Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35564
Docket No. MW-32674
01-3-95-3-611

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Railroad Company (former Fort
( Worth and Denver Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier established and advertised two (2) five-day positions with headquarters at Amarillo, Texas on September 16, 1994 with an improperly assigned work week of Sunday through Thursday with Fridays and Saturdays designated as rest days, instead of a work week of Monday through Friday with Saturdays and Sundays designated as rest days as contemplated by Rule 15 and assigned one of the positions within Bulletin No. FTW18A on September 30, 1994 (System File F-94-37/MWD 95-01-18AA FWD).

(2) As a consequence of the violation referred to in Part (1) above, Claimant P. J. Buzan and any other employe who may subsequently be assigned to and work said positions shall:

> '. . . be compensated eight (8) hours at their straight time rate of pay for each Friday that they are deprived of the opportunity to work what should be a regularly assigned work week. It is further requested that claimants also be compensated the difference between the straight time rate of pay and the punitive rates of pay as prescribed in Rule 21 for each Sunday (that should have been a regularly assigned rest day)

that the claimants are required to work.'
(Underscoring in original)

beginning October 10, 1994 and continuing until the violation ceases."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Prior to the time this claim arose, Track Patrol Gangs on this portion of the Carrier's system were regularly assigned to a five-day workweek, with Saturday and Sunday rest days. [The record shows that the Carrier did bulletin the Texline Patrol Gang with Sunday-Monday rest days in March 1994 and that matter was progressed to the Third Division as a separate claim in Docket MW-32422, which has yet to be decided]. Regarding the present matter, by bulletin dated September 16, 1994, the Carrier advertised positions on the Amarillo Patrol Gang 453-753, with a workweek Sunday through Thursday, rest days Friday and Saturday. Claimant Buzan bid for and was awarded the position of Foreman on the Amarillo Patrol Gang and commenced work on that assignment on Sunday, October 10, 1994. Finally, it is not disputed that a few weeks following the filing of the instant claim, on November 23, 1994, the Carrier abolished the Sunday through Thursday assignment for Amarillo Patrol Gang 453-753 and reverted to a Monday-Friday workweek with Saturday and Sunday as regular rest days.

On November 7, 1994, the Organization submitted the instant claim alleging that the Carrier had violated Rule 15 (b) of the former Fort Worth and Denver Railway

Company/BMWE Agreement "commencing October 10, 1994 when the carrier assigned the Claimant to a Foreman [position] on bulletin FTW- 18A (dated September 30, 1994) with a work week of Sunday through Thursday and Friday and Saturday as rest days." The Organization further alleged that the Carrier violated Rule 15(f) of that Agreement [as interpreted by the Forty Hour Week Committee in Decision No. 7 dated December 16, 1949], by establishing the Amarillo Patrol Gang with other than Saturday and Sunday off days without first contacting the General Chairman to explain the Carrier's operational need for the positions. In denying this claim, the Carrier consistently maintained that the positions on the Amarillo Patrol Gang were "seven-day positions due to the operational conditions imposed by warm weather." The Carrier thus maintains that Rule 15 (b) and 15 (f) have no application and that Rule 15 (d) of the Agreement gave it the right to bulletin such positions with any two consecutive rest days without any notice to or consultation with the Organization.

The operative Agreement language in Rule 15, which was taken virtually verbatim from the 1949 National Forty Hour Work Week Agreement, reads as follows:

"Rule 15

Note: The expressions 'position' and 'work' used in this rule refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees.

General (a) There is hereby established for all employees covered by this agreement, subject to the exceptions contained hereafter in this rule, a work week of 40 hours, consisting of five days of eight (8) hours each, with two (2) consecutive days off in each seven (7), the work weeks may be staggered in accordance with the Company's operational requirements, so far as practicable, the days off shall be Saturday and Sunday. The foregoing is subject to the provisions of this rule which follows:

Five-day Positions (b) On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.

* * *

Seven-day Positions (d) On positions which are filled seven days per week any two (2) consecutive days may be the rest days with the presumption in favor of Saturday and Sunday.

* * *

Deviation from Monday-Friday Week (f): If in positions or work extending over a period of five (5) days per week, an operational problem arises which the Company contends cannot be met under the provisions of paragraph (b) above and requires that some of such employes work Tuesday to Saturday instead of Monday to Friday, and the employes contend the contrary, and if the parties fail to agree thereon, then if the Company nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under the rules agreement."

