

**BEFORE PUBLIC LAW BOARD NO. 7007**

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

**Case No. 17**

**STATEMENT OF CLAIM:**

- (1) The Agreement was violated when the Carrier assigned Switch and Rail Crew V-882 to perform work on the Franklin Branch single track between Norwood and Walpole on Sunday, November 19, 2006, instead of the Franklin Maintenance Crew (Carrier's File MBCR-BMWE-22/0207).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Goscinak, H. Blais, D. McKay, N. Cibotti, T. Soares and R. Bussey shall now each be compensated for ten and one-half (10.5) hours at their respective time and one-half rates of pay.

**FINDINGS:**

The Organization filed the instant claim alleging that the Carrier violated the parties' collective bargaining agreement by assigning Switch and Rail Crew V-882 to perform certain work on the Franklin Branch single track, instead of assigning this work to the Franklin Maintenance Crew. The Carrier denied the claim.

The Organization initially contends that the Carrier failed to assign routine non-emergency track maintenance work to the regularly assigned track maintenance crew responsible for the routine day-to-day maintenance of the track involved. The Organization argues that there is no dispute that the Claimants were regularly assigned to the Franklin Track Maintenance Crew and were responsible for routine maintenance on the section of track involved here. There also is no dispute that on the Claimants' rest day of Sunday, November 19, 2006, the Temporary Switch and Rail Crew V-882 was

assigned to perform routine non-emergency track maintenance work on the Franklin Branch single track. The Organization asserts that the Carrier did not dispute the fact that the Claimants were qualified and available to perform all aspects of the subject work, but they were not afforded the opportunity to do so. Citing a number of Board Awards, the Organization emphasizes that it is well established that when an employee bids for and is assigned to a regular position, that employee is entitled to all of the work of that position.

The Organization maintains that under Rule 11.4(b), and in accordance with numerous Board Awards, it is clear that the Claimants, as the employees who regularly performed maintenance work on the section of track involved here, were entitled to preference for the work at issue, and the Carrier violated the Agreement when it assigned that overtime work to others. The Organization insists that the Carrier's failure to call and assign the employees responsible for track maintenance on this section of track was a clear violation of the Agreement and requires a sustaining award.

The Organization then addresses the Carrier's assertion that the assignment of work was proper because Sunday, November 19, 2006, was a regular work day for the temporary crew and because the work in question was needed for unnamed, unspecified "operational reasons." The Organization asserts that this is a red herring that is totally off the mark and fails to address the issues in dispute. The Organization points out that the primary issue is that under the Agreement, routine non-emergency track maintenance work of the nature involved here, whether it be straight time or overtime, accrues to the senior available qualified employee at the headquarters who ordinarily and customarily performs such work. In the instant case, that would be the Claimants.

The Organization then points out that Crew V-882 was established under Rule 29, which requires the Carrier to notify the General Chairman of the specific work to be performed by the temporary gang and the exact locations where such work will be performed. The Carrier's notice regarding Crew V-882 did not reference or contemplate any type of work on the Franklin Branch. The Organization insists that the Carrier also did not reference any such work on the Franklin Branch during the conference between the parties prior to the establishment of the temporary Crew V-882. The Organization emphasizes that, as consistently held by the Board, mandatory language in an agreement, such as appears in Rule 29, must be upheld to insure the integrity of the Agreement and to protect the rights of the employees covered by it. Moreover, this Board consistently has held that agreements must be applied as written.

The Organization suggests that the Carrier is attempting to use one violation of the Agreement to justify another violation. The Organization contends, however, that the NRAB clearly has enunciated the principle that a carrier may not find relief in a defense against a claim based on circumstances brought in to being by another breach of the Agreement. The Organization cites the dispute over the Carrier's misleading descriptions and comments involving Temporary Switch and Rail Crew V-882 and the improper work performed by this temporary gang.

The Organization then emphasizes that the Carrier did not seriously dispute the number of hours claimed. The Organization maintains that the proper rate pay in a proven violation is the amount that the employee was entitled to receive had the employee been assigned to perform the subject work. Because the instant work was

performed on one of the Claimants' rest days, the proper rate of pay for such an overtime violation is the applicable overtime rate.

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

The Carrier initially contends that because Crew V-882 was bulletined to work on Sunday, it could perform the work at issue with minimal interruption from rail traffic. The Carrier asserts that the area in question is single-track railroad, so the frequency of train service was paramount to efficiently performing the track repairs. Because any gang must "clear out" and re-establish itself each time a train passed, the Carrier argues that it stands to reason that there is greater production and less wasted time on a Sunday, when fewer trains pass through.

