

BEFORE PUBLIC LAW BOARD NO. 6915

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CN – WISCONSIN CENTRAL RAILROAD**

Case No. 16

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when the fixed headquartered crew at New Richmond, Wisconsin was assigned rest days other than Saturday and Sunday, when there was no crew to relieve with rest days of Saturday and Sunday at New Richmond, WI as required by Rule 17 (System File 001-20060221/WC-134-106-018).
2. As a consequence of the violation referred to in Part 1 above, Claimants Charles Larson, Brad Johnson and any member performing service on the weekend crew at New Richmond, Wisconsin shall now each be compensated for eight (8) hours at the applicable pro rata rates of pay for each Friday they were denied the opportunity to work and eight (8) hours at the time and one-half rate of pay for each Sunday they were required to work beginning January 6, 2006 and continuing.”

FINDINGS:

The Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated Rule 17 of the parties’ Agreement when it assigned rest days other than Saturday and Sunday to the fixed headquartered crew at New Richmond, Wisconsin, leaving no fixed headquarter crew at that location with rest days of Saturday and Sunday that needed to be relieved by the New Richmond weekend crew with rest days other Saturday and Sunday. The Carrier denied the claim.

The Organization initially contends that the Carrier failed to answer the Organization’s February 21, 2006, claim within the sixty-day period set forth in Rule 30. The Organization asserts that the Carrier received and signed for this claim on February

24, 2006, but the Carrier did not respond to it until April 26, 2006, at the earliest. The Organization argues that the Carrier did not challenge this procedural objection at any time, and the postmarks are clear. Pointing to the terms of Rule 30, the Organization emphasizes that postmarks are to be used in determining compliance, and prior Board Awards confirm how time limits are to be computed.

The Organization submits that the Carrier's response was issued at least sixty-one days from the date that the Carrier received the claim, so the claim must be paid as presented, in accordance with Rule 30G. The Organization points to numerous Board Awards in arguing that the Carrier's failure to respond within the contractual time period requires that the claim be sustained.

The Organization then maintains that Rule 17, which governs positions with fixed headquarters, is clear and not subject to misinterpretation. The Organization emphasizes that in the situation at issue, the Carrier did not have a fixed headquarters crew at New Richmond, WI, with consecutive rest days of Saturday and Sunday. The Organization asserts that because there was no such headquartered crew at this location, it is clear that there were no positions with consecutive rest days of Saturday and Sunday to be relieved. The Organization submits that the Carrier violated Rule 17 when it assigned the Claimants to a work week with rest days other than Saturday and Sunday.

The Organization emphasizes that the Carrier has offered no defense for its failure to answer the initial claim in a timely manner, and it additionally argues that the Carrier made other contentions that cannot stand. Addressing the Carrier's position that the Claimants' crew was relieving a crew with rest days of Saturday and Sunday in

compliance with Rule 17, the Organization insists that this other crew had a different fixed headquarters, Chippewa Falls instead of New Richmond. The Organization maintains that an analysis of Rule 17 confirms that the Carrier's position cannot prevail. The Organization insists that a common-sense interpretation of Rule 17 establishes that if a crew was to "relieve the duties" of another crew, it would be at the same fixed headquarters. The Organization emphasizes that Rule 17 addresses only fixed headquarters, and it would make absolutely no sense that the application of Rule 17 would expand beyond one fixed headquarters.

The Organization goes on to contend that there also is no sense to the Carrier's suggestion that a relief crew for Chippewa Falls would be established at New Richmond, which covers another subdivision. The Organization insists that common sense indicates that if the Carrier needed a crew to relieve the duties of another crew, both crews would be established with the same fixed headquarters on the same subdivision.

The Organization argues that the fixed headquarter crew at New Richmond and the fixed headquarter crew at Chippewa Falls covered different subdivisions and used different equipment. The Organization submits that there is no support for the Carrier's position that this case falls within the parameters of "relieve" in Rule 17. The Organization insists that the Carrier's contention that the fixed headquarter weekend crew at New Richmond relieved the fixed headquarter weekday crew at Chippewa Falls is not the "relieve" contemplated by the Agreement.

The Organization maintains that if a crew is created under Rule 17, with fixed headquarters, then it can only be concluded that a crew established under Rule 17C to

relieve the original crew would have to have the same fixed headquarters. In the instant case, the New Richmond crew simply is not relieving the “duties and positions” of the Chippewa Falls crew. These two crews cover two separate and distinct subdivisions. The Organization points out that the Carrier’s contention that the New Richmond crew was relieving the Chippewa Falls crew cannot stand because these two crews do not share the same headquarters, and they do not perform work in the same subdivision.

