

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40498
Docket No. MW-39868
10-3-NRAB-00003-070018
(07-3-18)**

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly changed the compressed half work schedule for all employees assigned to System Gangs 9003, 9013 and 9023 in the second half of November 2005 and failed to allow said employees to observe the Thanksgiving and day after Thanksgiving holidays pursuant to Rule 40(f) (System File UPRM-9703T/1439180).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimants, all employees assigned to System Gangs 9003, 9013 and 9023 shall now each ‘. . . be compensated for the differential in pay, from that of straight time and overtime rates, for all hours worked on November 22, 2005 at their applicable rates of pay.’”

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 a change to the compressed work schedule for employees assigned to System Gangs 9003, 9013 and 9023. The gangs were working a compressed half during the latter part of November 2005 and Thanksgiving and the day after Thanksgiving fell within the compressed half. The gangs were working an 88-hour compressed half and the Thanksgiving and the Day After Thanksgiving holidays fell on November 24 and 25, respectively. The gangs worked November 16 through November 22, 2005.

Rule 40, entitled Alternative Work Periods, applies to compressed halves and provides in relevant part:

- “(a) With the election in writing from the majority of the employees working on a project and with the concurrence of the appropriate Manager, a consecutive compressed half work period may be established where operations permit. The consecutive compressed half will consist of consecutive workdays that may be regularly assigned with eight (8) or more hours per day (i.e. 8, 9, 10, 11, or 12 hour workdays) and accumulated rest days. The consecutive compressed half will commence on the first calendar day of the payroll period unless changed by mutual agreement between the Manager and a majority of the employees. The consecutive compressed half arrangement will equal the number of hours worked as if the assignment was for a normal half with 8-hour workdays. Accumulated rest days for employees assigned to a gang

working a consecutive compressed half arrangement will consist of the remaining days in the payroll period.

* * *

- (c) Where it would be required to work a fraction of a day on a consecutive compressed work period arrangement under (a) or (b) in order to equal the number of hours in the period, respectively, the remaining hours will be distributed and worked throughout the compressed work period unless agreed to work a partial day at the end thereof.

* * *

- (f) Observance of holidays will be handled as follows:

- (1) Unless agreed otherwise by a majority of the gang members and the appropriate Manager, if a holiday falls on a Monday, Tuesday, Wednesday, Thursday, Friday or Sunday, the holiday will be observed at the end of the compressed work period and the amount of service hours ordinarily scheduled in line with the terms of this Agreement will be reduced by eight (8).

* * *

- (5) If required to perform service during the hours at the end of the compressed work period observed as the holiday, employees will be compensated at the overtime rate.

* * *

- (l) Employees working a compressed work period under paragraph (a) will have their workdays and rest days set forth in writing a

minimum of five (5) workdays in advance of the beginning of the work period arrangement and said written notice will be posted at convenient locations accessible to the employees affected.

* * *

- (p) The provisions of the rule apply to a gang as a whole and not individual employees and is designed to improve productivity, and the composition of employee's rest hours to afford employees a greater opportunity for extended visits to their homes. No claims will be filed on behalf of any employees subject to this rule. Except as provided herein, existing practices, understandings, or any other Agreements regarding the assignment of work periods are not modified."

The Organization argues that the Carrier erred when it required the employees assigned to System Gangs 9003, 9013 and 9023 to forego a total of ten hours work on November 16 through 21 and then assigned them to work at straight time on November 22 – which should have been observed as a holiday. The Organization continues that the alternative work schedules of compressed halves are subject to Rule 40 and only permissible when agreed to by a majority of the employees on a project and the approval of the Carrier Manager. The compressed halves on this project were for an eight day compressed half with 96 hours distributed over those eight days. The two holidays at issue should have been observed after six days were worked for a total of 72 hours to be worked in the half. The extra work time should have been distributed evenly over the six days. The gangs should not have worked the seventh day on November 22. Because they did work seven days, that seventh day should be paid at the overtime rate.

The Carrier counters that the Organization is attempting to rewrite the Agreement because there is no language in the Agreement that requires a compressed half to be eight days in duration. The Carrier reminds the Board that it is a management right to assign work so long as it does not violate the Agreement. Here, the Carrier did not violate the Agreement by observing the two holidays after seven days of work. The 72 remaining hours, after the 16 hours of holiday were

deducted, were worked over the seven days. Rule 40 addresses the number of hours worked in a compressed half; it does not discuss the number of days worked. The Carrier cites the decision of Referee Newman in Award 3 of Public Law Board No. 6867 and contends that the principle of stare decisis requires the instant claim to be denied.

Award 3 of Public Law Board No. 6867, cited by the Carrier, involved the application of Rule 40's Alternative Work Periods to a system gang working a compressed half in the second half of May 2002. At issue was the observance of the Memorial Day holiday. The Organization asserted that the holiday should have been observed on the eighth day with the eight hours for the holiday distributed over the prior seven days. The Organization also asserted that the Carrier violated Rule 40(l) by not issuing prior notice of the schedule change. The Carrier responded that Rule 40 addresses the number of hours worked per day as elected by the employees, but not the number of days.

“A careful review of the record and arguments of the parties convinces the Board that the Organization's claim for additional compensation for the second half of May, 2002 must be denied. The Organization's position is dependent upon a showing that what was elected by System Gang 9049 and concurred in by the Manager under Rule 40(a) was a compressed half consisting of 8 workdays. It has failed to show that Rule 40(a) contemplates a compressed half of any fixed number of days. Rather, the evidence substantiates that System Gang 9049 was working a compressed half consisting of 10 hour workdays, was bulletined as such, and that Carrier did not give up its right to schedule more than 8 workdays during a compressed half of 88 or 96 hours. In the instant case, Carrier scheduled the 96 hour second compressed half in May, 2002 to be worked over nine workdays, with the ninth being designated as the holiday and the other eight comprised of 11 hour days.

The Organization has not met its burden of proving that this action violated any of the provisions of Rule 40, including Rule 40(l) with respect to the required written advance notice of change of schedule.

In this case the Board agrees with Carrier that there was no schedule change for System Gang 9049 requiring written notice so long as the 10 hour workday compressed half was maintained. Carrier's agreement to Rule 40 did not restrict its right to assign work to be accomplished in a productive manner or to promote efficiency, so long as its specific terms are complied with. We find that they were in this case and, accordingly, the claim is denied."

The Board carefully reviewed the evidence and arguments in the instant matter. The Board finds the decision of Referee Newman to be controlling. Award 3 of Public Law Board No. 6867 placed the burden upon the Organization to prove that the election pursuant to Rule 40 was for a fixed number of days. The Organization was unable to prove such an election and agreement with the Carrier Manager as required by the Rule. Instead, the evidence showed that the election was for a compressed half of ten hour days.

Here, the Carrier scheduled a nine day compressed half and observed the two holidays on the last two days of the compressed half. The remaining hours were distributed over the compressed half. Based upon the above, the claim must be denied.

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 15th day of June 2010.