

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29542
Docket No. MW-29742
93-3-91-3-100

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance
(of Way Employes
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when, effective December 4, 1989, the Carrier changed the work week of Gangs 2893 and 2905 from ten (10) hours per day, four (4) days per week (Monday through Thursday) to eight (8) hours per day, five (5) days per week (Monday through Friday) without serving a fifteen (15) day advance notice.
2. As a consequence of the aforesaid violation, each employee assigned to Gang 2893 or 2905 from December 4 through December 18, 1989 shall be allowed eighteen (18) hours of pay at their respective straight time rates and sixteen (16) hours of pay at their respective time and one-half rates."

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 waived right of appearance at hearing thereon.

On Monday, December 4, 1989, a Carrier Supervisor informed the employees working in Palestine Division Gangs 2893 and 2905 that they were to start working eight hours per day, five days per week effective immediately, and without giving a fifteen day notice. Prior to this time, the employees in these gangs worked four days, per week, ten hours each day.

The Organization filed a Claim, alleging the Carrier violated the Agreement by failing to give the employees of Gangs 2893 and 2905 fifteen days notice of the change. To support its contention, the Organization points to the Memorandum of Agreement signed on August 7, 1974, which states:

"9. A four (4) day work week on an individual gang established pursuant to paragraph 1 of this Agreement may be terminated by the serving of a 15-day notice by a majority of employees working in such gang or by the District Engineer having supervision on the district where such gang is working."

In response to the Organization's argument that it violated the Agreement by failing to provide a 15-day notice before changing from a four-day workweek, ten hours per day, to a five-day workweek, eight hours per day, the Carrier acknowledges that the change occurred, but maintains that some of the Claimants bid on these gangs and were assigned to the positions after reviewing bulletins which clearly stated that the gangs were working eight-hour days with Saturday and Sunday as rest days. The Carrier asserts that the Organization acquiesced to this change because it failed to file an exception at the time the bulletins were posted.

The Organization argues that whether any of the Claimants bid on jobs that were posted as eight-hour days, five days a week, is of no relevance. What is of importance, according to the Organization, is that the majority of the Claimants had elected to and did establish a work week of four days, ten hours per day, in accordance with the Agreement, and that the Carrier violated this Agreement. The Organization denies that it acquiesced to the change in workweek.

The Carrier contends that the Claimants were fully employed throughout the claim period, therefore, they did not experience any wage loss. Further, the Carrier maintains that by working a five-day workweek, eight hours per day, the Claimants received overtime compensation they would not have received had they been working ten-hour days. The Organization asserts that the payment of overtime to Claimants on some days when they worked more than eight hours cannot validly be construed to excuse or mitigate the Carrier's violation of the Agreement. Further, the Organization

contends that the Carrier increased its liability toward the Claimants when the Claimants were required to work more than forty hours each week by being required to work eight hours on Friday's.


The Carrier asserts that the claim is excessive. The Carrier points out, first, that there is nothing in the Agreement which requires that a penalty be paid if a violation occurs. Second, the Carrier argues that the Organization's claim is excessive because at least two employees bid on the positions knowing they were bidding on a five-day schedule; and because seven Claimants were on Leave of Absence, while two other Claimants were on vacation during the claim period. Third, the Carrier asserts that the Claimants were compensated eight hours at the straight time rate on the days the Organization contends were rest days; therefore, the maximum Claimants could be awarded for those days should be eight hours at the half-time rate. The Organization submits that the Board is not barred from sustaining the instant claim notwithstanding the Claimants were working and the Agreement does not mention a penalty for such violation.

The Board finds that the Carrier violated the August 7, 1974 Memorandum of Agreement when it unilaterally went to a five-day week without serving a fifteen-day notice. The remedy shall be constructed in the following manner: For each Claimant, a determination shall be made of the daily earnings the Claimant would be entitled to receive on the basis of ten hours per day, four days per week. For each fifth day worked during the workweek, Claimant would be entitled to pay at the time and one-half rate. From such entitlement, the Carrier can deduct the actual earnings received by the Claimant on that day. The Carrier also may reduce its liability with respect to any Claimant that Carrier can demonstrate was not available for work on one or more of the Claim dates.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois this 9th day of March 1993.