In analyzing this case, it must be established as a starting point that the language of Rule 15 is not so crystal clear that the position of either party in the present case is plainly vindicated or that the other can be dismissed out of hand solely by reading the words of Rule 15 standing alone. Almost since its inception in March 1949, the artfully drafted compromise language of the negotiated National Forty Hour Work Week Agreement has been a fertile source for controversy which has required frequent arbitral intervention. Like the present case, almost all of those disputes involved the need to reconcile the inherent tension in the language appearing in the following phrase from Rule 15 (a): ". . . the work weeks may be staggered in accordance with the Company's operational requirements, so far as practicable the days off shall be Saturday and Sunday. The foregoing is subject to the provisions of this rule which follows. . . ." Nor is reconciliation of that language easily accomplished simply by reading out of context the specific provisions of Rule 15 (b) [cited by the Organization] and/or Rule 15 (d)[cited by the Carrier].

Proper disposition of the present case is achieved by application of the guiding principles laid down with authoritative force in precedent-setting decisions more than 40 years ago and followed since by most Railway Labor Act arbitration tribunals which have addressed the confronting issues under the language of the Forty Hour Work Week. Close attention to these precedents demonstrates a remarkable consistency of analysis regarding the presumptions and burdens of proof to be applied in interpreting the Forty Hour Work Week Agreement language which appears in Rule 15. See Third

Division Awards 6502, 6695, 7370, 17593, 23461, 28307, 32795; Second Division Award 8289; Board of Arbitration NMB Case No. 212; Special Board of Adjustment No. 488, B&O/BMWE, Award 35; Special Board of Arbitration UP/BLE; Public Law Board No. 4104, Awards 2, 3, 9, 10, 11; Public Law Board No. 2166, Award 1 and Public Law Board No. 5565, Award 8. This consistency of analysis is broken only by sporadic outliers in which a few arbitrators were persuaded, for one reason or another, to depart from the authoritative line of precedent emanating from Third Division Awards 6502 and 6695. Cf., Third Division Awards 6856 [subsequently modified by Arbitrator Carter in Award 7370, supra, after his own analysis was rejected by the Board of Arbitration in NMB Case No. 212]; 10171; 30011 and 31300.

The overwhelming weight of authority in the better-reasoned majority line of cases follows the reasoning first laid down by Arbitrator William Leiserson 45 years ago in Third Division Awards 6502 and 6695. The Leiserson analysis was later adopted in its entirety by the Board of Arbitration in NMB Case No. 212 and by Arbitrator Edward Carter in Third Division Award 7370, supra. In the Majority Opinion of the Board of Arbitration in NMB Case No. 212, dated June 4, 1956, Arbitrator David L. Cole (Chairman of the Emergency Board which had recommended the Forty Hour Week Agreement) expressly declined to follow Arbitrator Carter's decision in Third Division Award 6865, endorsed with approval Arbitrator Leiserson's decision in Third Division Award 6695 and applied the Leiserson analysis. Writing for the majority in NMB Case No. 212, Arbitrator Cole held as follows (Emphasis added):

> "Referee Carter who wrote the Adjustment Board's opinion in Award 6856 (the Erie case) also participated in several other awards on this general subject of Sunday work. One of these was Award 1644 in which he summed up the view for which the Carrier is now contending in these words:
>
> > The agreement does not prohibit the assignment of a type of work on Sunday after September 1, 1949, even though it was not so assigned prior to that date, if such work is necessary to be performed on Sunday.
>
> In Award 6856 he cited a number of awards as supporting this view, although the facts in several indicated that the type of work in question had been performed on Sundays prior to September 1, 1949. This fact-he

called merely strong evidence, or a 'presumption' that it continued to be necessary.

The position of the Organization, on the other hand, is summarized and supported by the following statement by Referee Leiserson in Award 6695:

> 'This claim can only be upheld if the contractual provisions of its 40-Hour Agreement with the Clerks permit it. Examining Rule 35 (d) which governs 7-day service, we find that the rule states that any two consecutive days may be the rest days on positions which have been filled 7 days per week. Admittedly, the positions at Utica have not been filled seven days a week either before or after September 1, 1949, except by special arrangements during World War II. Accordingly we cannot hold that this rule authorizes the proposed change from the present 5-day service to a 7-day operation.

