

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26518
Docket Number MW-26667

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(National Railroad Passenger Corporation
(Amtrak) - Northeast Corridor

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

(1) The Carrier violated the Agreement when, effective November 4, 1983, it changed the work week of Mr. A. P. Cunha from Monday through Thursday with Friday, Saturday and Sunday designated as rest days to Friday through Monday with Tuesday, Wednesday and Thursday designated as rest days and then failed to compensate Mr. Cunha at the time and one-half rate for the work he performed Saturday, November 5 and Sunday, November 6, 1983, which were rest days of his original assignment (System File NEC-BMWE-SD-914).

(2) As a consequence of the aforesaid violation, Mr. A. P. Cunha shall be paid:

1. 14 hours overtime for work performed on November 5, 1983.
2. 14 hours overtime for work performed on November 6, 1983."

OPINION OF BOARD: On December 28, 1983, a Claim was filed by the General Chairman with the Senior Engineer-TLS of the Carrier. The Claim alleged that the Carrier was in violation of the AMTRAK-BMWE Agreement and the Special Construction Gangs Agreement of November 3, 1976, when it "...failed to pay the claimant at the overtime rate for November 5 & 6, 1983."

The Rules at bar are the following.

"Rule 40

BEGINNING OF WORK WEEK

The term 'work week' for regularly assigned employees shall mean a week beginning on the first day on which the assignment is bulletined to work, and for unassigned employees shall mean a period of seven consecutive days, starting with Monday."

"RULE 45

TIME WORKED IN EXCESS OF 40 STRAIGHT TIME HOURS
IN ANY WORK WEEK

Time worked in excess of 40 straight time hours in any work week, shall be paid at time and one-half rates, except where such work is performed by an employee due to moving from one assignment to another, or where days off are being accumulated in accordance with the provisions of Rule 39."

"RULE 90-A

TRACK UNITS - SOUTHERN DISTRICT

V. WORK WEEK.

The normal work week for employees assigned to positions in units established pursuant to this Agreement, will consist of five (5) days of eight (8) straight time hours each, with two (2) consecutive rest days. An original determination of whether a unit is to be established for five (5) or four (4) ten (10) hour work days with three (3) consecutive rest days shall be made in the notice given to the General Chairman pursuant to II above. When it is known in advance that a five (5) day week will not be practicable and feasible for the duration of the unit, those times will be specified in such notice. At all other times, the Chief Engineer may change the work week from five (5) days to four (4) days, or vice versa, upon at least five (5) days written notice to the involved employees and the General Chairman, except that such changes may be made in less than five (5) days upon concurrence of the General Chairman."

"SPECIAL CONSTRUCTION GANGS AGREEMENT (NOVEMBER
3, 1976)

Paragraph 1(d)

A work week consisting of four ten-hour work days may be established with any three consecutive days as rest days."

The Claimant held seniority as a Repairman with the Carrier and at the time the dispute arose, he held an assignment on the Carrier's Panel Renewal System Unit. When this Unit was established the days and hours of assignment were 7:00 A.M. to 5:30 P.M., Monday-Thursday. Friday-Sunday were designated as rest days. On October 27, 1983, the Division Engineer changed the starting time and work days of the employees on this Unit, effective November 4, 1983. The letter by the Division Engineer making this change stated the following:

"Present Schedule

Monday through Thursday

7:00 A.M. - 5:30 P.M.

Rest Days: Friday, Saturday and Sunday

Effective November 4, 1983

Friday through Monday

7:00 P.M. - 5:30 A.M.

