

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40419
Docket No. MW-39952
10-3-NRAB-00003-070086
(07-3-86)**

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago
(and North Western Transportation Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to bulletin the Gang 3316 track supervisor position headquartered in Menomonie, Wisconsin, with rest days of Saturday and Sunday and instead advertised said position with rest days of Sunday and Monday (System File 7WJ-7474T/1441831 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, it is the Claim of the Brotherhood that Carrier must immediately re-advertise the position for Gang 3316 – Track Inspector with the proper rest days of Saturday and Sunday. Claimant D. Hulke must be compensated for the difference between the Gang 3316 Track Inspector rate of pay and his current flag foreman position retroactive to 10/6/05, the date of advertisement 4668 for the position as Gang 3316.”**

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 claim involves the bulletining of a Track Supervisor position on Gang 3316 with a workweek of Tuesday through Saturday instead of Monday through Friday.

The Organization maintains that the Agreement was violated because the Carrier did not comply with the requirements of Rule 23 when it failed to discuss the deviation from the Monday through Friday workweek with the Organization and unilaterally posted the position. The Carrier failed to identify, explain, and discuss the circumstances that it considered an operational requirement. The Carrier failed to try to reach an understanding with the Organization prior to positing the assignment.

Rule 23 provides:

“Work Week:

- A. General – Subject to the exceptions contained in this Rule there is hereby established a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with operational requirements; so far as practicable the days off shall

be Saturday and Sunday. The work week rules are subject to the following provisions:

- B. Five-day positions - On positions the duties of which can be reasonably be met in five days, the days off shall be Saturday and Sunday.

- F. Deviation from Monday - Friday week - If, in positions and work extending over a period of five days per week, an operational problem arises which the Company contends cannot be met under provisions of paragraph B hereof and requires that some of such employees work Tuesday to Saturday instead of Monday to Friday, and the employees contend to 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.”

The Organization continues that the assertion of a managerial prerogative for the assignment was not only unpersuasive, but was also untimely because it was offered only after it should have been discussed pursuant to Rule 23. Accordingly, the Carrier’s defense is procedurally flawed. Further, the Carrier’s argument of past practice is irrelevant.

The Carrier replies that the Track Supervisor position has been in existence for more than 20 years on a staggered workweek. The Carrier continues that the record contains documentation for the past ten years. The Carrier argues the principal of laches applies and the claim must be denied because the Organization slept on its rights to assert a claim. The Carrier also points out that the Tuesday through Saturday assignment was appropriate when the Claimant was the Manager of the territory, but only became an issue when the Claimant returned to the craft and wanted the instant position to be a Monday through Friday position.

The Carrier further argues that Rule 21, requiring that claims be presented within 60 days of the occurrence, bars the instant matter from consideration. The Carrier offers a variety of citations in support of the argument that the instant

matter does not involve a continuing violation. The Carrier also defends on the merits – that the bulletin and assignment was appropriate.

Rule 21 A provides:

“All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. If any such claim or grievance is disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances.”

The Board carefully reviewed the record. The 40-hour workweek at issue can be traced back to the National Forty Hour Work Week Agreement of 1949. The Board notes that there are legions of Awards interpreting 40-hour workweek issues.

The issue presented here is whether the bulletining of the Track Supervisor position violated the Agreement. The evidence establishes that a Track Supervisor position has existed on this territory, but the headquarters have changed. The evidence also indicates that the Claimant, who was previously the Manager of Track Maintenance, was the manager when the Tuesday through Saturday workweek was being used. He did not alter the schedule during the period he was the MTM. According to the Carrier, this evidence indicates that agreement was reached with the Organization on some long ago date, or that the Organization is procedurally barred because a claim was untimely.

The Carrier’s evidence established that the position has existed for a number of years and that was not refuted by the Organization. Rule 21 requires that a claim be filed within 60 days of the occurrence giving rise to the claim. That time has

Form 1
Page 5

Award No. 40419
Docket No. MW-39952
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passed. Although the specific act at issue might have caused a continuing liability, it was not a continuing violation of the Agreement. See Third Division Award 31043.

AWARD

Claim denied.

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 14th day of May 2010.