

BEFORE PUBLIC LAW BOARD NO. 7007

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
MASSACHUSETTS BAY COMMUTER RAILROAD**

Case No. 16

STATEMENT OF CLAIM:

- (1) The Agreement was violated when the Carrier assigned Rail Crew V-882 to perform work on Sunday(s) October 29, November 5, 12, 19 and 26, 2006 and failed and refused to pay Crew V-882 employees at their respective overtime rates of pay for their work on said dates (Carrier's File MBCR-BMWE-23/0207).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Morris, D. Nickerson, J. McCarthy, M. Machado, R. Christ, D. Fitzgerald, E. Kehl, P. Marion, D. Brunelle, B. Johnson, P. O'Connell, R. Duguay and A. Catino shall now each be compensated for ten (10) hours at their respective time and one-half rates of pay per day for their work on the aforesaid dates of October 29, November 5, 12, 19 and 26, 2006.

FINDINGS:

The Organization filed the instant claim alleging that the Carrier violated the parties' collective bargaining agreement by failing and refusing to pay the Claimants at their time and one-half rates for work that they performed on five consecutive Sundays in October and November 2006. The Carrier denied the claim.

The Organization initially acknowledges that it agreed to the Carrier's proposal to implement a change in the work week of Rail Crew V-882 to include Sunday work. The Organization contends, however, that the Carrier's purported reasons for implementing this change, which essentially resulted in Sunday work being paid for at the straight-time rate, were questionable at best. The Organization asserts that the Carrier extracted the Organization's concurrence in this change on the basis of "reasons" such as that the rail

work could not be performed during a regular Monday-through-Friday work period due to rail traffic constraints. The Organization argues that such work was performed during Monday-through-Friday work periods, so there was no validity to the basis upon which the Carrier extracted the concession from the Organization.

The Organization maintains that the record conclusively establishes that the Carrier's decision to implement a change in Rail Crew V-882's work week was unsupported by any *bona fide* "operational requirement." The Organization points out that it believed the Carrier's excuses that it needed to change this work week to include Sunday work, and the Organization agreed to the change in good faith. The Organization emphasizes that after the change, it became evident that the Carrier's alleged operational requirements never existed. The Organization submits that it was duped.

The Organization argues that the Carrier's decision to alter the work week of Rail Crew V-882 was improper. Every time the gang was required to work on a Sunday that would have been a normal rest day had the gang's work week not been changed, the gang members were entitled to be compensated at the appropriate overtime rate.

The Organization then addresses the Carrier's assertion that the claim dates constituted the Claimants' normally assigned work day. The Organization argues that this position totally ignores the fact that this entire situation involves the Carrier's changing of the crew's work week under the guise of operational requirements that simply did not exist. The Organization emphasizes that Sunday is not a normal workday under typical workweek scenarios.

As for the Carrier's argument that no violation had occurred because the

Organization did not object to the establishment of the crew, the Organization insists that it agreed to the establishment on the basis of the reasons that it was given during the October 19, 2006, meeting, reasons that ultimately were determined to have been either manufactured or outright untruths. The Organization emphasizes that this is not a situation in which the Organization gives its concurrence and then changes its mind after the fact. Instead, the Carrier obtained the Organization's concurrence in the change of work-week assignment on the basis of very substantial and real misinformation.

The Organization submits that the question here is whether the record demonstrates that a true operational requirement existed to justify the change of work week for Rail Crew V-882, and the answer is "no." The Organization maintains that during the October 19, 2006, conference, the Carrier hung its hat on the assertion that the change in work week was necessary because of the inability to perform gang work during the normal Monday-through-Friday window. The Organization contends that the Carrier's subsequent actions show that this was a falsehood, so the very foundation of the Carrier's defense is without merit.

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

The Carrier initially contends that by bulletin dated October 20, 2006, Switch and Rail Crew V-882 was established to work from Sunday through Wednesday. The Carrier asserts that the gang's former workdays were Monday through Thursday. The Carrier argues that because the gang was bulletined to work on Sunday, it was able to replace rail with minimal interruption from rail traffic compared to the weekday train traffic. The

Carrier points out that, as an example, there were twenty-six daily trains scheduled to operate through Winchester Center on weekdays, while this was reduced to ten per day on weekends.

The Carrier emphasizes that this was not a "Sunday only" gang, in that this gang worked four ten-hour days. The gang therefore was assigned to work thirty "non-Sunday" hours per week. The Carrier points out that while Sunday work was a priority, and necessary to complete the project in a timely manner, there still was some work that could be accomplished during the "normal" workweek that would facilitate Sunday production to an even greater extent. The Carrier also maintains that because any gang must "clear out" and re-establish itself each time a train passed, it stands to reason that there is greater production and less wasted time on a Sunday, when fewer trains pass through.