The Carrier also maintains that Crew V-882, comprised of thirteen employees and six RMOs, could accomplish the work in significantly less time than the six-man, one-machine maintenance crew, resulting in far less disruption to train service. The Carrier insists that it made good business sense to utilize Crew V-882 to perform this work. This temporary gang was quicker, better tooled, had more manpower, and operated on a scheduled workday with fewer obstacles – and at the straight-time rate of pay. The Carrier points out that this was of greater importance due to the approach of winter, when such work would be even more difficult due to weather conditions.

As for the Organization's position that working on the Franklin Branch was not mentioned in connection with Crew V-882, the Carrier suggests that no job description is 100% complete. The Carrier asserts that, in accordance with Rule 29, it identified this

temporary gang's "primary" work areas. The Carrier insists that due to the unpredictable nature of the railroad industry, when areas need attention, that attention cannot be deferred. Procrastination could lead to disaster.

The Carrier further points out that, contrary to the Organization's position, Rule 29 does not require identification of "exact locations" of work, nor does Rule 29 require a description of "specific work." The Carrier reiterates that too many variables exist in the railroad industry for such specific descriptions to be possible. The Carrier argues that it is inaccurate and unwarranted for the Organization to accuse the Carrier of bargaining in bad faith in establishing the District Gang.

The Carrier then contends that without evidence relating to the condition of the ties at the time, the Organization's description of the work as "routine day-to-day maintenance" may or may not be accurate. The Carrier submits, however, that it apparently was important enough for the District Gang to address the matter. The Carrier also emphasizes that Crew V-882 had worked in that same area during the previous week, on a weekday, and apparently without complaint. This may also have affected the Carrier's decision to finish this work on the following Sunday.

The Carrier argues that the Claimants want the overtime on Sunday, November 19, 2006, without having to work for it. The Carrier submits that the fallacy in this position is that Crew V-882 performed this work at the straight-time rate on that day. If the Franklin Crew is entitled to any monetary penalty for the incident at issue, and there appears to be no Agreement support for such a penalty payment, then it would be the straight-time earnings of the Crew on that date, not the overtime rate.

The Carrier then argues that the Franklin Crew would not have been called to perform this work at the overtime rate. If Crew V-882 had not performed the work, and if the work truly was "routine maintenance" as the Organization has suggested, then the work certainly would have been scheduled during the Franklin Crew's normal workweek. The Carrier insists that it was not necessary to work employees at the overtime rate in this matter, and the Franklin Crew does not have a demand right to be called at overtime to perform this work. Moreover although Crew V-882 worked for ten and one-half hours on the claim date, it did other work besides the replacement of ties on the Franklin Branch. The Carrier points out that the Roadmaster estimated that Crew V-882 spent four or five hours on this particular work.

The Carrier further maintains that there was no Scope Rule violation because the work in question was performed by Maintenance of Way employees holding seniority in the Track Sub-Department.

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 Switch and Rail Crew V-882 to perform work on the Franklin Branch single track between Norwood and Walpole on Sunday, November 19, 2006, instead of the Franklin Maintenance Crew. Therefore, the claim must be denied.

The record reveals that Switch and Rail Crew V-882 had been bulletined to work on Sunday and, therefore, was working at straight-time. The thirty-two ties were replaced and gauged to be done with minimal interruption from other rail traffic. That is because there is less traffic on Sunday than the rest of the week. Although the Organization states that the Franklin Maintenance Crew had exclusive rights to perform that work and that the Franklin Branch was not mentioned as part of the new Sunday through Wednesday work schedule, there was really no violation of the Agreement when the Carrier assigned Switch and Rail Crew V-882 to perform that work. There is no exact location defined. The record also reveals that Switch and Rail Crew V-882 had worked in that same area during the previous week.

The Carrier makes a good argument that it would have taken the Franklin Crew much longer to replace and gauge those thirty-two ties during the regular workweek because of the additional rail traffic. In addition, they were not as well equipped as the Switch and Rail Crew.

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

**AWARD:**

The claim is denied.

  
**PETER R. MEYERS**  
Neutral Member  
**ORGANIZATION MEMBER**  
**CARRIER MEMBER**

DATED: 11/10/09

DATED: 11-10-09