

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35740
Docket No. MW-35227
01-3-99-3-79**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it changed the five (5) day position at Selkirk Yard of Mohawk-Hudson Seniority District Foreman J.C. Wolf from Monday through Friday with Saturdays and Sundays designated as rest days to a five (5) day position Saturday through Wednesday with Thursdays and Fridays designated as rest days and when it failed to properly compensate Foreman J.C. Wolf for work he performed on each Saturday and Sunday beginning February 22 and 23, 1997 and continuing and for the work he was entitled to perform on Thursdays and Fridays beginning February 26 and 27, 1997 and continuing (System docket MW-4837).**
- (2) The Carrier violated the Agreement when it changed the five (5) day position at Selkirk Yard of Mohawk-Hudson Seniority District Class 2 Machine Operator J. C. Worley from Monday through Friday with Saturdays and Sundays designated as rest days to a five (5) day position Saturday through Wednesday with Thursdays and Fridays designated as rest days and when it failed to properly compensate Class 2 Machine Operator J.C. Worley for work he performed on each Saturday and Sunday beginning February 22 and 23, 1997 and continuing and for the work he was entitled to perform on Thursdays and Fridays beginning February 26 and 27, 1997 and continuing (System Docket MW-4839).**

- (3) The Carrier violated the Agreement when it changed the five (5) day position at Dewitt Yard of Mohawk-Hudson Seniority District Class 2 Machine operator W.L. Mott from Monday through Friday with Saturdays and Sundays designated as rest days to a five (5) day position Saturday through Wednesday with Thursdays and Fridays designated as rest days and when it failed to properly compensate Class 2 Machine Operator W.L. Mott for work he performed on each Saturday and Sunday beginning February 22 and 23, 1997 and continuing and for the work he was entitled to perform on Thursdays and Fridays beginning February 26 and 27, 1997 and continuing (System Docket MW-4840).
- (4) The Carrier violated the Agreement when it changed the five (5) day position at the Dewitt Yard of Mohawk-Hudson Seniority District Class 2 Machine Operator R.D. Zimmerman from Monday through Friday with Saturdays and Sundays designated as rest days to a five (5) day position Saturday through Wednesday with Thursdays and Fridays designated as rest days and when it failed to properly compensate Class 2 Machine Operator R.D. Zimmerman for work he performed on each Saturday and Sunday beginning February 8 and 9, 1997 and continuing and for the work he was entitled to perform on Thursdays and Fridays beginning February 6 and 7, 1997 and continuing (System Docket MW-4838).
- (5) As a consequence of the violation referred to in Part (1) above, Foreman J.C. Wolf shall be allowed:

 - (a) the difference between his straight time and his time and one-half rate of pay for all time he worked on each Saturday and Sunday beginning February 22 and 23, 1997 and thereafter until the violation is corrected; and
 - (b) eight (8) hours' pay at his respective straight time rate of pay for the hours he was not allowed to work on each Thursday and Friday beginning February 26 and 27, 1997 and thereafter until the violation is corrected.

- (6) As a consequence of the violation referred to in Part (2) above, Class 2 Machine Operator J.C. Worley shall be allowed:
- (a) the difference between his straight time and his time and one-half rate of pay for all time he worked on each Saturday and Sunday beginning February 22 and 23, 1997 and thereafter until the violation is corrected; and
 - (b) eight (8) hours' pay at his respective straight time rate of pay for the hours he was not allowed to work on each Thursday and Friday beginning February 26 and 27, 1997 and thereafter until the violation is corrected.
- (7) As a consequence of the violation referred to in Part (3) above, Class 2 Machine operator W.L. Mott shall be allowed:
- (a) the difference between his straight time and his time and one-half rate of pay for all time he worked on each Saturday and Sunday beginning February 22 and 23, 1997 and thereafter until the violation is corrected; and
 - (b) eight (8) hours' pay at his respective straight time rate of pay for the hours he was not allowed to work on each Thursday and Friday beginning February 26 and 27, 1997 and thereafter until the violation is corrected.
- (8) As a consequence of the violation referred to in Part (4) above, Class 2 Machine Operator R.D. Zimmerman shall be allowed:
- (a) the difference between his straight time and his time and one-half rate of pay for all time he worked on each Saturday and Sunday beginning February 8 and 9, 1997 and thereafter until the violation is corrected; and
 - (b) eight (8) hours' pay at his respective straight time rate of pay for the hours he was not allowed to work on each Thursday

and Friday beginning February 6 and 7, 1997 and thereafter until the violation is corrected.

