

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36999
Docket No. MW-36427
04-3-00-3-625

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Grand Trunk Western Railroad Company, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly changed the work week of Flint Gang employes M. Head, R. Wicke, J. Richert and B. Richert from a Monday through Friday work week with Saturdays and Sundays designated as rest days to a Wednesday through Sunday work week with Monday and Tuesdays designated as rest days, beginning January 11, 1999 and continuing through May 16, 1999 (Carrier's File 8365-1-682).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants M. Head, R. Wicke, J. Richert and B. Richert shall now be ‘ . . . compensated at the applicable overtime rates for all hours worked on all Saturdays and Sundays, and be compensated at the applicable straight time and overtime rates for all Mondays and Tuesdays. . . .’”

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.

This is a 40 Hour Work Week Agreement dispute involving the Carrier's abolishment of the positions of Assistant Foreman Port Huron Gang 13M and Trackman on Flint Gang 11M, working daylight hours on Monday through Friday, and the bulletining of Foreman and Boom Truck Driver positions on the Light Maintenance and Emergency Repair Gang headquartered in Flint, Michigan, with assigned hours of 11:00 P.M. to 7:30 A.M. and rest days of Monday and Tuesday effective January 4, 1999. The claim alleges a violation of Rules 10(b) and 12 in both the change from Saturday and Sunday rest days and shift hours commencing at 11:00 P.M.

The extensive correspondence on the property reveals that the Carrier gave the Organization notice of this change on December 23, 1998. The Organization protested and requested clarification on December 28, 1998. The parties met on a number of occasions to discuss the reasons for the Carrier's action, with the Organization suggesting other alternatives to address the Carrier's perceived problem of getting employees to respond at all or timely to emergency overtime calls for night time and weekend work, creating an inability to have qualified employees available resulting in delays in service to customers. On the property the Carrier noted that it previously solicited the Organization's help in getting employees to respond to overtime calls to no avail, and that the Organization did not dispute the fact that the employees' refusal to respond to such calls created a real service problem for the Carrier, one that became critical and intolerable in March 1998.

After the filing of the claim, the Organization took issue with the Carrier's assertion of operational necessity, positing that the Carrier had always scheduled the Flint Gang for a Monday through Friday workweek and had established no change in operation or circumstance substantiating the deviation from the

contractually mandated Monday through Friday workweek. The Carrier submitted monthly Track Department call lists and records maintained by the supervisor on emergency calls between March and December 1998 indicating that it could not get anyone to respond on various Saturdays, Sundays and during the night, and noting that track failures are more numerous during cooler weather. The Organization stated that these documents neither proved an operational necessity nor any resulting train delays. The Carrier offered to review with the Organization all documentation submitted and maintained concerning resultant track delays and interruptions in service caused by the inability to get employees to respond to emergency calls, and provided the Organization with additional monthly reports noting service delays. The Organization responded that the documentation still did not establish the requisite showing of operational necessity, as the great majority of the work performed by the Flint gang was normal maintenance work that they had routinely performed from Monday through Friday for many years. It attached statements from two long term employees indicating that maintenance work at the Flint yard was always done on the Monday through Friday shift. In the Carrier's final denial it noted that the documentation presented established that employees were called for, and reported to perform emergency service in the Flint yard on other than daylight hours and weekdays.

The Organization contends that Rules 10 (a) (b) and (f) require the Carrier to schedule employees with Saturday and Sunday as rest days when the position can reasonably be met in five days, which it asserts is the case with the Flint Gang as evidenced by the fact that it was scheduled for a five day workweek, had been working as a five day position for more than 40 years with no change in circumstance or train operations, and the Carrier never assigned any relief positions to work the Claimants' designated rest days in this position. It notes that the lengthy arbitral history of the 40 Hour Work Week Rule establishes the presumption in favor of the Monday through Friday workweek, and places a very heavy burden on the Carrier to show that operational requirements cannot be met in fewer than seven days requiring a staggered workweek before it can rebut this presumption, especially in light of an extended history establishing a five day position. See, Third Division Awards 7370, 17593, 23461, 28307, 32795; Special Board of Adjustment No. 488, Award 35; Special Board of Adjustment No. 1107, Award 1; Public Law Board No. 4104, Cases 9, 10 & 11. The Organization argues that the Carrier did not meet its burden of establishing operational necessity, as it has been held that the

avoidance of paying overtime is insufficient to demonstrate operational necessity, (Special Board of Adjustment No. 1107, Award 1; Third Division Awards 6695 and 7370) and that the Carrier's Rule 10(d) argument cannot be reached.