As for the Carrier’s suggestion of a practice of assigning positions in the manner it did in this instance, the Organization contends that the Carrier must provide probative evidence in support of this affirmative defense. The Organization submits that the only evidence in the record is that beginning on January 6, 2007, and continuing, there was no fixed headquartered crew at New Richmond with assigned rest days of Saturday and Sunday for the New Richmond weekend crew to relieve.

The Organization asserts that the Carrier improperly required the Claimants to work a workweek with rest days other than Saturday and Sunday. The Organization therefore argues that the Carrier was improperly paying the Claimants in that the Carrier was not paying them overtime for certain hours worked and then suspending hours of what should have been their normal tour of duty.

The Organization emphasizes that because there was no fixed headquartered crew at New Richmond to relieve on the claim dates, the Carrier violated Rule 17C. Moreover, the Claimants should have been assigned work hours in accordance with Rule 17B, which provides for five consecutive work days with two consecutive rest days on Saturday and Sunday. The Organization therefore asserts that the Claimants were denied

the opportunity to perform eight hours' work during each Friday of the claim period, and they should be compensated at the time and one-half rate for each Sunday that the Carrier required them to work.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization's first knowledge of what it now asserts to be a violation of the Agreement came on November 1, 2005, the date on which the positions that are the subject of this dispute were posted. The Carrier asserts that the Organization's knowledge of this matter therefore came 112 days prior to February 21, 2006, the date that the claim was presented. The date that these positions were awarded, November 10, 2005, was 103 days prior to the date of the claim, and the successful bidders began working in these positions on November 21, 2005, ninety-two days before the date of the instant claim.

The Carrier argues that under Rule 30, the instant claim was not presented within the applicable sixty-day time limit. At best, the instant claim was presented at least ninety-two days after the Organization had knowledge of what it alleges to be a violation of the Agreement, and as much as 112 days after such knowledge. The Carrier contends that whichever date is considered to be the date of the occurrence on which this claim is based, the instant claim was filed far beyond the applicable time limit set forth in Rule 30A.

The Carrier emphasizes that under Rule 30G, claims that are not progressed by the Organization within the appropriate time limits will be barred from further consideration.

The Carrier asserts that the Organization has attempted to gain unwarranted leverage with respect to the time limit issue by attempting to define the instant claim and dispute as constituting a “continuing claim.” The Carrier submits that this is an obvious attempt to shoehorn this matter into the legitimate parameters of the sixty-day time limit. The Carrier argues to allow the Organization’s attempt to succeed would invite a new and unilateral definition of “continuing claims.” This also would incite the presentation of late claims, under the guise that they are “continuing,” to try to legitimize the Organization’s failure to comply with the agreed-upon time limits, or to allege that the Organization’s right to advance the claim has been resurrected because the Carrier failed to respond within the second-stage time limits, as has been alleged here.

The Carrier insists that under paragraphs A and C of Rule 30, the instant claim is barred, and the Board is compelled to deny this claim without considering the merits.

The Carrier then asserts that this claim also must fail on the merits. The Carrier submits that the conditions set forth in Rule 17 for the establishment of positions with rest days other than Saturday and Sunday have been met in this case. The Carrier argues that there is no question that the crews were paid the differential as mandated by the Agreement, and the Carrier notes that the Organization has not disputed the Carrier’s position that the New Richmond Section relieves the duties of positions at Chippewa Falls, which have Saturday and Sunday rest days. The Carrier contend that these undisputed and relevant facts establish that the Carrier is in full compliance with the spirit, intent, and clear language of the governing rule.

The Carrier further argues that the Agreement does not contemplate the

Organization's position that only if positions with Saturday and Sunday rest days are headquartered at New Richmond can there be positions having rest days other than Saturday and Sunday headquartered at New Richmond. The Carrier suggests that if the parties had intended for such a restriction to apply, then they very simply could have included language such as "at that location," or a similar phrase, after the phrase "relieve the duties of positions." The Carrier contends that the parties obviously did not desire or intend to include such a restriction in connection with Paragraph C of Rule 17, and this restriction does not exist.

The Carrier points out that the parties did include such a location restriction in Paragraph D of Rule 17, which governs the establishment of Night Section Gangs. The Carrier therefore maintains that where and when the parties intended to confine a Carrier privilege to the same location, they did so with language that achieved the purpose. The Carrier insists that no similar restrictive language may be read into Paragraph C of Rule 17.

The Carrier asserts that Rule 17 was intended to provide a means whereby positions could be established to cover the weekend rest days of crews. The Carrier argues that this is just what was permitted and accomplished by established of the positions of the New Richmond Weekend Crew. The Carrier submits that no violation of Rule 17 has been shown or proven, and no remedy can be fashioned where there is no proof that the Agreement was violated.

The Carrier goes on to argue that even if some remedy were appropriate here, the remedy sought by the Organization is excessive and would produce a significant

windfall. The Carrier emphasizes that the Claimants were paid for the days they worked, on the assignment they had bid and were awarded. The Claimants also were paid the applicable differential for each hour worked on a Saturday and/or Sunday in relief on another crew's rest days.