We subscribe basically to the interpretation of Referee Leiserson. We do so, in brief, because we find that the parties in agreeing upon Sections 1 (a), 1 (b), 1 (c), 1 (d) and 1 (j) made it clear that seven-day operations stand on different grounds from six-day and five-day operations, by using guarded and carefully drawn language distinguishing the three kinds of work weeks. We find that the seven-day operation, unlike the other two, is closely tied to the Sunday Work Rule, which rule did away with the long-established practice of premium pay for Sunday as such, but assured the employes that seven-day types of work previously dispensed with by the Carrier would not be reinstated now that it may be done at straight time and that types of work which have not been needed on Sundays will not hereafter be assigned on Sunday. To avoid misunderstanding or misquotation, however, it must be pointed out that neither Section 1 (d) nor Section 1 (j) stipulates that the prior Sunday work must have been paid for either at the rate of time and one-half or straight time. Read with the test stipulated in Section 1 (d) that speaks of seven-day positions as those which have been filled seven days per week, this makes the intent of the parties quite plain . . . The reference to staggered work weeks in accordance with operational requirements applies to six-day operations, as distinguished from five-day, and also to seven day operations which may

properly be carried on by one or more of the many classes or crafts of employes who are parties to the agreement, and in any event is definitely and explicitly qualified by the more specific sections which follow Section 1(a)."

Just three weeks later, on June 28, 1956, Arbitrator Carter rendered Third Division Award 7370, in which he synthesized the Leiserson analysis with his own views regarding presumptions and burdens of proof under the controlling language, as follows:

"Where there has been no additional need brought about by some change in circumstances that creates a need for seven day service, the rules of the Forty-hour Week Agreement do not permit the institution of seven day service where it did not exist before.

Construing the rules as a whole, they simply mean that Sunday assignments will remain as they were before the forty hour week except where there has been such a change in operating conditions due to a change in the nature or amount of business, or other changed conditions which makes Sunday work necessary. The presumption is that work is not required to be performed on Sunday when it was not required to be so performed before the Forty Hour Week Agreement. The Carrier is required to overcome this presumption by evidence that changed circumstances necessitated the institution of seven day service. There is no evidence in the present case of any changed conditions which warranted any seven day assignment. Before as well as after the seven day assignments here made the work was performed without any regularly assigned Sunday work. There would appear to be no better proof that Sunday work was not required than the fact that it was so performed before and after the Sunday assignments of which complaint is here made. We do not think these Sunday assignments were justified at the Butte freight house and that they were in violation of the Agreement. This result is sustained by the principles announced in Awards 1566, 1644, Second Division; 5247, 6232, 6502, 6695, 6856, Third Division." (Emphasis added)

These early cases laid down the guiding principle, followed in all of the better-reasoned cases decided in the last 40 years, that the language appearing in Rule 15 (a) and (b) creates a rebuttable presumption that existing five-day operations staffed by

positions with a Monday-Friday work week and Saturday-Sunday rest days should not unilaterally be changed to seven-day operations with other than Saturday-Sunday rest days. A Carrier invoking the language of Rule 15 (a) and (d) to alter this status quo and justify implementing such a change from five-day Monday through Friday positions to seven-day positions with other than Saturday-Sunday rest days, bears the burden of rebutting that presumption by producing clear and convincing evidence of necessity due to a material change of operational requirements, i.e., a bona fide operational need to make the change.

Typical of this long line of cases is Third Division Award 17593, which cites Award 7370 in concluding as follows:

> "We believe Rules 7 (a) and 7 (d) authorized the Carrier to establish seven day positions on positions which had, prior to September 1, 1949, been filled seven days per week. We likewise are of the opinion that this language prohibits Carrier from creating additional seven-day positions absent a showing by it of a material change of operational requirements of the Carrier." (Emphasis added)

See also Second Division Award 8289; Third Division Awards 23461, 28307, 32795; Public Law Board No. 2166, Award 1; Special Board of Arbitration UP/BLE; Public Law Board No. 4104, Awards 2, 3, 9, 10, 11 and Public Law Board No. 5565, Award 8.

Application of the principles established in this long line of cited precedent to the facts of the present case leads the Board to conclude that the Carrier failed to rebut the presumption because it did not produce clear and convincing record evidence of the operational necessity of changing the Claimants' long-established Monday-Friday five-day positions, with Saturday-Sunday rest days so as to provide seven-day coverage with rest days other than Saturday and Sunday. The primary reason advanced on the property by the Carrier to justify the change was a need to check seven days per week during the summer months for buckling of track due to extremely high ambient temperatures in Southwest Texas. However, it cannot reasonably be argued that such high summertime temperatures were a recent phenomenon and the undisputed record shows that for many years prior to September 1994 the Carrier met the operational need to check for track buckling while scheduling Track Patrol Gangs as five-day positions with Saturday and Sunday rest days. Moreover, it is well established that railroading,

per se, has always been a "24/7" operation and avoidance of overtime payments to incumbents of five-day positions for occasionally necessary Saturday-Sunday work is not alone an "operational necessity" sufficient to overcome the presumption discussed supra. See e.g., Board of Arbitration NMB Case No. 212; Special Board of Adjustment No. 488, B&O/BMWE, Award 35; Third Division Awards 6695, 7370, 14098, 17343, 19622 and Special Board of Arbitration UP/BLE.