- (c) eight (8) hours' pay at his respective rate of pay for the vacation day he observed on February 5, 1997 due to the abolishment of his position."

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.

On February 11, 1997, the Carrier posted Bulletin No. 371 advertising several Maintenance positions at the Dewitt and Selkirk yards on the Albany, New York, Division. The positions had advertised rest days of Thursday and Friday. All of the Claimants in this case bid on and were awarded those positions.

There is no dispute that prior to the bid awards, these same positions had been regularly assigned for approximately 50 years as five day workweeks, Monday through Friday, with rest days of Saturday and Sunday. There also appears to be no dispute that the new positions were in effect for only a short time. The Carrier abolished the Saturday through Wednesday assignments on April 1, 1997 and reverted to a Monday through Friday workweek with Saturday and Sunday as regular rest days.

Four claims submitted on behalf of the Claimants were consolidated before the Board. The Organization alleged that the Carrier violated the provisions of Rule 10, which addresses the "Forty Hour Work Week." It argued that the duties performed on the weekend positions were no different than those historically handled Monday through

Friday. Moreover, it asserted that the Carrier failed to demonstrate that operational necessity warranted the establishment of seven-day positions. In addition, the Organization argued that the Carrier established the new positions without first contacting the General Chairman to explain the Carrier's operational need for the positions.

In denying the claims, the Carrier contended that the positions to which the Claimants exercised seniority were properly established in accordance with Rule 10. The Carrier maintained that it had legitimate operational reasons for establishing the seven day positions. It noted that the railroad is in operation seven days per week and the Albany Division, which has the highest amount of snowfall of all divisions, clearly needed a seven-day operation for snow and ice removal, as well as to perform track inspections, repairs and other maintenance work that cannot wait until Monday. The Carrier acknowledged that such work had previously been performed on an overtime basis, stating in its February 12, 1998 letter to the Organization that "overtime is a legitimate business reason. It was not the only reason for a seven-day operation but it was a consideration." The Carrier further maintained that, even though it was not contractually obligated to do so, it met with the General Chairman on February 10, 1997 to explain the reasons for the operational change.

The Carrier also raised several procedural arguments which must be disposed of before proceeding to the merits of the case. First, it argued that this matter was a duplication of a prior claim which was denied and not progressed further on the property. While we agree that the Board should not have to repeatedly adjudicate the same dispute and that pyramiding, compounding and duplicating of claims is generally not permitted, there is no probative evidence that this occurred here. In the prior case, the Carrier denied the claim in part on the basis that it was vague and had no named Claimants. The Organization then submitted the instant claim with the Claimants named herein and with specific requests for monetary remedies which had not been previously asserted. Given these distinguishing characteristics, we cannot say that identical claims have been progressed so as to preclude our consideration of the matter at hand.

Similarly unpersuasive is the Carrier's assertion that the Claimants bid on and were awarded an assignment with the full knowledge of the terms and conditions of the position. The Carrier contends that the Claimants knew the assignments in dispute had other than Saturday and Sunday rest days and should not now be heard to protest or

object to the work schedules of the jobs they voluntarily sought. While there is a division of authority on this particular point, we conclude that the better reasoned view is that the Organization, as the party asserting the claim, retained the right to protest an alleged violation of the Agreement. No acquiescence can be found simply by virtue of the fact that the positions were bid on and awarded. On the contrary, under Rule 10(g), the parties have specifically recognized that a dispute regarding such assignments may be progressed. Compare, Third Division Awards 31242 and 29542.