The Carrier asserts that if there was proven violation, which is not the case, then the only amount that could be contemplated as a remedy would be the difference between what the Claimants earned and what they would have earned had they been assigned to positions with rest days of Saturday and Sunday. The Carrier points out that in the instant case, the difference would be a negative amount by virtue of the hourly differential paid to the Claimants for their work on Saturday and Sunday.

Pointing to the Organization's claimed remedy on behalf of Claimant Larson, the Carrier notes that for the period from January 6 until February 19, 2006, alone, this would amount to seven days of straight-time pay and at least seven days of overtime pay, which equals more than seventeen straight-time days' pay for Claimant Larson. The Carrier maintains that because Claimant Larson already was paid for thirty-one days for this time period, the Organization's requested remedy would result to more than forty-eight days' pay for the January 6 to February 19 time period, during which Claimant Larson would have had no more than thirty-one days of assigned work.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the record in this case, and we must find that the claim is barred on the grounds of timeliness and the claim must be denied.

The record reveals that on November 1, 2005, the Carrier posted Bulletin Nos. 526 and 527 advertising for new positions on the New Richmond Weekend Section Gang. The end date for the bulletins was November 10, 2005, and the effective date was to be on or about November 21, 2005.

The Organization submitted a claim objecting to the new schedule with a date of February 21, 2006. That date is one hundred twelve days after the bulletin setting forth the new hours was posted. That February 21, 2006, day is also one hundred three days after the end date of the posting and ninety-two days after the successful applicants were actually to assume the positions on the new schedule about which the Organization objects.

Rule 30 states the following:

All claims and grievances must be presented in writing by the employee or the duly authorized representative to the officer of the company designated to receive same within sixty (60) days from the date of the occurrence on which the claim or grievance is based . . .

The Organization received its notice when the bulletin was posted. The bidders were awarded the position on November 10, 2005. It is the schedule of that position to which the Organization objects. The claim was not filed until February 21, 2006. Hence, the claim was not progressed by the Organization within the appropriate time limits and it is time barred.

Once this Board has determined that the case must be denied on the basis of

procedural grounds, there is no requirement that we discuss the merits of the dispute.

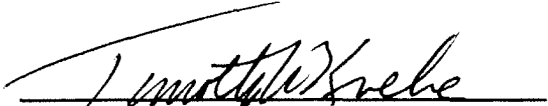
Consequently, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: May 10, 2010

Dissent to Follow



CARRIER MEMBER

DATED: May 10, 2010

LABOR MEMBER'S DISSENT
TO
AWARD 16 OF PUBLIC LAW BOARD NO. 6915
(Referee Meyers)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the on-property handling between the parties. Such is the case here.

The issue presented to the Board for consideration in this dispute was the improper assignment of employees to positions with other than Saturday and Sunday rest days beginning on January 6, 2006 and continuing. The claim was filed on February 21, 2006.

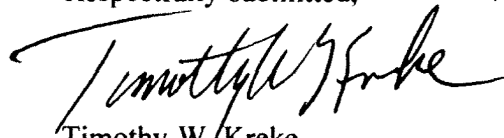
This case was denied by the Majority on procedural grounds, accepting the Carrier's assertion that the Organization failed to file a timely claim. Within its submission, the Carrier asserted that the triggering event occurred on November 10, 2005 and, therefore, the February 21, 2006 claim was untimely.

Without dwelling on the reasons, the Carrier's time limit argument is simply wrong in this instance, we must note that the Board's decision to deny the case based on this procedural argument is improper for at least two (2) reasons which were fully developed during oral arguments. First, the Carrier denied the claim based solely on the merits thereby waiving its right to raise this procedural issue at a later date (See NRAB Second Division Award 1552, Third Division Awards 11570, 12516 and Fourth Division Award 1839). Second, a review of the entire on-property record of this dispute reveals that the Carrier never asserted the Organization failed to present a timely claim. The only time this argument appears is within the Carrier's submission to this Board. NRAB Third Division Award 16061 held: "*** The Carrier is limited, before this Board, to the reasons it gave on the property for disallowing the claim. Award No. 12388 (Engelstein). ***" NRAB Third Division Award 17231 held: "This Board has repeatedly ruled that contentions or charges not made during the handling on the property, cannot be considered by this Board in the determination of a dispute."

The Carrier's decision to present a new argument to the Board and the Board's determination to deny the case based on that new argument demands strong and vigorous dissent. The Majority's decision to deny this claim was wrongly decided and shall provide no precedential standing in future cases.

For these reasons, the Organization respectfully dissents.

Respectfully submitted,


Timothy W. Kreke
Labor Member