BEFORE PUBLIC LAW BOARD NO. 6915

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

Case No. 31

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when it failed to allow Maintenance of Way Employes Chad Palubicki, Brian Cicha, Benjamin Nelson, Ryan Duda, Jeremy Kramer, David Vernetti, Taylor Queen, Theodore Van Doorn, Duane Palubicki, Kale Edinger, Patrick Wendt, James Winchel, Richard Marvin, Craig Anhalt, Peter Weyenburg, Jeffrey Stewart, Timothy Chimulera, John Allen, Brandon Beerntsen, Harold Hepfer, Brian LaJoie, Fred Hoppe, Theodore Brister, Kyle Cortwright, Chad Stuebs, Cody Kezewski, Robert Phillips, Frederick Feger, Jeffrey Hooper James Walker, Jr., Jerry Meinburg, Chad McCarthy, Jessica Killingham, Keith Kendall, Andrew Schumacher, Daniel Gorges, Steven Reihl, Jeffrey Loehr and Bradley Laurin to report to their awarded positions and when it improperly 'cancelled' said positions. (System File C 40-01).

2. As a consequence of the violation referred to in Part 1 above, Claimants shall now each be compensated for the differential rates of pay, loss of earnings and expenses that may have been incurred while not being allowed to go to their awarded positions beginning March 12, 2007 and continuing.

FINDINGS:

The Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the controlling Agreement when it failed to allow the Claimants to report to the bulletined positions that had been awarded to them pursuant to their bids, and then cancelled these positions. The Carrier denied the claim.

The Organization initially contends that the Carrier's procedural objection must be rejected. The Organization asserts that there are two problems with the Carrier's position that the instant claim is procedurally invalid because it was not presented to the proper

Carrier official. The Organization argues that the Carrier has not referenced who it contends is the designated official who should have received the claim. The Organization emphasizes that the claim was presented to the proper Carrier officials, and the Carrier has not established otherwise. The Organization submits that it presented the instant claim to three Carrier officials, and Managing Engineer Holman was the Carrier official who responded. The Organization suggests that the Carrier's failure to carry this position forward after its initial denial letter demonstrates that the Carrier realized that this argument was invalid. The Organization maintains that there was no procedural error, and the Carrier's contention in this regard cannot stand to defeat the claim.

The Organization insists that the Carrier mischaracterized what occurred when it took the position that this dispute arose when the Carrier complied with the Organization's requests. The Organization emphasizes that it did not acquiesce to the Carrier's violation of the Agreement, nor did the Organization make any requests in connection with the cancellation of the positions. The Organization firmly rejects the Carrier's self-serving contentions, and the Organization maintains that it did not request or agree to the cancelling of the positions involved in this matter.

The Organization goes on to assert that the Carrier should have performed one of three actions: allow the employees to work the positions; compensate the assigned employees; or abolish the awarded positions in accordance with the collective bargaining agreement, as has routinely been done in the past. The Organization submits that the Carrier's self-serving contentions misrepresent the facts, are unsupported, and cannot stand to defeat the claim.

The Organization contends that none of the Carrier's contentions in its denial letter are supported by fact or probative evidence. The Organization points out that it insisted that the employees be told to report to their assignments, be otherwise compensated, or that the assignments be abolished in connection with Rule 10. The Organization asserts that nothing in the record establishes otherwise, and the Carrier's unsupported and self-serving statements amount to nothing but sophistry and cannot be considered when reviewing this case.

The Organization then argues that the Carrier's actions in this matter were in violation of the clear language of the Agreement. The Organization points out that the Claimants all were assigned to bulletined seasonal start-up positions with a start date of March 12, 2007. The Carrier, however, did not assign the claimants to their positions, nor did it properly compensate the Claimants or abolish the assignments. The Organization asserts that the Carrier instead chose to cancel the bulletins after the assignments were made, thereby violating the Agreement.

