

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23461
Docket Number MW-23038

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{
{ Missouri Pacific Railroad Company
{ (Former Chicago and Eastern Illinois Railroad Co.)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the members of Surfacing Gang 5748 were compensated at their respective straight-time rates instead of at their respective time and one-half rates for the service each performed on certain dates during the period January 3, 1978 through February 12, 1978 (System File S 214-94).

(2) The Agreement was further violated when the members of Surfacing Gang 5748 were not permitted to work their scheduled assigned hours on certain dates during the above-mentioned claim period.

(3) Each member of Surfacing Gang 5748 now be allowed the difference between what they should have been paid at their respective time and one-half rates and what they were paid at their respective straight-time rates because of the violation referred to in Part (1) hereof.

(4) Because of the violation referred to in Part (2) hereof, each member of Surfacing Gang 5748 be allowed eight (8) hours of pay for each day they were not permitted to work their scheduled assigned hours during the above-mentioned claim period."

OPINION OF BOARD: The Organization claims that Carrier violated the Agreement when it compensated the members of Surfacing Gang 5748 at their straight-time rates rather than at the time and one-half rate for work performed on certain dates during the period January 3, 1978 through February 12, 1978. During this period, Carrier divided the Surfacing Gang into two segments, one worked Monday through Thursday, ten hours each day, and the other worked Thursday through Sunday, ten hours each day. Carrier compensated each employe at the straight time rate for all hours in excess of eight hours each day, and at the straight time rate for any work performed on Saturday or Sunday.

The Organization asserts that Carrier's actions violated the Agreement which provides that, subject to limited exceptions, employes will work a five day work week, Monday through Friday, eight hours each day.

Carrier, on the other hand, claims it did not violate the Agreement since each employe voluntarily signed an agreement to work four ten hour days at straight time as a means of meeting a "legitimate operational need" of the Carrier, and to prevent the layoff of several employes. It also insists that the "double shifting" ended on February 8, 1978.

POSITION OF EMPLOYES:

Rule 9 of the Agreement provides, in relevant part:

"Rule 9--The 40-Hour Week

Establishment of Shorter Work Week

NOTE: The expressions 'positions' and 'work' used in this Agreement refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees.

(a) General--

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, is hereby established. The work week may be staggered in accordance with the Carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the provisions of this Agreement which follows:

(b) Five-Day Positions--

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

(f) 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 paragraph (b) of this rule, and requires that some of 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 this agreement.

It is further agreed that the following statement of principles shall be used as a guide in the future application of this rule:

1. There is no absolute right to make work assignments from Tuesday to Saturday on any positions the duties of which can reasonably be met in five days as specified in paragraph (b) of this rule. Paragraph (b) governs such assignments.

2. Paragraph (f), however, permits exceptions to paragraph (b) under certain conditions.

3. The first condition is that there must be an operational problem which cannot be met under the provisions of paragraph (b).

4. The second condition is that the operational problem 'requires that some of such employees work Tuesday to Saturday instead of Monday to Friday.'

5. Another condition is that the operational problem and the necessary number of Tuesday to Saturday assignments to meet it must be explained to the duly accredited representative of the employees and an effort made to reach agreement.

6. If the parties fail to agree, the management may then put into effect the assignment it deems necessary to meet the operational problem, but it does so at its risk, because paragraph (f) gives the employees the right to process as a grievance or claim their contention that the assignment itself is improper."

The Agreement is clear that a Monday through Friday, eight hour per day work week is the contractually preferred schedule. Deviation from the Monday through Friday work week is permitted, pursuant to Rule 9 (f) and 9 (3), if an operational problem arises which cannot be handled on a Monday through Friday schedule and if the operational requirement necessitates a Tuesday through Saturday schedule (Rule 9 (4)). In either case, a five day work week is clearly contemplated by the Agreement.

Carrier has failed to demonstrate that an operational problem existed which could not be accommodated in the Monday through Friday work week. Carrier's assertion that the work was seven day per week work is not sufficient in light of the fact that the work was previously performed on a Monday through Friday basis.

Rule 9 (5) of the Agreement requires Carrier to explain the operational problem to the Organization in an effort to reach agreement and prevent the implementation of a Tuesday through Saturday work week. This the Carrier did not do.

While the Carrier may have been responding to the employees' desires to avoid the layoff of their fellow workers, it is nevertheless absolutely clear and well established in prior Board decisions that an employer cannot enter into individual agreements with employees which modifies a collective bargaining agreement. (See Awards 21048, 4461.)

Even if the four day work week were desired by all employees, it is fundamental that they cannot individually agree with Carrier to amend the Agreement. On this there can be no dispute.

There is nothing in the Agreement to authorize a four day, ten hours per day, work week. To the contrary, the Agreement contemplates a five day, eight hours per day, work week.

Accordingly, the claimants listed shall be paid at the straight time rate for all days on which they would have been scheduled to work but did not work. All claims for overtime are denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: _____

A. W. Paulsen

Executive Secretary

Dated at Chicago, Illinois, this 8th day of December 1981.