SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 128

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of P. B. Graybill for payment of travel time and auto mileage reimbursement in travel between his residence and work point between July 11 and August 8, 2002, while held on former Laborer position after being awarded 1st Rate Carpenter position by bulletin and also payment for 16 hours overtime and 1 hour double time that his newly awarded position allegedly worked while held on his former position as well as the difference in rate of pay between Laborer and 1st Rate Carpenter for all time he worked his former position between July 11 and August 8, 2002.

(Carrier File MW-ROAN-02-13-SG-230)

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:

On June 21, 2002, Carrier issued Bulletin No. 51141, advertising for a 1st Rate Carpenter position on Carpenter Force No. 3. On July 15, 2002, Carrier issued Bulletin No. 51240 awarding the position to Claimant, who had been working as a Laborer on T & S 20. Carrier did not release Claimant from his Laborer position until August 8, 2002, and Claimant began working the 1st Rate Carpenter position on August 12, 2002.

The Organization contends that Carrier violated Rule 8 of the Agreement by not awarding the position and releasing Claimant to work it within twenty days of its advertisement. We agree. Rule 8(a) provides:

Permanent vacancies and permanent new positions (except positions covered by Rule 20) will be bulletined for a period of fifteen days within fifteen days previous to or ten days following the date the vacancies occur or new positions are established. The name of the employee applying

> for and awarded the position will be announced by bulletin within twenty days from the date of the advertisement bulletin. Bulletins advertising positions and announcements under such bulletins will be posted at the headquarters of each gang or at places accessible to employees not in gangs, and copy furnished to General Chairman.

Public Law Board 6399, Case No. 1, Award No. 1, held "Under the clear and unambiguous language of Rule 8(a), absent some express provision to the contrary, the award of the position and the right to begin working it go hand-in-hand." The instant claim is controlled by PLB 6399, Award No. 1. Carrier violated the Agreement when it failed to award the 1st Rate Carpenter position and failed to release Claimant to that position within twenty days of the position's advertisement.

In PLB 6399, Award No. 1, Carrier relied upon a past practice that allowed Carrier to hold an employee awarded a new position in his old position for up to thirty days without payment of compensation. The Board held that such a past practice existed but that it contradicted the plain language of the Agreement. Consequently, the Board found that Carrier violated the Agreement but that the Organization had acquiesced in a practice that violated the Agreement. The Board stated the consequence of such acquiescence:

> Under the doctrine of acquiescence, a party who acquiesces in a practice in violation of the clear language of the contract may withdraw its acquiescence at any time and insist on observance of the contract. However, the other party may not incur monetary liability until it has been given notice that the previously acquiescing party insists on strict contract compliance.

The Board concluded:

> For a substantial period of time, the Organization acquiesced in a practice allowing Carrier to retain successful bidders at their former assignments for up to thirty days, even though that practice was contrary to the plain language of Rule 8(a). The Organization may now insist on compliance with the Agreement. However, it is apparent that Carrier relied on the practice and the Organization's acquiescence in retaining the Claimant in his former assignment until August 28, 2000. Accordingly, we will sustain the claim but only to the extent of finding that Carrier violated the Agreement. We will not award any monetary compensation. Therefore, we have no occasion to consider what type of monetary compensation is appropriate for a breach of Rule 8(a). Carrier is now on notice that it must comply with Rule 8(a) or face future monetary liability.

The incident giving rise to the claim at issue occurred long after PLB 6399, Award No. 1 issued. Thus, Carrier was not longer able to rely on Organization acquiescence in its past practice of retaining an employee in his former position for up to thirty days without compensation. The issue now squarely before this Board is what compensation is due the Claimant.

Carrier contends that the parties have had a long-standing practice that an employee held over on his former position receives no compensation for the first thirty days and thereafter receives travel time and mileage from his residence to his work point at the beginning and end of his work week. Carrier argues that this practice should govern the remedy in the instant case. However, this is the exact practice that PLB 6399, Award No. 1 found was contrary to the plain language of Rule 8(a). Once Award No. 1 issued, Carrier was on notice that it could no longer rely on this practice but was required to comply with the plain language of Rule 8(a).

The appropriate remedy thus is to require Carrier to make Claimant whole. However, while entitled to be

made whole for the violation of Rule 8(a), Claimant is not entitled to an additional windfall. With this principle in mind, we turn to the elements of compensation that the Organization is seeking.

The Organization seeks compensation to Claimant for the hours he worked on T & S 20 from July 11, 2002 through August 8, 2002, at the difference between the applicable (straight time or overtime depending on the nature of the hours worked) rates for Laborer and 1st Rate Carpenter. Such compensation makes Claimant whole and we shall award it.

The Organization seeks 16 hours of overtime and one hour of double time allegedly worked by Carpenter Force No. 3 on July 26, 2002. During handling on the property, Carrier denied that Carpenter Force No. 3 worked the overtime and double time alleged. Carrier asserted that only the Foreman worked that time. The Organization provided no evidence that anyone other than the Foreman worked the overtime and double time. Moreover, Claimant worked more hours of overtime on T & S 20; thus he did not lose any overtime opportunities as a result of Carrier's failure to release him from T & S 20 within twenty days of the 1st Rate Carpenter position advertisement. Accordingly, Claimant is not entitled to the 16 hours of overtime or one hour of double time claimed.

The Organization seeks travel time and mileage for Claimant's traveling between his residence and the T & S 20 work point during the period July 11, 2002, through August 8, 2002. This claim is excessive. Had Claimant been released to Carpenter Force No. 3, he still would have had to travel between his residence and the work point of that assignment. Thus, to make Claimant whole, Claimant is entitled to compensation only for the difference between the distance from his home to the T & S 20 work point and the distance from his home and the Carpenter Force No. 3. work point.

Claimed sustained as outlined above.

M. H. Malin
Chairman and Neutral Member

D. D. Bartholomay
Organization Member

D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on March 29, 2004