

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40608
Docket No. SG-40809
10-3-NRAB-00003-090104**

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of T. R. Russell, for difference in pay between the Claimant’s hourly rate and overtime rate of pay for all hours worked on Saturdays which should have been his assigned rest day, and eight hours pay at the straight time rate of pay for all Mondays that he was forced to observe as a rest day starting August 13, 2007 and continuing until this dispute is resolved, account Carrier violated the current Signalmen’s Agreement, particularly Rules 1, 5, 51, 56 and 80, when it awarded the Claimant a Relief Signal Maintainer’s position on Bulletin No. 1142 with assigned rest days of Sunday and Monday in violation of the Agreement. Additionally, Carrier shall be required to properly post this position with assigned rest days of Saturday and Sunday as required by the Agreement. Carrier’s File No. 1486059. General Chairman’s File No. N-56-701. BRS File Case No. 14124-UP.”

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.

The Claimant was assigned to Gang 5094 on August 3, 2007 as a result of his successful bid for a Relief Signal Maintainer position with Sunday and Monday as rest days. The prior Relief Maintainer position that this was replacing had Saturday and Sunday as rest days, as did all Signal Maintainer and Foreman positions on Gang 5094. This claim protests the Carrier's discontinuance of the historical assignment and the creation of a new position, seeking overtime compensation for Saturdays worked by the Claimant, and straight time compensation for Mondays not worked, as well as the posting of the position with Saturday and Sunday as rest days. While citing Rules 1 (Seniority Class One) 5 (40-Hour Work Week) 51 (Advertising Positions for Seniority Choice) 56 (Established Positions) and 80 (Loss of Earnings) the following contract language is directly applicable to the dispute in this case.

"RULE 5 - 40-HOUR WORK WEEK

* * *

GENERAL

There is established for all employees, subject to the exceptions contained in this agreement, 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 the Carrier's operational requirements; so far as practicable the days off will be Saturday and Sunday. The foregoing work week rule is subject to the provisions which follow:

A. Five-Day Positions

On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.

* * *

E. Deviation from Monday-Friday Week

If in positions or work extending over a period of five days per week, an operational problem arises which the carrier contends cannot be met under the provisions of Section A of this Rule, and requires that some such employees work Tuesday to Saturday instead of Monday to Friday, and the employees contend the contrary, and if the parties fail to agree thereon, then if the carrier nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under the agreement.”

The Organization argues that the data submitted by the Carrier with its denials on the property should have been the subject of dialogue prior to the implementation of the position, because Rule 5(E) requires the Carrier to seek resolution of a deviation of the workweek from Monday through Friday through negotiation with the Organization prior to effectuating the change, citing Third Division Award 31471 and Second Division Award 7041. It notes that no effort was made by the Carrier to conference this matter prior to posting and awarding the five-day relief position with Sunday - Monday as rest days to the Claimant, and asserts that it has accommodated the Carrier’s established need through such dialogue in the past as proven by the negotiated use of Relief Maintainers in Rules 1 and 26. The Organization contends that the data does not support any operational need for a deviation on this territory, because it reveals that all weekend service needs were met by regular assignees who are required to make themselves available for such work under the provisions of Rule 16, and have the right of first refusal for such overtime opportunity prior to the use of a Relief Signal Maintainer such as the Claimant, noting that such schedule change would only provide negligible relief from the asserted (but not established) need. The Organization also notes that the

data covers more than 12 territories, and does not account for the capacity expansion created by the building of a third main line to deal with the increased traffic in this area, which provides relief from any possible service interruption. The Organization contends that the Carrier failed to meet its burden to prove its affirmative defense of need, relying on Public Law Board No. 5565, Award 8 and Third Division Awards 20107, 22242 and 35409 and Second Division Award 12015.

The Carrier asserts that the Organization failed to prove the application to, or a violation of, cited Rules 51, 58, or 80. With respect to Rule 5, the Carrier contends that it has the right to modify rest days under Rule 5(E) if there is an operational need. It argues that it established the need for a Tuesday through Saturday workweek by showing the enormous volume of train traffic in the area causing a significant number of maintenance issues (2500 within an eight month period) 32% of which occurred on the weekend, causing train delays, citing Public Law Board No. 6596, Award 2 and Third Division Awards 30011, 31295, 31298 and 37018. The Carrier also posits that it was having trouble keeping Signal Maintainers available on weekends to cover these trouble calls, necessitating scheduling Saturday coverage to perform the required seven day per week maintenance service. It also contends there is nothing in the Agreement requiring it to pay an employee to remain available for call on Saturday, and that Rule 16 is permissive and does not prohibit the Carrier's right to establish a full-time position including Saturday as a regular work day. Finally, the Carrier contends that the Organization is improperly attempting to shift the burden of proof in this case, which it failed to meet, relying on Third Division Awards 26033, 27851 and 27895.

A careful review of the record convinces the Board that the Carrier met its burden of showing an operational need for the change in rest days occurring in this case. See Third Division Award 36999. The documentation reveals a very high volume of train traffic in this area, necessitating the building of a third main line, and the resultant signal maintenance issues, a substantial number of which occurred on the weekend. The Organization presented nothing countering this showing other than contentions that the data encompassed a larger territory and showed that the work was actually performed. It did not address the Carrier's contention that it was having difficulty keeping Signal Maintainers available on the weekends to cover trouble calls under Rule 16, which would still apply regardless of the change of schedule involved in this case. Because the presumption of the appropriateness of a

workweek with Saturday and Sunday as rest days contained in Rule 5 is rebuttable by a showing of operational need, and that it is not practicable for this to be a Monday through Friday position, we are of the opinion that such a showing has been made in this case. See Public Law Board No. 6596, Award 2, as well as Public Law Board No. 2960, Award 80.

The Board finds that the Carrier should have made its showing of necessity to the Organization prior to making the disputed assignments, which discussion appears to be mandated by Rule 5(E). See Third Division Award 31417. The new position, which was posted for a ten day period on July 20, 2007, did not become effective until August 1, 2007, and the claim was initiated on August 13, 2007. Both parties have an obligation to discuss the matter prior to the Carrier effectuating the change. Because the Organization did not request a conference upon learning of the Carrier's intention with the posting (there was time between when the posting went up and when the assignment went into effect when such a discussion could have been held) there was no established loss of earnings by the Claimant, who still had a five day 40-hour workweek. We are of the opinion that the Carrier has shown that Saturday and Sunday rest days were not practicable for this position. Accordingly, the claim is 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 27th day of August 2010.