worthy of note that Agreement Side Letter No. 6, dated January 28, 2000, makes reference to *positions* working across two or more managerial division territories. In this respect, the Letter reads in part:

This confirms our understanding with respect to Section V(C) that provides that the current boundaries of the managerial divisions . . . are frozen for the purposes of determining if a *position* works across two or more territories for eligibility for the referenced up to \$1,000 lump sum bonus. (Emphasis here added by the Board.)

It is also noteworthy that Section 3(b) of Article XVI of the 1996 National Agreement provides that an individual who bids and is subsequently assigned to work on a regional and system-wide production gang established by a covered carrier may be held to that gang for a period of no more than 30 days. This section then goes on to state that after such time, the employee will be entitled to bid for other jobs with the carrier, subject to the limitation that no more than ten percent of a gang may bid off during a one week period.

We find these provisions significant in that Section 4 of Article XVI provides that "each employee" assigned to a regional or system-wide production gang shall be entitled to a lump sum payment based upon his or her compensation earned on that gang, provided that the employee does not leave the gang voluntarily for a period of at least six months. At the same time, Section V(C) of the Realignment Agreement states that "employees" assigned to such gangs will be eligible to receive the lump sum payment. In other words, it appears that these several contractual provisions recognize that employees may bid into and out of a gang, and that each employee assigned to and remaining with the gang for a six-month period would be eligible to receive a lump sum payment if during the period of time that they held a gang position the position worked across two or more managerial division territories.

Although the claim was initiated by letter of October 23, 2000, a February 14, 2001 appeal letter of the claim includes an unrefuted statement that Claimant did not voluntarily leave the production gang to which he was an assigned for a period of at least six months.

In the light of the above considerations and overall study of arguments, exhibits and past awards as presented, the Board finds that Claimant is entitled to the lump sum compensation for having been required to perform work between two or more managerial division territories during the six month period of time that he held a position on a non-DPG gang.

As to the amount of the lump sum compensation, it being unquestioned that while assigned to the Machine Operator position in the gang that Claimant earned \$17,341.39, and the 1996 National Agreement providing an entitled to a lump sum payment equal to five percent of compensation earned on that gang, the lump sum payment shall be \$867.07, not \$1,000 as claimed.

AWARD:

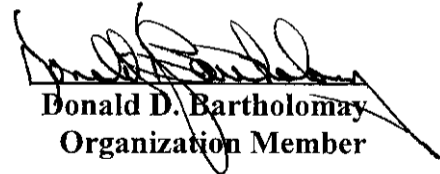
Claim sustained.



Robert E. Peterson
Chair & Neutral Member



Dennis L. Kerby
Carrier Member



Donald D. Bartholomay
Organization Member

Norfolk, VA
October 28, 2004