

Award No. 35805
Docket No. MW-32422
01-3-95-3-307

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(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 assigned to the 453-751 Patrol Gang, headquartered at Texline, Texas, on March 16, 1994 and improperly assigned them a work week of Tuesday through Saturday with Sundays and Mondays 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 (System File F-94-08/MWD 94-06-15AA FWD).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant E. V. Sanchez and any other employee 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 Monday 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 Saturday (that should have been a regularly assigned rest day) that the claimants are required to work.**

beginning March 16, 1994 and continuing until the rest days are properly changed back to Saturdays and Sundays.”

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.

Maintenance of Way Circular No. 6 provides for “Emergency Inspections Hot Weather.. . employees must inspect track every day between noon and 8 PM.. . on all lines where speed limits exceed 40 MPH or where unit trains operate at speeds over 25 MPH.”

Bulletin FTW-06 bulletined two positions for a patrol gang headquartered at Texline, Texas. The Claimant bid on and was awarded a Foreman’s position on that gang, working Tuesday through Saturday, with Sunday and Monday as rest days. The Claimant commenced working on that gang on March 16, 1994. The gang worked until it was abolished in November after the hot weather was over. The claim protests the establishment of the Claimant’s position on the gang with rest days other than Saturday and Sunday.

Rule 15 provides:

“RULE 15 -WORK WEEK

General (a): There is established for all employees, subject to the exceptions contained in this rule, 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 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 work week rule is subject to the following provisions:

Five-day Positions (b): On positions the duties of which can reasonably be met in five (5) days, the days off will be Saturday and Sunday.

* * *

Seven-day Positions (d): On positions which have been filled seven (7) days per week and 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 live (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."

Contending that the Claimant's position was a five-day position governed by Rule 15(b) and asserting that the Carrier did not consult with the Organization as required by Rule 15(f), the Organization argues that the Carrier improperly established the Claimant's position with Sunday and Monday as rest days and that the rest days should have been Saturday and Sunday. The Carrier argues that the Claimant's position was a seven-day position governed by Rule 15(d) and thus it could establish the position with Sunday and Monday as rest days.

In support of the Carrier's arguments, this record can be read to persuasively suggest that the Carrier established the Claimant's gang to inspect track in accord with a seven-day per week inspection requirement during hot weather as required by Maintenance of Way Circular No. 6; the Claimant's position was therefore not governed

by Rule 15(b) which mandates Saturday and Sunday off for live-day positions (“the days off will be Saturday and Sunday”); the Claimant’s position was governed by Rule 15(d) which does not require Saturday and Sunday as days off for seven-day positions (and only has “the presumption in favor of Saturday and Sunday” as rest days) and any consultation requirement with the Organization imposed by Rule 15(f) in order to implement rest days other than Saturday and Sunday does not apply in this case because Rule 15(f) concerns live-day positions established under Rule 15(b) and the Claimant’s position was a seven-day position established under Rule 15(d).

However, as persuasive as the Carrier’s arguments may seem in this case, we cannot decide this matter on a de novo basis. In Third Division Award 35564, the Board (with a different referee) sustained the Organization’s claim in virtually the same dispute, noting that “[t]he 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 ” - i.e., this case.

The Board in Third Division Award 35564 held that precedent showed:

“ . . . that the language appearing in Rule 15(a) and (b) creates a rebuttable presumption that existing live-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 rests 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.

* * *

Application of the principles established . . . 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 [citations omitted]."

Because this dispute has been previously decided in Third Division Award 35564, the question to the Board then is limited to whether Third Division Award 35564 is palpably in error. At best, the result in Third Division Award 35564 is debatable. However, a debatable result is not one that is palpably in error. In light of that Award, for the Board to decide this case the other way - even in light of strong arguments made by the Carrier as well as the positions stated in the Carrier's Dissent to Third Division Award 35564 - would be an invitation to chaos as the parties would not have direction concerning how to address similar disputes in the future. For purposes of stability, the Board must defer to the holding in Third Division Award 35564. On that basis, this claim shall be sustained on the merits.

In terms of a remedy, the relief fashioned in Third Division Award 35564 shall also be applied in this case - an additional one-half hour pay for each hour worked on what should have been the weekend rest day (in this case, Saturday) during the period between the time the position was established with Saturday as a work day until the position was abolished in November 1994. As it was in Third Division Award 35564, the Organization's request for further relief is denied. Finally, because it appears that only one position was filled on the gang (i.e., by Claimant), relief in this case shall be limited only to the Claimant.

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 14th day of November, 2001.

**Carrier Members' Dissent
To Award 35805 (Docket MW32422)
(Referee Benn)**

In so far as this decision rests on the disposition made in Third Division Award 35564, the Carrier Members' Dissent and Answer in that decision is equally valid here. Further as noted at pages 2-3 of this decision the applicable rule provision was 15(d) under the facts.

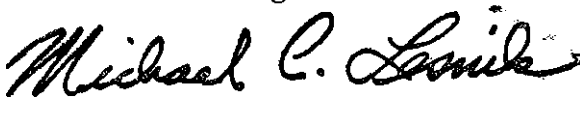
At page 5 of this decisions, the Majority notes that "at best" the disposition of Award 35564 is "debatable" but that such does not make the decision "palpably erroneous." However, Award 35564 missed a basic determining fact in its review. This fact was not something that was occasional as was implied in that Award but was a requirement every single day. That the 7-day assignment had been completed by "others" prior to the changed work week is not disputed.

While we do concur with the "purposes of stability" expressed at page 5, we must note that the discrepancy in Award 35564 was more than just "debatable" and correcting that error would have given guidance to "similar disputes."

We Dissent.


Paul V. Varga


Martin W. Fingerhut


Michael C. Lesnik