With respect to the change of shift hours, the Organization relies upon the plain language of Rule 12 in arguing that the Carrier is not permitted to establish a starting time prior to 6:00 A.M. for maintenance gangs of this sort, or 5:00 A.M. for production gangs. The Organization asserts that the only discussions in Section 6 negotiations between the parties involved the need for the earlier starting time for production gangs, and the Carrier never addressed any other need to have nighttime crews performing maintenance work of this sort. The Organization contends that the change in shift hours is also a violation of the Agreement, and that both the workweek and shift hour violations require a remedy that makes the Claimants whole for losses sustained by them, including overtime pay for the Saturdays and Sundays they worked, as well as straight time pay for the Mondays and Tuesdays they were forced not to work due to the improper schedule change. For support it relies upon Third Division Awards 13738, 19947, 25968, 30662, 30987, 31453, 31590 and 32107.

The Carrier argues that there is no dispute that the railroad operates on a 24 hour/7 day per week basis and that under Rule 10(d) it has the ability to establish workweeks with two consecutive days off other than Saturday and Sunday on such seven day positions, and that the terms "positions" and "work" relate to the railroad's operation, not an employee work schedule. See Third Division Awards 5555 and 31295. It contends that its inability to get qualified available employees to work overtime on weekends and during the night, despite trying repeatedly over a lengthy period of time, created a critical and intolerable situation resulting in repeated train delays and interruptions in service, and that it communicated such operational need to the Organization over a lengthy period of time, attempting to solicit its help in getting employees to agree to work the overtime required, which increased during the winter months. The Carrier argues that the Organization never questioned such facts until after it filed the claim and that it provided the Organization with documentation that met its burden of proving operational necessity permitting the scheduling of a staggered workweek, which the Organization continued to ignore throughout the processing of the claim. The Carrier asserts that there was nothing arbitrary about its establishment of the Flint

Gang in question, and that its established need rebutted the presumption of the appropriateness of Saturday and Sunday as rest days, permitting it to stagger the workweek in compliance with Rule 10(d) citing Third Division Awards 10171, 11370, 18504, 21394, 22426, 30011, 31136, 31295, 33912, 34079, 35025; Public Law Board No. 6596, Award 2. It notes that while there is no evidence that it made the schedule change to avoid paying overtime for this weekend work, it would have been a permissible consideration in establishing operational necessity, relying upon Third Division Awards 21394, 30011 and 31136. It also contends that it need not assign regular relief positions as a condition precedent to staggering workweeks, citing Third Division Award 21394.

With respect to the change of shift hour allegation, the Carrier points to the language of Rule 12(d) which indicates that regular daylight starting times shall be between 6:00 and 8:00 A.M. "except where more than one shift is employed . . ." in arguing that because it clearly has a three shift around-the-clock operation, the limitation of starting times does not apply to it. It notes that the contested assignment was not a daylight assignment. The Carrier contends that one specified exception does not permit the Board or the Organization to read into Rule 12 other exceptions including the necessity for operational requirements or the need to meet with the Organization and obtain agreement. Because Flint had more than one shift during the time period in question, the Carrier asserts that the starting time restrictions in Rule 12 do not apply.

A careful review of the record including the lengthy precedent relied upon by the Organization in its Submission convinces the Board that the Organization failed to establish a violation of either Rule 10 or 12 of the Agreement. We accept that the language of Rule 10 creates a presumption of the appropriateness of a workweek with Saturday and Sunday as rest days, but permits the Carrier the ability to establish staggered workweeks with other than Saturday and Sunday rest days based upon operational requirements and when working the assignment from Monday through Friday is not practicable. Thus, the presumption is rebuttable by a showing that operational requirements necessitate a seven-day position at the time in issue.

