

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc. (Seaboard System Railroad)

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

(1) The Agreement was violated when the Carrier deviated from the scheduled assigned work days of System Rail Gang 5X11 on March 19 and 28, 1985 [System File 5X11-84-45/12-38(85-302) I].

(2) As a consequence of the violation referred to in Part (1) above each of the employes assigned to System Rail Gang 5X11 on March 19 and 28, 1985 shall:

'... be allowed ten (10) hours pay at their respective overtime rates of pay for work performed on March 19, 1985 and ten (10) hours pay at their respective straight time rates of pay for time they were not allowed to work as scheduled on March 28, 1985.'

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Prior to February 1, 1985, Carrier posted a bulletin with the tentative schedule of work for the months of February, March and April of 1985 for System Rail Gang 5X11. All the Claimants herein were assigned to that gang at the time this dispute arose. That work schedule contained, inter alia, provisions that March 19 was an off day for the gang and further that the second half of March began with 10 hours scheduled for March 20 and ended with 10 hours scheduled for March 28, 1985. The gang is a System Floating Force operating out of camp cars and covers a very large territory formerly the Seaboard Coast Line.

On the morning of March 14, 1985, the System Rail Gang Foreman advised all members of the gang that they would be required to report for work on March 19, which had been a scheduled off-day, and further that they would not work on March 28, 1985.

The parties had signed a Memorandum of Agreement on April 13, 1971, which provided:

"IT IS AGREED:

That in the application of Rule 38, Section 1, System Forces, in making up time for the purpose of accumulating rest time for longer consecutive rest periods, may elect, under the provisions of Section 2, to work up to ten (10) hours on any calendar days to the extent that the total hours worked in each half month, at no additional expense to the Company, are the equivalent of the straight-time work hours therein."

Also relevant to this matter is the following Rule:

"RULE 38
WEEKEND VISITS HOME

Section 1

Employees stationed in camp cars will be allowed, when in the judgment of Management conditions permit, to make weekend visits to their homes. If employees cannot by using regular train service after completion of work on the last day of the work week, arrive home within a reasonable time and return to their camps on the first day of the succeeding work week in time for regular service, they will be allowed to make up time during the week in order to do this, provided that not more than two (2) hours shall be made up on any one day and at no additional expense to the Company. Free transportation will be furnished over Company lines where service is available, consistent with the regulations of the Company, and any time lost on this account will not be paid for. The total time worked each day must be recorded in the time book on the day worked.

Section 2

All the men in the gang must observe the same hours. The wishes of a majority of the men in the gang (the Foreman included) shall prevail on the question of working make-up time. Any make-up time is subject to the concurrence of the Division Engineer or Engineer of Bridges."

The Claim herein was filed on May 22, 1985.

The Organization maintains that Carrier violated the 1971 Memorandum Agreement in that the schedule was changed without the concurrence of members of the gang. By this unilateral action, according to the Organization the employees were required to work on their rest day and did not receive the appropriate time and one-half rate of pay for that day. In addition, it is averred that by the same unilateral change, the employees were deprived of their contractual right to work a regularly scheduled (posted) day, namely March 28, 1985. As a further point, the Organization cited the provisions of Paragraph (g)(8) of Rule 20, which provides:

"(8) If the parties are in disagreement over necessity of splitting the rest days on any such assignments, the Carrier may nevertheless put the assignments into effect subject to the right of employees to process the dispute as a grievance or claim under the rules agreement, and in such proceedings the burden will be on the Carrier to prove that its operational requirements would be impaired if it did not split the rest days in question and that this could be avoided only by working certain employees in excess of five days per week." (Emphasis added)

In this context, the Organization cites Third Division Award 13834 relating to Carrier's operational requirements and the changed schedule. A host of other Awards were cited by the Organization in support of its positions.

Carrier takes the position, initially, that the Claim is procedurally deficient. First it is alleged that the Claim was amended and is not the same Claim initially filed by the Organization. Further, the Claim was filed on May 22, some 69 days after the act complained of: namely the day the schedule change was announced, March 14, 1985. As a further procedural point, Carrier insists that the Organization has failed to cite any Agreement Rule as having been violated.

On the merits, the Carrier argues that the Organization has failed to meet its burden of showing that Carrier's actions were in violation of the Agreement. In this instance, Carrier argues that operational needs required the rescheduling of the rest day. This has not been refuted by the Organization. Carrier also notes that the new schedule did not result in any member of the gang losing work opportunity or compensation as a result of the new rest day schedule. Carrier insists that it is its prerogative as well as its obligation to determine the most efficient utilization of its resources, including manpower, so long as that right is not restricted by the Agreement. In this instance, it is maintained that Carrier acted properly and responsibly and the Claim is without merit.

With respect to the procedural issues raised by Carrier, the Board finds that they do not have merit. The Claim for rest day pay was filed within the time limits, following the gang's receipt of their pay checks (see Third Division Award 23589). Further, the Claim is the same Claim as that filed on the property and it does indeed cite Rules which the Organization believes were violated. Also, this point was not raised by Carrier during the handling of this matter on the property (see Third Division Award 25966).

Carrier makes the point that the posted schedule was termed "Tentative." However, there is no indication that any other schedule was posted, nor was there any other deviation from that schedule than that being contested herein. Significantly, Carrier was indeed restricted in the exercise of its managerial prerogatives by the Agreement: in particular the Memorandum Agreement of April 1971. It is further noted that Carrier failed to ever, during the handling of this dispute, specify what the operational needs were which dictated the changes.

There have been a host of Awards dealing with this issue (or closely related disputes). The Board relies in particular on Third Division Awards 7324 and 8868. In this instance, there was a violation by Carrier and the Claim must be sustained. However, the compensation shall be limited to one-half time for March 19 as well as straight time for March 28, 1985.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1990.