The Organization emphasizes that the Agreement does not allow for cancelling a bulletin. The Organization submits that after the start-up date has been determined, employees are to begin work on that date. In the instant matter, the start-up date was clearly outlined on the bulletin, and the Claimants were assigned their respective positions. The Organization insists that under these circumstances, the Carrier cannot simply cancel the bulletins and the associated positions. The Organization points out that if the Carrier determined to eliminate these positions, it was obligated to abolish them in accordance with Rule 10, which requires an advance notice to the respective employees

and the General Chairman. The Organization submits that the Carrier improperly cancelled the assignments.

The Organization then points to the restrictions in Rule 6E relating to employee options for applying for positions once they are assigned to their positions. The Organization maintains that this supports the fact that the Agreement does not allow for positions to be cancelled because the Rule 6E restrictions cannot be lifted for seventy-five days unless the positions are abolished in accordance with Rule 10, the employees are displaced by senior employees, or the employees have the opportunity to bid other positions. The Organization emphasizes that there is no provision or mention of cancelling.

The Organization goes on to contend that the Carrier has not provided a valid defense for its failure to properly assign the Claimants in accordance with their assigned positions beginning March 12, 2007. The Organization suggests that the Carrier has attempted to sidetrack the argument by asserting that the Organization has not cited an Agreement rule that prohibits the Carrier from its actions. The Organization submits that this is a misrepresentation because there are clear contractual guidelines for handling bulletins, including the proper assignment and abolishment procedures. None of these rules allow for the cancelling of bulletins or awards, and the Organization argues that the Carrier cannot circumvent its obligations under these rules. The Organization points out that bulletins, assignments, and abolishment are contemplated by the Agreement, but cancelling of bulletins and assigned positions is not.

As for the Carrier's assertion that the Organization has not shown what Agreement

provision prohibits the Carrier from cancelling these positions, the Organization submits that the Agreement requires proper abolishment under Rule 10 after employees have been assigned to positions. Cancelling is not one of the options available to the Carrier under the Agreement. The Organization contends that the Carrier's interpretation of the Agreement in this matter circumvents the provisions of Rule 10, so the Carrier's position must be rejected.

The Organization further maintains that the Carrier is inaccurate in asserting that the Claimants were not regularly assigned employees. The Organization emphasizes that the positions in question were bulletined and awarded. Employees who are assigned to positions in accordance with Rule 6 are regularly assigned employees. Moreover, Rule 6E restricts an employee's ability to move away from an assigned job for seventy-five days, or until the job is abolished. The Organization submits that this provision supports the obvious fact that once an employee is assigned to a bulletined position by a Carrier-issued award, that employee becomes the regularly assigned employee, with the result that bulletined and assigned positions cannot be cancelled because of Rule 6E's restrictions.

The Organization goes on to contend that once employees are awarded bulletined positions, those employees are the regularly assigned employees and are to begin work on the start-up date in the bulletin, regardless of their status when they applied. The Organization suggests that the Claimants were on furlough only because the Carrier violated the Agreement by not assigning the Claimants to their positions in accordance with Rule 6L. The Organization insists that the Carrier cannot be allowed to violate the

Agreement by not allowing the Claimants to report to their positions and then assert that they were not regularly assigned employees because they were not allowed to report to their positions.

The Organization argues that the Carrier's misguided and unfounded interpretation cannot stand to defeat the clear wording of the Agreement. Once the Claimants were awarded their respective assignments, they were, in fact, regularly assigned employees, and those assignments could be abolished only in accordance with Rule 10.

Referring to the several conflicting reasons that the Carrier offered for why it could not assign the Claimants to their positions on March 12, 2007, the Organization submits that there was no reason for the Carrier to violate the Agreement. The Carrier had a plethora of opportunities to assign the Claimants to their positions, to otherwise compensate them, or to properly abolish these positions. Moreover, there is no support for the assertion that the Carrier has cancelled bulletins of this sort in the past.

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

The Carrier initially contends that the doctrine of estoppel applies to this claim. The Carrier argues that the instant claim is improper because the Organization was involved in and, to some degree, complicit in the decisions to delay the start up of the seasonal production gangs. The Carrier asserts that during the entire time period leading up to the decision to cancel the bulletins due to various unforeseeable and uncontrollable events, the Organization did not convey any notice that the cancellation of the bulletins would be construed as different from abolishing them.