Rest Days: Tuesday, Wednesday and Thursday"

This change in schedule had the following effect on the days and hours worked by the Claimant after he started his work week on October 31, 1983. He worked October 31, 1983, through November 3, 1983, and was paid pro rata. He worked November 4, 1983, which was a Friday, and was paid time and one-half for 12 hours and 45 minutes work. On November 5-6, 1983, the Claimant worked 14 hours each day. The Carrier compensated the Claimant 10 hours pro rata on these 2 days and overtime rate for 4 hours. It is the position of the Claimant that he should have been paid the overtime rate for all of the hours he worked on these latter 2 days since they are both rest days. The original Claim filed on December 28, 1983, errs in its calculation of relief requested under the Agreements at bar. Such is later corrected. The calculation error in the original Claim does not nullify, in the mind of the Board, the validity of the Claim. See Third Division Award Nos. 20841 and 25061 for resolution of comparable issues. Ultimately, the relief requested amounts to the difference in the pro rata and overtime rate for 20 hours.

In its denial of the Claim on the property the Carrier argues that it could not agree "...that the Claimant was required to work four (4) days and have three (3) rest days before his assigned hours and work days could be changed." It was the further contention of the Carrier that Rule 32 of the AMTRAK-BMWE Agreement permitted it to stagger its work week in accordance with AMTRAK's "operational requirements." This Rule states the following:

"Rule 32

FORTY HOUR WORK WEEK

Except as otherwise provided in this Agreement, Amtrak will establish for all employees a work week of 40 hours, consisting of five (5) days of eight (8) hours each, with two (2) consecutive days off in each seven (7). The work week may be staggered in accordance with Amtrak's operational requirements. So far as practicable, the days off shall be Saturday and Sunday."

A review of the record before the Board warrants the conclusion that the Carrier is in error in the manner in which it is interpreting the operant Agreement and the Special Construction Gangs Agreement. Rule 40 unambiguously defines a "work week" as one beginning on the first day on which an assignment is bulletined to work. Paragraph 1(d) of the Special Construction Gangs Agreement clearly states that such work week can consist of 4 ten-hour work days with any 3 "...consecutive days as rest days." Rule 90(a) permits the same type of arrangement. The Carrier effectively bulletined 4 day work weeks. Rule 45 states that time worked in excess of 40 straight time hours in any work week will be paid at the time and one-half rate. Nothing in Rule 32 nullifies the mandates found in the Rules cited in the foregoing. Further, this latter Rule provides that the guidance found therein shall hold "...except as otherwise provided in this Agreement...." The burden of proof has sufficiently been met by the Organization as moving party in the instant case.

Since the Agreements were violated, the Claimant shall be paid the difference between the overtime and pro rata rates for 10 hours on November 5, 1983, and for 10 hours on November 6, 1983.

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

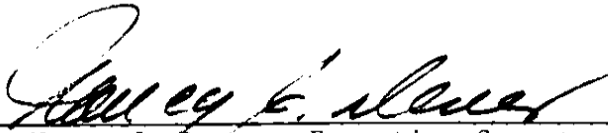
That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

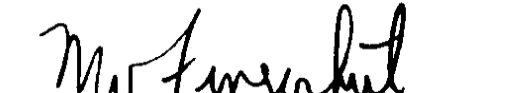
Dated at Chicago, Illinois, this 9th day of September 1987.

CARRIER MEMBERS' DISSENT
TO
AWARDS 26518, 26519, 26522 & 26523
DOCKET NOS. MW-26667, MW-26672, MW-26722 & MW-26724
(Referee Suntrup)

In sustaining these claims, the Majority failed to accord sufficient weight to the fact that the November 3, 1976 Special Construction Gangs Agreement was specifically negotiated to grant the Carrier flexibility in changing workweeks to meet the unique operational requirements of its mechanized gangs and, in consideration for such flexibility, an incentive rate of 25¢ per hour over and above the rate provided for the classification was granted.

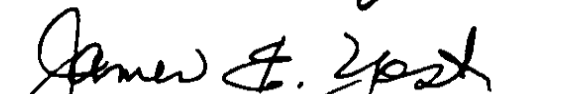
We dissent.


M. C. Lesnik


M. W. Fingerhut


R. L. Hicks


P. V. Varga


J. E. Yost