SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 112

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of R. D. Luther and C. E. Davis for thirty-two (32) hours at the straight time rate of pay account RMD-19 section gang performed work on RMD-17 on April 19, May 8, 11 and 15, 2000.

(Carrier File MW-FTW-00-97-LM-304)

Claim on behalf of R. D. Luther and C. E. Davis for forty-eight (48) hours at the straight time rate of pay account RMD-19 section gang and electric welder and welder helper performed work on RMD-17 on May 22, 23 and June 7, 2000.

(Carrier File MW-FTW-00-97-LM-317)

Claim on behalf of R. D. Luther and C. E. Davis for thirty-two (32) hours at the straight time rate of pay account RMD-19 section gang performed work on RMD-17 on June 14 and 20, 2000.

(Carrier File MW-FTW-00-97-LM-390)

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

These claims arise out of Carrier's use of employees headquartered in Roadmaster District 19 to perform work in Roadmaster District 17. Prior to the 1983 Memorandum of Agreement, fixed headquartered section employees acquired and maintained seniority in the RMD in which their headquarters were located. The parties dispute the effects of the 1983 Memorandum of Agreement. Carrier maintains that the 1983 Memorandum of Agreement abolished RMDs and freed Carrier to work fix headquartered section gangs outside their RMD. The Organization maintains that the 1983 Memorandum of Agreement merely created floating section gangs that could work across RMD lines but did not allow for working

fixed headquartered section gangs outside their RMD.

We need not resolve the issue as globally as the parties have presented it. The claims present instances in which employees form the section gang headquartered at Sardinia, Ohio, in RMD 19, were assigned to perform tasks in the territory of the section gang headquartered at Portsmouth, Ohio, in RMD 17. The assignments were made because the Portsmouth section gang was working at a location other than the one where the work was performed and could not perform the work in a timely manner. The Sardinia section was adjacent to the Portsmouth section.

During handling on the property, Carrier provided statements from fifteen track supervisors employed at diverse locations throughout the Eastern seniority region attesting to numerous instances in which section gangs have worked on the territory of adjacent section gangs under comparable circumstances, both within the same RMD and across RMDs. The Organization provided no contrary evidence. Accordingly, we conclude that Carrier established a past practice of supplementing a section gang with the forces from another section gang in an adjacent territory. This past practice reflects the parties' understanding that, regardless of the effect of the 1983 Agreement on RMDs in general, there is no prohibition against "doubling" section gangs under these circumstances.

Accordingly, the claim is denied.

M. H. Malin
Chairman and Neutral Member

D. D. Bartholomay
Organization Member

D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on September 24, 2002

ORGANIZATION'S DISSENT

TO

AWARD NO. 112 OF SPECIAL BOARD OF ADJUSTMENT NO. 1048
(Referee Malin)

It is not the intent of this dissent to rehash the position of the Organization but to demonstrate the limited application of the Award.

The Award correctly pointed out that "The Sardinia section was adjacent to the Portsmouth section." and that the Carrier established a practice in which section gangs have worked on the territory of adjacent section gangs under comparable circumstances both within the same RMD and across RMDs. In other words, the Carrier established a practice which would allow only adjacent sections to work together whether on the same RMD or an adjoining RMD. As is the custom of the distinguished Chairman and Neutral Member of this Board, words were carefully chosen to limit the applicability of this Award to the evidence presented in the case.

Moreover, the Organization strongly objects to the Boards decision to allow a past practice to take precedent over the clear rules of the Agreement. The Carrier also has a responsibility to enforce the provisions of the Agreement and to allow past violations to circumvent the clear rules is violative of that Agreement.

A dissent is required because of the damage done to the clear language of the 1983 Agreement and future cases involving this issue will be progressed by the Organization. Therefore, for this reason, I dissent.

Respectfully submitted,

D. D. Bartholomay
Employe Member, SBA 1048

CARRIER'S RESPONSE

TO

ORGANIZATION'S DISSENT

TO

AWARD NO. 112 OF SPECIAL BOARD OF ADJUSTMENT NO. 1048
(Referee Malin)

After noting that the decision in this case was based on the record in the handling on the property, which is generally true of any case submitted to arbitration, the Organization has erroneously characterized the Board's acknowledgement of evidence in the record concerning the past practice.

In this case, as in any dispute alleging violation of the agreement, the Organization has the threshold burden to demonstrate how some provision of the agreement has been violated. The thrust of the Organization's dissent is a complaint that a past practice has been allowed to take precedent over the clear rules of the agreement. However, the Organization did not identify to what clear language it was referring in its dissent. In fact, in the handling of the case the Organization never identified any rule language that would restrict a fixed headquarter section gang from performing work on its seniority region outside of its regular territory during the regular work day. As noted in the handling on the property, there is no such restriction in the applicable agreement language; it was this inability to demonstrate any such restriction, express or implied, that was fatal to the Organization's case.

A fair reading of the carefully articulated decision clearly reveals that this was not a case of practice being favored over clear and unambiguous agreement language. Instead, the Board correctly identified the circumstances of the dispute, recognized that there was no agreement language expressly restricting the complained of occurrence, and acknowledged the established practice of section gangs performing in this manner under the applicable agreement. In the absence of any agreement language to the contrary, the well-established practice may illustrate the intent of the parties. Accordingly, there can be no valid basis for objecting to the reasoning of the Board in this instance. Certainly, there may be circumstances in which a section gang working off its regular territory outside of its regular assigned work day might infringe upon some other employee's right to perform service; however, we would hope that the Organization would not endorse the frivolous progressing of future cases complaining of circumstances as involved in the case decided by the Board.

Respectfully submitted,

D. L. Kerby
Carrier Member, SBA 1048