Based upon all of the foregoing, we conclude that the Carrier did violate Rule 15 (a) (b) and (f) [as interpreted by Decision No. 7 of the Forty Hour Week Committee] when it unilaterally and without sufficient operational necessity changed former five day Track Patrol Gang positions with Monday-Friday workweeks and Saturday-Sunday rest days to a Sunday-Thursday workweek with Friday-Saturday rest days. As remedy for that proven violation, the Carrier is directed to compensate the Claimant for an additional one-half (½) hours pay for each hour worked on Sundays during the period between October 10, 1994 and the date when the Carrier reverted to the Monday-Friday workweek for Amarillo Track Patrol Gand 453-753. As authority for the overtime "make whole" remedial damages for the Sundays covered by this claim, we rely on Third Division Awards 13738, 19947, 25968, 30662, 30987, 31453, 31590, 32107 and Public Law Board No. 2206, Award 52. In short, the appropriate rate for calculating damages is the rate the injured employee would have earned but for the violation of Rule 15. The Organization's plea for additional straight time damages for the "lost work opportunity" on Fridays covered by this claim is not persuasive. See Special Board of Adjustment No. 488, Award 35.

## AWARD

Claim sustained in accordance with the Findings.

## ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of July, 2001.

**Carrier Members' Dissent**
**to Award 35564 (Docket MW-32674)**
**Referee Eischen**

**On January 1, 1994, Maintenance of Way Circular No. 6 was issued by the Carrier's Engineering Department requiring:**

> **"....employees must inspect track every day between noon and 8 PM as instructed by Roadmaster, on all lines where speed limits exceed 40 MPH or where unit trains at speeds over 25 MPH. Employees must especially watch for rail movement close to road crossings, bridge ends, turnouts, curves, sags, and areas of substandard ballast." (Emphasis added)**

**The track involved here was from Amarillo, Texas (MP 328) to Texline, Texas (MP454.20). The daily inspection was done by the Amarillo Patrol Gang, involved here, and the Texline Patrol Gang who shared the daily inspection requirement.**

**On property the Carrier specifically advised the Organization:**

> **"Track buckling occurs during warm weather conditions and is an extremely dangerous condition under which a train can derail. As a result of potential for track buckling, the Carrier's Maintenance of Way Circular No. 6 requires employees to inspect track every day during warm weather conditions.... In July 1994, the Carrier established the Amarillo Patrol Gang. This gang replaced the track supervisor and, consequently, inspected track between Amarillo and Texline. It was assigned a work week of Sunday through Thursday. The Claimant bid on and was assigned to this patrol gang." (Emphasis added)**

**On the property none of the foregoing facts were contested. Nor did the Organization indicate how this daily inspection could be accomplished if everyone had Saturday and Sunday rest days. Simple logic indicates that it can not be done. It is obvious that the Carrier had a requirement for a seven day operation - how else do tracks get inspected daily. Under Rule 15 (d) on seven day operations, "...any two consecutive days may be the rest days...."**

**At page 9 of the decision the Majority notes that summertime temperatures in southwest Texas are not a recent phenomenon and that, "...for many years prior to**

September 1994..." Carrier had met its needs with assignments having Saturday and Sunday as rest days. The Majority has overlooked the most important fact of all - the Carrier had a long history of doing weekend track inspections with the inspections being performed by exempt personnel. The work existed seven days per week. When the Organization protested this arrangement, the inspection work was then assigned to Organization members who now were required to comply with the requirement of Maintenance of Way Circular No. 6. This was NOT an, "occasionally necessary Saturday - Sunday work..." There was nothing occasional about it. Visual inspection was required every day. Carrier was not obligated to create positions with the work days of Monday through Friday and then work the holders of those positions seven days per week. The Majority quoted from the Note to Rule 15:

> "Note: The expression 'position' and 'work' used in this rule refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees."

The work involved had to be performed seven days per week; it had been performed seven days per week in the past; and the Carrier had every right under Rule 15 to bulletin and assign seven-day positions to perform the work in this instance. It is the work to be performed that determines whether or not the Carrier can establish seven-day positions. The Majority also quotes from Third Division Award 7370 as follows:

> "When there has been no additional need brought about by some change in circumstances that creates a need for seven day service, the rules of the Forty-hour Week Agreement do not permit the institution of seven day service where it did not exist before...."