The final procedural argument advanced by the Carrier is also without merit. The Carrier objected to the introduction of certain correspondence submitted after the Senior Director's denial letter following conference. Certainly, it is in both parties' best interests to make sure that all pertinent issues are joined as soon as practicable. However, it is well established that the Board may properly consider evidence in the record which was exchanged prior to the time a party files a Notice of Intent with the Board. See, Third Division Award 33998.

Turning to the merits, the pertinent contractual provision is Rule 10 - 40 Hour Work Week, and it states in pertinent part as follows:

- “(a) Except as otherwise provided in this Agreement, the Company will establish for all employees a work week of forty (40) hours, consisting of five (5) days of eight (8) hours each, with two (2) consecutive days off in each seven (7). The work week 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 work week is subject to the following provisions of this Rule:
- (b) The expressions ‘positions’ and ‘work,’ as used in this Rule, refer to services, duties or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees.
- (c) On positions the duties of which can reasonably be met in five (5) days, the days off will be Saturday and Sunday.

- (e) On positions which are filled seven (7) days per week, any two (2) consecutive days may be the rest days, with the presumption in favor of Saturday and Sunday.
- (g) In positions or work extending over a period of five (5) days per week, where the Company contends an operational problem cannot be met under the provisions of paragraph (c) of this Rule, some of the employees may, as agreed upon by the General Chairman and the Senior Director-Labor Relations, be assigned Sunday and Monday instead of Saturday and Sunday as days off. If the parties fail to agree thereon and the Company nevertheless puts such assignments in effect, the dispute may be progressed as a grievance or claim."

In a recent Award of this Board, which is strikingly similar to the one at bar, the history of the "Forty Hour Work Week" and the decisions which have interpreted that language over the years was reviewed. In Third Division Award 35564, it was stated:

"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."

Applying the foregoing principles, the Board in that case sustained the claim, holding that the primary reason advanced by the Carrier to justify the scheduling change was the need to check seven days per week during the summer months for buckling of track due to high summertime temperatures in southwest Texas. No clear

and convincing evidence of operational necessity had been produced on that record, according to the Board.

We find that similar circumstances dictate the same outcome in the instant case. No evidence was adduced that new operational problems had arisen which justified the institution of seven-day positions at the Selkirk and Dewitt yards. The Carrier's primary reason to justify the change was a need to deal with the snow on a 24/7 basis. However, before as well as after the seven-day assignments, the work was performed Monday through Friday with Saturday and Sunday as rest days. While snow removal, repair and maintenance work was done on those days, it was on an overtime basis.

Moreover, while the avoidance of overtime appears to be a genuine Carrier concern, the Board in a majority of cases has consistently rejected the idea that avoidance of overtime amounts to an "operational necessity" sufficient to overcome the presumption in favor of a Monday through Friday schedule. See, Third Division Awards 6695, 7370, 14098, 17343, 19622 and 35564 and Special Board of Adjustment No. 1107, Award 1.

Given this history, we find that the record does not support the conclusion that material operational changes necessitated the change in the workweek. Accordingly, the claim must be sustained. As remedy for the Rule 10 violation, it is the Board's intent to provide a make-whole remedy, to put the Claimants in the position they would have been in had it not been for the contractual violation. Had the Claimants been properly assigned, they would have received time and one-half for any Saturday or Sunday on which they worked. Thus, the Claimants are entitled to be compensated for each Saturday and Sunday they worked from the date they began the improper assignments until the positions ended. The Organization has failed to demonstrate, however, whether the Claimants ever worked on a rest day, and, if so, how often. Absent such a showing, there is no basis for the Board to award additional straight time compensation for "lost work opportunities" on Thursdays and Fridays during the period in question. See Third Division Awards 32795 and 35564. The Carrier is further directed to compensate Claimant Zimmerman for eight hours' pay at the appropriate rate of pay for the vacation day he observed on February 5, 1997 due to the abolishment of his position.

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 October, 2001.