Regardless of the fact that the Flint Gang had always been established as a five-day position prior to January 1999, the Carrier presented evidence that over an

extended period of time it was unable to meet its service demands on that territory by the use of overtime for weekend and evening work due to the employees' unwillingness to respond to overtime calls for emergencies, which occurred with some frequency during cooler months. It was not the Carrier's initial desire to change employees' schedules, and it sought the Organization's help in getting employees to do the needed emergency work in a timely fashion on overtime. Thus, it cannot be said that the purpose for changing the schedules in issue was to avoid overtime. Rather, it was the inability to get volunteers for such overtime that created the operational need to have workers guaranteed to be available for emergency assignments. While the Organization relies upon the language of Rule 10(b) covering positions where the duties can reasonably be met in five days, we are unable to conclude that in the situation proven by the Carrier to have existed at Flint at the time it made the scheduling change it was unreasonable or arbitrary for it to find that the duties of the positions could not reasonably be met on a Monday through Friday schedule, and that it was no longer practicable for it to have such gang scheduled with Friday and Saturday rest days.

The Organization did not rebut the Carrier's evidence of operational need merely by asserting that it was unsatisfied with the proof of train delays, that the majority of the work performed was normal maintenance which could have been done on Monday through Friday, or that the work by the Flint Gang always was performed only on Monday through Friday. Overtime was clearly a requirement on this territory and the inability to perform it timely became a change sufficient to support the Carrier's operational requirement contention. See, Third Division Awards 30011, 31295; Public Law Board No. 6596, Award 2. Additionally, the Board agrees with the Carrier that it is not restricted by the language of Rule 12 from starting a maintenance gang of this sort at a time other than 6:00 - 8:00 A.M., because the exception for more than one shift applies herein. Accordingly, we find that the Organization failed to sustain its burden of proving that the Carrier's protested action violates either Rule 10 or 12 of the Agreement, requiring the denial of this claim.

AWARD

Claim denied.

Form 1
Page 7

Award No. 36999
Docket No. MW-36427
04-3-00-3-625

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 18th day of May 2004.

LABOR MEMBER'S DISSENT
TO
AWARD 36999, DOCKET MW-36427
(Referee Newman)

The Majority clearly failed in its responsibility to review and properly render a decision in this docket. The facts and prior awards of this Board and other Boards of Adjustment, involving similar factual situations, were ignored when the Majority issued its erroneous award to further deprive the Claimants of their contractual rights.

While the Majority is correct when it stated that Rule 10 (Forty-Hour Work Week) gives the Carrier some discretion in the establishment of work weeks and rest days. However, that does not mean that the Carrier's discretion is absolute.

In this case, the Carrier alleged that an operational necessity was present to deviate from a long standing establishment of a Monday through Friday work week with Saturday and Sunday as designated rest days. The record was crystal clear that for more than forty (40) years the gangs at the Flint Yard worked a Monday through Friday work week. Hence, for the Carrier to make its case to deviate from a Monday through Friday work week would require overwhelming evidence that something had drastically changed at the Flint Yard to justify deviating from the longstanding established practice. The Carrier presented documentation that it alleged would support its decision to change the work week. However, that alleged evidence was woefully lacking in support of its position. Unfortunately, the Majority in this case accepted the alleged evidence of a drastic operational change as justification to operate a gang outside of the clear and unambiguous language of the Rule 10.

A few alleged missed calls for rest day overtime is not a justifiable reason to deviate from more than forty (40) years of established practice of operating a Flint Yard gang on a Monday through Friday work week. Indeed shortly after this award was rendered, Third Division Award 37049 held:

“*** In this case, the Carrier argues the obverse of that theorem, i.e., the primary reason advanced on the property by the Carrier to justify the unilateral change in workweek was a claimed difficulty, bordering on impossibility, of reaching any of the Claimants for occasional emergency overtime calls on Sundays. The sole evidence offered in support of that contention, anecdotal recollections by MTM Caston of having to call ‘MOP Agreement people’ when he could not reach ‘SP Western Lines people’ to take occasional weekend overtime calls is not persuasive of a ‘material operational change’ sufficient to justify implementing the unilateral change from five-day Monday through Friday positions to seven-day positions with other than Saturday - Sunday rest day.”

Labor Member's Dissent

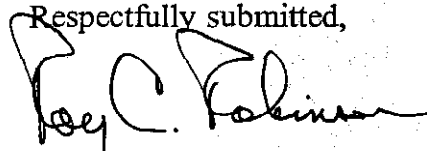
Award 36999

Page Two

As it alleged in the above-cited case, the Carrier asserted operational difficulties. However, it will be noted that such mitigating factors cannot validly serve to alter the clear language of Rule 10 and a forty (40) year practice of working the Flint Yard gang on a Monday through Friday basis.

Therefore, I dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson". The signature is stylized with a large, looped initial "R" and a cursive "C".

Roy C. Robinson
Labor Member