The Carrier further asserts that because the Organization agreed to allow Gang V-882 to be scheduled to work on Sunday, the Organization cannot now claim that the days and hours of assignment of this gang as originally established was in violation of Rule 29. The Carrier points out that it formalized the agreement on this matter by e-mail dated October 20, 2006, the same day that the new positions were advertised for bid. The Carrier argues that the Organization's subsequent claim that it been "lied to," when it was told that the remainder of the rail at Winchester Interlocking could not be changed during the week, was based on the reported assignment of Gang V-882 to work in that area on a Thursday.

The Carrier insists that while Sunday work at this location was a priority, and

necessary to complete the project on time, there still was some work that could be accomplished during the normal workweek that would facilitate the Sunday production to an even greater extent. The Carrier contends that it is unfair and inaccurate for the Organization to insist that the Carrier had misled it.

The Carrier argues that under the circumstances here, this matter should be decided in accordance with Rule 29(V)(2), which provides that if the parties continue to disagree about a proposed assignment change, the Carrier may implement the change subject to the employees' right to process the dispute as a grievance or claim, with the Carrier bearing the burden of proving that the operational requirements exist.

The Carrier contends that a *bona fide* operational requirement did exist, and the General Chairman reacted without benefit of the entire body of facts. The Carrier asserts that the number of trains scheduled to operate through Winchester Center was reduced from twenty-six on weekdays to ten on Sunday. The Carrier argues that, by itself, this represents a *bona fide* operational requirement for the temporary change. The Carrier also points out that the fact that winter was approaching also was a factor in requesting Sunday work. The Carrier insists that time was of the essence.

The Carrier then maintains that the work performed by the crew on Thursday, October 26, 2006, the single act that precipitated the Organization's call to rescind the Sunday work, was performed north of the crossover, in "261" territory. The Carrier emphasizes that in a "261" territory, track is signaled in both directions, so the gang could work on Track 2 while trains could run in both directions on Track 1, thereby minimizing the number and duration of train delays. The Carrier insists that this work

was in an area specifically situated so as not to cause train delays, and it was consistent with the Organization's recollection that the Transportation Department would not allow the Engineering Department to perform work that would cause train delays.

The Carrier goes on to argue that this Thursday work set the stage for the problematic work to be performed at the crossover and in a southerly direction. The Carrier points out that this work was in a "251" territory, in which train movement is restricted to a single direction. The Carrier emphasizes that such work would have affected the on-time performance of any train scheduled to run through that area. The Carrier submits that this work was, in fact, performed on a Sunday, although this Sunday work could not have been completed without the Thursday work.

The Carrier maintains that during the short, five-week existence of this assignment, each of the primary objectives identified in the original notice was completed, and some other areas requiring attention also were addressed before the onset of the cold winter conditions. The Carrier maintains that this was the specified purpose for changing the gang to a Sunday-through-Wednesday schedule, and Sunday work was the key ingredient needed to address these issues with a minimum amount of disruption to train service.

The Carrier cannot agree that it misled the Organization. The Carrier told the Organization what it was going to do, and then did it. The Carrier asserts that an operational requirement existed and was satisfied in the interest of safety, productivity, and customer convenience.

The Carrier then emphasizes that the requested remedy of payment at the overtime

rate is excessive. The Carrier argues that the crew was working on its regularly scheduled workday. Each affected employee presumably bid on his/her position and was fully aware of the days and hours of assignment, as well as how they would be compensated for the hours worked. The Carrier asserts that the Claimants have been properly paid at the pro rata straight-time rate of their positions.

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 find that the Organization has failed to meet its burden of proof that the Carrier violated the Agreement when it assigned Rail Crew V-882 to perform work on Sundays October 29, November 5, 12, 19, and 26, 2006, and then did not pay the employees at their overtime rate for the work on those dates.

The record reveals that the Organization agreed to allow V-882 to reschedule the work on Sunday as part of its regular workweek. The Agreement was formalized on October 20, 2006.

The record reveals that the Chief Engineer's position that the rail installation could not be performed during weekday service because it would have had a major negative impact on commuter rail service makes good sense. It appears that Sunday work was a priority because more work could be done when there were fewer trains coming through the area. Although the Organization takes the position that it was "lied to" during the

course of the negotiations leading to the Agreement on the change in schedule, this Board does not find any evidence of that. The Carrier indicated what it was going to do and did exactly that. There was an operational requirement that did exist, and the fact that the work was performed on Sundays made it easier for the work to be completed in a short period of time.

This Board sees no evidence of any violation of the parties' Agreement.

Therefore, the claim must be denied.

AWARD:

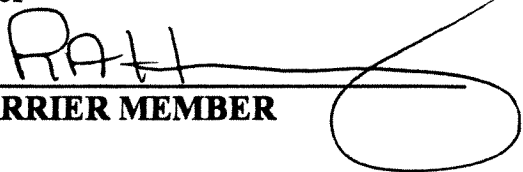
The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER



CARRIER MEMBER

DATED: 11/10/09

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