The Carrier maintains that the Organization was kept apprised of and consulted with respect to the issues and problems encountered, and it was involved in the decision to cancel the bulletins. The Carrier argues that under these circumstances, it is highly improper that the Organization now would present these claims.

The Carrier submits that the Organization cannot meet its burden of proof in this matter. The Carrier argues that there is no dispute that the bulletins were posted for the required period at appropriate locations. As for the Organization's allegation that the "effective date" of the bulletins did not fall within forty-five days from the date of posting, the Carrier contends that although the start date was projected, it could not be determined because of the issues explained and acknowledged by the Organization. The Carrier suggests that the inclusion of the word "approximately" in connection with the projected start date demonstrates that some flexibility as to the actual start up date was contemplated and intended.

The Carrier emphasizes that although the Claimants had been awarded positions in strict accordance with the terms of Rule 6A and 6L, none of them actually worked in any of those positions because they had not started yet. The Carrier further asserts that none of the Claimants were placed in a worse position.

The Carrier asserts that for the sound and plausible reasons relating to climate in Minnesota, Wisconsin, and Illinois during the late winter and spring months at issue, it is evident that no violation of this rule, or its spirit or intent, can be shown in this case. The Carrier argues that once it could be determined that the gangs could not be started by the projected start-up date of approximately forty-five days, the Carrier cancelled and

rebulletined the positions, without opposition or contest from the Organization.

Pointing to the fact that the Organization's position appears to be based upon the meaning of the word "cancel," as opposed to the word "abolish," the Carrier submits that these two terms are widely accepted to be synonymous with each other. The Carrier suggests that this further establishes that the Organization's claim is frivolous and must be denied.

The Carrier additionally contends that none of the Claimants actually had begun working in the new production gang positions. Moreover, the vast majority of the Claimants were in furlough status, and they would not be working and would have no earnings but for the gang start up. The Carrier argues that this instant claim is merely a ploy by the Organization to achieve some windfall for employees who were not even in active status. The Carrier asserts that if the Organization were to prevail here, then the Carrier would have to push back the projected start up dates so far into the production year as to negate any possible effect from lingering winter weather, thereby resulting in an abbreviated production season and a reduction in potential earnings for the Organization's members. The Carrier characterizes this as an absurd and illogical result.

Addressing the Organization's position that Rule 10A requires that assignments be "abolished," and not "cancelled," the Carrier points out that Rule 10A is not applicable in this case because there was no reduction in force. Instead, the instant matter involved an attempt to increase the workforce, not reduce it. The Carrier submits that pursuant to the express terms of Rule 10A, this Rule does not apply to the instant matter.

The Carrier then asserts that because most of the Claimants were in furlough status

and had no job to go to until the Carrier could produce one by starting the production gangs, while other Claimants in active service were restricted from exercising seniority to higher-paying positions during the period when the Organization requested the jobs be abolished/cancelled, none of these employees are due any sort of compensation. The Carrier points out that during the on-property handling, the Organization never identified a single Claimant, nor did the Organization carry its burden of proof that any Claimant would have been assigned to a specific position producing higher earnings. The Carrier insists that the Organization cannot prove that any specific Claimant would have ended up in a specific job. The Carrier therefore argues that the Organization cannot prove lost earnings.

The Carrier acknowledges that the circumstances in the late winter and spring of 2007 were uncontrollable and unfortunate, but there was no violation of the Agreement. Accordingly, that misfortune is not compensable. The Carrier maintains that under the clear language of the governing provisions of the Agreement, no remedy is due in this matter. The Carrier further argues that the remedy requested by the Organization is excessive and would produce a significant windfall. While most of the Claimants were on furlough status, those who were in active status were paid the applicable rate of the positions to which they were assigned and actually working. The Carrier emphasizes that because the Organization cannot show with any certainty where the Claimants otherwise would have worked and what they would have earned, no monetary remedy is justified.

The Carrier insists that the Organization failed to show where even one single Claimant was denied a specific position solely as a result of the production gang positions

being cancelled, or that it would have been any different if the positions had been abolished, as opposed to cancelled. No loss of earnings has been, or can be, substantiated.

