

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36055
Docket No. MW-33310
02-3-96-3-815

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway (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 abolished the foreman and the assistant foreman positions on the Spot Patrol Gang, Amarillo, Texas, which had Saturdays and Sundays as designated rest days, and thereafter advertised the same positions with Wednesdays and Thursdays as designated rest days beginning July 1, 1995 (System File F-95-15/MWD951113AB FWD).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. E. R. Roach (and any other claimants who may subsequently be assigned to these positions) shall ‘... now be compensated eight (8) hours at their straight time rate of pay for each Wednesday and Thursday 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 and Sunday (that should have been a regularly assigned rest day) that the claimants are required to work.”

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.

According to the record, the disputed positions lasted from July 1, 1995 until October 23, 1995, when they again resumed a Monday through Friday workweek with rest days of Saturday and Sunday.

The issue before us is not new. It was most recently addressed in Third Division Award 35564, which involved these same parties and, from our reading of the text of the Award, the same Agreement Rule 15 as well as essentially identical factual circumstances.

Award 35564 traced the history of Rule 15, which emerged from the National Forty Hour Work Week Agreement of 1949, as well as the line of precedent that has developed over the ensuing years. We do not quarrel with the well-written reasoning of the Board in Award 35564. That precedent establishes a rebuttable presumption against the type of workweek changes in dispute here. The presumption is overcome only by Carrier's production of "... 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."

The record herein is limited; it contains no factual evidence. The claim and initial appeal state that the Claimants were "... deprived of the opportunity to work what should be a regularly assigned work week." In addition, it asserted that the Carrier failed to discuss the changes in advance to explain any operational need for the change.

In response, the Carrier asserted two inherently contradictory reasons to justify its actions. In its October 4, 1995 reply, the Carrier cited Rule 15(f) for its operational exception that permits Sunday - Monday rest days for five-day positions in certain circumstances. (Apparently the Carrier official failed to realize that not even the operational exception of Rule 15(f) would permit rest days of Wednesday-Thursday for a five-day position.) The Carrier's stated reason was as follows:

"In this case there was an operational problem. This operational problem was caused by the flow of traffic therefore, it was necessary to assign rest days of Wednesday and Thursday. We have more traffic on Wednesday and Thursday and a considerable amount less on Saturday and Sunday. Because of the increased traffic during the week production of this gang has declined."

In its January 8, 1996 reply, however, the Carrier took a rather different tack. It said that track inspection was necessary seven days per week during the summer months when the threat of sun kinks was greatest. Accordingly, Rule 15(d) permitted the scheduling of any two consecutive rest days without need of consulting with the

Organization. Interestingly, this explanation was the same operational contention that was rejected by Award 35564.

Given the lack of probative evidence in the record and the contradictory explanations asserted by the Carrier, we do not find that the rebuttable presumption against the Carrier's action has been overcome. No proper operational necessity has been demonstrated. We are compelled, therefore, to find that the Carrier did violate Rule 15 as alleged.

In light of these circumstances, we find the remedy provided in Award 35564 to be appropriate here. Accordingly, the Carrier is directed to compensate the Claimants for an additional one-half hour of pay for each hour worked on Saturdays and Sundays between July 1 and October 23, 1995.

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 21st day of May, 2002.

**Carrier Members' Dissent
to Award 36055 (Docket 33310)
Referee Wallin**

This is the third iteration of the same issue raised and decided in Awards 35564 and 35805. For the reasons detailed in the Dissents to those Awards, this decision is equally in error.

We Dissent.


Paul V. Varga


Martin W. Fingerhut


Michael C. Lesnik