

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26519
Docket Number MW-26672

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 the Panel Renewal System Gang 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 permit the employees assigned to the Panel Renewal System Gang to work on November 3, 1983 and failed to compensate them at the time and one-half rate for the work they performed on Saturday, November 5 and Sunday, November 6, 1983, which were the rest days of their original assignment (System File NEC-BMWE-SD-915).

(2) As a consequence of the aforesaid violation, Panel Renewal System Gang employees G. Addison, A. Affonsa, W. Allison, K. Briscoe, W. Crook, E. Dickson, H. Douglas, K. Harris, M. O'Donnell, A. Plant, W. Siwarski, N. Welsh, G. Wright, J. Wright and G. Yound shall each be paid:

1. 10 hours at the pro-rata rate for being held off his assigned position on November 3, 1983.
2. 15 1/4 hours overtime for work performed on November 5, 1983.
3. 12 hours overtime for work performed on November 6, 1983."

OPINION OF BOARD: On December 28, 1983, the General Chairman filed fifteen Claims with the Carrier for various Claimants on the grounds that the Carrier was in alleged violation of the AMTRAK-BMWE Agreement and the Special Construction Gangs Agreement of November 3, 1976, when it "failed to pay the Claimant(s) at the pro rata rate for November 3, 1983, and at the overtime rate for November 5 & 6, 1983."

The original Claim filed on December 28, 1983, errs in its calculation of relief requested under the Agreements at bar and it also had to be amended since the Carrier agreed to pay pro rata for November 3, 1983. This error was later corrected without jeopardy to the Claim (see Third Division Award Nos. 20841 and 25061 for precedent for resolution of comparable issues).

The Rules at bar are the following:

"Rule 40 BEGINNING OF THE WORK WEEK

The term 'work week' for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work, and for unassigned employes 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 employe 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 employes 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 employes 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 Claimants held various positions with the Carrier at the time of the Claims, including that of Trackman, PRS; Welder Helper, PRS; EWE-B-PRS; Welder, PRS, and Foreman, PRS. All were members of the Carrier's Panel Renewal System, as noted above, and it was the Organization's contention that:

"...once the 'work week' for the PRS unit commenced on October 31, 1983 the assigned employees in that unit were entitled to three consecutive rest days, once they had worked four days, before their assigned hours and work days could be changed."

In its first level denial of the Claims, treated thereafter as one case because of the similar nature of the Claims, the Senior Engineer stated the following:

"In accordance with Rule 90-A the Organization was advised of the Carrier's intent to change the work week of the Panel Renewal System from Monday through Friday to Friday through Monday. Inasmuch as this change became effective (on) November 4, 1983, and the Claimants were given a rest day on November 3, 1983, and compensated at the punitive rate of pay on November 4, 1983 since, through this schedule change, two (2) consecutive rest days could not be provided. Thus the Claimants were required to work on an assigned rest day and were compensated accordingly."

The substance of this case is similar to that of Third Division Award 26518 which references a comparable dispute between the same parties which has been studied and ruled upon by the Board. This Claim has, however, a number of idiosyncrasies. First of all the Carrier paid part of the original Claim by paying the Claimants pro rata for November 3, 1983. In its correspondence to the Organization dated October 24, 1983, the Carrier states:

"...November 3, 1983 was a regularly scheduled work day in the work week being changed and Claimants were advised to observe a rest day for which they received no compensation...(but since) November 4, 1983 was a regularly scheduled work day in the work week which was established...we are arranging payment to the Claimants of five hours each at their applicable rate of pay effective November 3, 1983 which payment constitutes a day's pay for November 4, 1983 minus the overpayment for November 4, 1983..." (Emphasis added)

This had the effect of making the new calculation of the relief under the original Claims equal to overtime for November 4-6, 1983, minus the pro rata for those days which had been paid to the Claimants by the Carrier. The Carrier reckoned November 4-6, 1983, as the first three days of a new work week. Relief now sought is equal to fifteen hours at pro rata. Secondly, the relief requested is factually applicable to all of the Claimants only if, in fact, they worked as directed by the Carrier without voluntary absences. The record shows that seven of the Claimants did take voluntary absences from duty during the time frame in question. These Claimants are G. Addison, A. Affonsa, W. Allison, K. Briscoe, W. Crook, H. Douglas and M. O'Donnell. Relief requested for them must, therefore, be calculated accordingly.

The record shows that the Carrier admits that it required the Claimants to work one work week which ran from October 31, 1983, through November 3, 1983, and that it required the Claimants to immediately begin another work week which started on November 4, 1983, through November 7, 1983. Carrier's correspondence dated October 24, 1983, which is cited in the foregoing explicitly outlines the chronological relationship between the two work weeks. This is not a fact in dispute. What is in dispute is whether November 4-6, 1983, should have been rest days or not. The Carrier's defense, in final analysis, of why these three days were not rest days rests on the privileges it states that it has from Rule 32. 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."

The same conclusion applies here as was applicable in Third Division Award 26518. In that Award the Board stated the following:

"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 '...(e)xcept as otherwise provided in this Agreement....'"

The Agreements were violated. Accordingly, Claimants E. Dickson, K. Harris, A. Plant, W. Siwarski, N. Welsh, G. Wright, J. Wright and G. Young shall each be paid the difference between the overtime and pro rata rates for 10 hours each day November 4-6, 1983. Whether the other seven Claimants who had voluntary absences during the time frame under consideration are to receive the same relief is to be determined by a joint check of the records by the Carrier and the Organization. If one of those Claimants was absent one day during his work week, he is entitled to the difference between the overtime and pro rata rates for 10 hours; if absent two days, the difference for 5 hours; if absent three days, he is entitled to no further compensation.

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.

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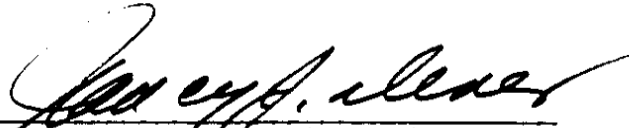
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A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:

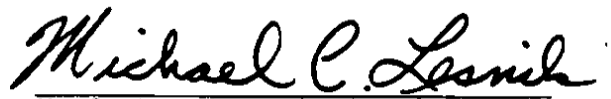

Nancy J. Beyer - Executive Secretary

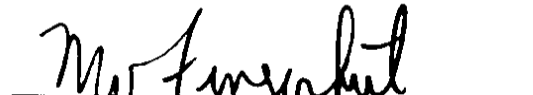
Dated at Chicago, Illinois, this 9th day of September 1987.


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