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 procedural arguments raised by the Carrier, and we find them to be without merit. This Board finds that the procedural requirements have been met and the case is ripe for a decision on the merits of the substantive issue.

This Board has reviewed the record in this case, and we find that the Organization has failed to meet its burden of proof that the Carrier acted in violation of the Agreement when it cancelled the positions for a number of Claimants and did not allow the Claimants to report to those positions. Therefore, the claim must be denied.

The record reveals that the Carrier made every effort to plan its production season for the summer of 2007 by posting bulletins for the seasonal positions on February 2, 2007. At that time, there were five different projected start-up dates. Subsequent to that posting, there was a need to delay the start-up dates because of weather, unforeseeable delays resulting from a rail strike in Canada, and subsequent problems relating to the quality and supply issues involving the new rail that was to be installed. The Carrier cancelled the positions, and this Board finds that the Carrier acted fully within its rights to do so.

The Organization relies on language in Rule 6L, which sets forth the timeframe for the bulletining of the positions for seasonal work. However, the last sentence states:

> When the start date of the gangs has been determined, all employees will begin their new positions as awarded.

The Carrier has put forth a compelling position that although there was a projected start date, it could not be determined. The bulletins were subsequently cancelled because there was an inability for the Carrier to perform the work for the several reasons set forth above. The record reveals that no employees had actually begun work in those positions because none of that work had begun. There were no positions to abolish because the Carrier cancelled the entire operation.

The Organization also relies on Rule 10, which states, in part:

> When forces are reduced, not less than five (5) working days advance written notice, including the date of the notice, will be given to regularly assigned employees . . .

The record is clear that the forces here were not reduced. Most of the affected Claimants were on furlough and the Carrier was attempting to fix a date to begin the seasonal work. The Carrier ran into a number of problems and recognized that it would be unable to begin that work, so it cancelled the bulletin. It was unfortunate that the work could not be completed and the employees could not go to work. However, the Carrier took the action it believed was appropriate, the canceling of the bulletins, and this Board finds no violation of the Agreement in the Carrier's action.

For all of the above reasons, the claim must be denied.

AWARD:

The claim is denied.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: June 16, 2010

CARRIER MEMBER

DATED: 6-16-10

LABOR MEMBER'S DISSENT
TO
AWARD 31 OF PUBLIC LAW BOARD NO. 6915
(Referee Meyers)

A strong dissent is required because the reasoning of the Majority in Award 31 of Public Law Board No. 6915 is misguided and fundamentally flawed.

At the hearing, the Organization presented five (5) awards, specifically NRAB Third Division Awards 29578, 31265, 31439, Award 24 of Public Law Board No. 3781 and Award 58 of Special Board of Adjustment No. 1016 in support of its position. The similarity between the effective rules and the factual circumstances involved in those awards and those involved in this dispute is so striking that even an uninformed reader could connect the dots. Nevertheless, when rendering the decision in this dispute it is obvious that NRAB Third Division Awards 29578, 31265, 31439, Award 24 of Public Law Board No. 3781 and Award 58 of Special Board of Adjustment No. 1016 were given no consideration whatsoever.

In each of the presented awards employes were awarded positions just as the employes in this dispute were awarded positions. In each of the presented awards, the employes were to start their awarded positions within a specified start date just as the employes involved herein were scheduled to begin their positions on a specified date. In each of the presented awards the Board awarded the employes compensation for the days the Carrier held them off their assigned positions. In this case, the Board deprived the employes of the same compensation.

Rule 6L states: "When the start date of the gangs has been determined, all employes will begin their new positions as awarded." The Carrier determined the start date and clearly identified it on the bulletin. It was bound by that date. However, just as in the cases resolved by NRAB Third Division Awards 29578, 31265, 31439, Award 24 of Public Law Board No. 3781 and Award 58 of Special Board of Adjustment No. 1016 where that Carrier did not allow its employes to begin working their assigned positions as scheduled, this Carrier refused to allow the Claimants to begin working their positions in violation of the agreement.

The Labor Member to this Board cannot sit silently by while such substantial precedent goes ignored. Therefor I dissent.

Respectfully submitted,

Timothy W. Kreke

Timothy W. Kreke
Labor Member