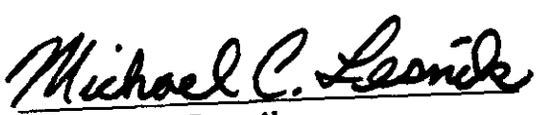
In this case there had always been seven day track inspections during warm weather. The circumstances did not change; the need for seven day service had always been there. The work had been performed initially seven days per week by exempt employees, then five days per week by Maintenance of Way employees and two days per week by exempt employees, and finally all seven days by Maintenance of Way employees. But, most importantly, the work was seven day per week work and the Carrier had every right to establish seven day assignments to perform the work.

Finally, we do not take issue with the exposition made at pages 3-9 of this decision. Although, far from being a full exposition, it is helpful every once in awhile to explain how the rules have come to be applied. We do have serious problems when the Majority fails to apply the facts to the theory.

**We Dissent.**

**Paul V. Varga**

**Martin W. Fingerhut**



**Michael C. Lesnik**

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 35564, DOCKET MW-32674
(Referee Eischen)

The Majority was correct in its ruling in Docket MW-32674 and nothing present in the Carrier's dissent distracts from the correctness and precedential value of this award.

The dissent attempts to portray the Referee as unable to properly analyze the vast body of award precedent concerning this subject and render a coherent and well reasoned decision in this matter. I do not know what universe the dissenting members exist in, but it is evident from reading the award and reading the dissent, it is not the universe in which we exist. This case was not difficult to decide. The Carrier had a Track Patrol Gang that was assigned a work week of Monday through Friday with Saturday and Sunday assigned as rest days, inspecting track between Texline and Amarillo, Texas. It is no secret that during the summer months in this part of the country, temperatures routinely exceed one hundred (100) degrees. Rather than paying the Track Patrol Gang members overtime to patrol the track on Saturday and Sunday, it magically declared that the position was transformed into a seven (7) day assignment on October 10, 1994. Then, on November 23, 1994, again magically, it was a five (5) day assignment and the Track Patrol Gang reverted to a Monday through Friday assignment. So, according to the Carrier for slightly more than one (1) month this assignment was a seven (7) day assignment. I suppose this is possible if you exist in another universe.

The dissenting members refer to Circular No. 6 as a means to completely disregard Rule 15 of the Agreement. Of course the Board recognized the principle that unilaterally promulgated Carrier edicts do not trump the mutually agreed to rules of the Agreement.

Finally, what is particularly troubling about the dissent is the final paragraph where the dissenters allege that they do not take issue with the "exposition" made at Pages 3 through 9 of the award. What the dissenters fail to point out is that the "exposition" was a detailed analysis of the awards rendered on the subject at issue here since the inception of the Forty Hour Work Week Agreement. The Referee here made the proper decision based on the facts of this record and ample precedent. Hence, the award is correct and stands as precedent.

Respectfully submitted,

Roy C. Robinson
Labor Member

**Carrier Members' Answer**
**to**
**Labor Member's Response**
**to**
**Carrier Members' Dissent**
**to**
**Award 35564 (Docket MW-32674)**
**(Referee Eischen)**

**Our Dissent simply pointed to a basic fact that had been missed by the Majority. The inspection of track had been and continued to be a daily requirement. The work was not, "magically...transformed" to a seven day assignment. It had been that. What changed was the Organization's demand that such work only be done by it. The Organization's Response does not rebut the fact, highlighted in our Dissent, that the work had been done by others to fulfill the seven day operation. M. W. Circular #6 was no "edict" superceding the contract but a condition precedent. This dispute was how, pursuant to Rule 15, the work could be done.**

**Further, as was noted in Award 35564, this was only one part of the action taken to provide seven day inspection. The Organization's bifurcation of claims probably skewed the perception of what was happening. And we were not able to overcome that effect in the required separate handling of the matter.**

**Finally, our Dissent did not take issue with the, "...detailed analysis of the awards rendered on the subject..." nor do we find deficiency in the ability of the Referee to do so. Our Dissent was not and never has been to make an ad hominem assault on anyone. Since the Response did not take issue with the facts of record noted in our Dissent, the facts were not the irritant. If we are being euphemistically consigned to some "parallel universe" for pointing out a factual error, so be it!**

P V Varga
**Paul V. Varga**

Martin Fingerhut
**Martin W. Fingerhut**

Michael C. Lesnik
**Michael C. Lesnik**