Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33150
Docket No. SG-33376
99-3-96-3-882

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Wheeling & Lake Erie Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Wheeling & Lake Erie Railway Co. (WLE):

Claim on behalf of T. Wisnoski, S.F. Smith, C.H Morgan, G.J. Remenaric and J.J. Gresh for payment of eight hours each at the time and one-half rate for each day after August 24, 1995 that they are required to work in excess of four days per week, account Carrier violated the current Agreement, particularly Rule 5, when it refused to allow the Claimants to have a work week of four ten-hour days. General Chairman's File No. 231/951018A. BRS File Case No. 10056-WLE(S)."

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 were given due notice of hearing thereon.

When this claim arose Claimants were the five members the Carrier's Signal Gang headquartered at Brewster, Ohio. It is not disputed that all of the Claimants signed and presented to Carrier's Roadmaster Brown written requests dated August 24, 1995, reading as follows:

> "I . . . , working on the signal gang for the Wheeling and Lake Erie Railroad Company, headquartered at Brewster, Ohio, am requesting by contract that I work a four (4) ten (10) hour day work week with (3) three consecutive days off.
>
> Understanding it takes a majority in the gang to exercise Rule No. Five (5) - Optional Work Period, accept this as my part of the majority vote needed to work a four (4) ten (10) hour day work week."

The record shows that Carrier denied these requests but throughout handling on the property provided no reason for doing so.

The contract provision relied upon by Claimants in making the above-referenced request in August 1995 and which this claim alleges Carrier violated, reads as follows:

"RULE NO. 5 - OPTIONAL WORK PERIODS

A. Employees at the option of the majority in the gang or at the request of the Carrier may work four (4) ten (10) hour days with (3) three consecutive days off or eight (8) ten (10) hour days with 6 (six) consecutive days off at the pro rata rate.

B. If this rule is used to change an assigned employees work week, the employee will be permitted to exercise his displacement rights."

The record shows that from the inception of the Agreement this Signal gang has worked either five eight hour days per week or four ten hour days per week, in accordance with Rule 5. Because this contract provision is unusual and the language requires interpretation, it is informative to consider the past practice of its application, as well as any other indirect evidence of the mutual intent of the Parties.

Before and after 1995, the four ten-hour day work weeks occurred during the period of time in which Daylight Savings Time is in effect, *i.e.*, generally between early

April and late October, apparently by joint preference of the employees and the Carrier. In 1995, however, the Signal Gang did not go to a four ten hour day work week but, rather, remained on an eight hour a day, five days per week, schedule throughout the year.

For reasons which have never been fully articulated, Carrier did not initiate the seasonal change-over in April 1995. Moreover, it is not disputed that Carrier declined to make the conversion after the members of the Signal Gang filed their written requests, supra, without providing any reason. Because the Carrier had refused the Claimants' August 24, 1995 request to go on a four day per week schedule, the Organization's General Chairman filed this claim, by letter dated October 18, 1995, alleging a "continuing violation" of Rule 5.

In denying the claim on the property, the Director Human Resources did not provide the reason why Carrier did not honor the request for the "Optional Work Period" in 1995 but he did articulate the following well-reasoned explanation of the intent of Rule 5:

> "As you are well aware, the intent of Rule 5 is to provide the employees, as well as the Carrier, a means to get around the provisions of Rule 3 (which provides that the work week will be five (5) or six (6) days) if it is mutually beneficial to do so, it gives neither the employees nor the Carrier the unilateral right to go to a four (4) day work week. In other words, if the employees desire a four (4) day work week and the Carrier has no objections, then Rule 5 provides the agreement avenue to deviate from the provisions of Rule 3 and, likewise, the same would apply if the Carrier desires the employees to work a (4) day week." (Emphasis added)

If one concurs that by mutual intent Rule 5 gives neither the employees nor the Carrier the unilateral right to go to a four day work week, it does not follow that it gives either Carrier or the employee the unilateral right arbitrarily and without any explanation to veto a colorably reasonable request by the other to go to a four day work week.

The record shows that before and after 1995, Carrier or the employee (or both together) have initiated, without stated objection by either, a conversion to four day work weeks during the annual Daylight Savings Time season; followed by a conversion back to the normal five day work week schedule at the end of the annual Daylight Savings Time season. Under this accepted practice of administering Rule 5 before and

after 1995, Claimants were entitled to at least the courtesy of an explanation if Carrier had some valid reason for withholding for the 1995 Daylight Savings Time season its concurrence with the consistent practice. No such explanation was ever provided in handling on the property and at the Board level Carrier merely asserted unspecified "operational considerations." In the facts and circumstances presented, we find that Carrier's unilateral and unexplained veto of their August 24, 1995 requests without rhyme or reason was indeed violative of the mutual intent of Rule 5.

The Organization's claim for damages is excessive and disproportionate to the scope of the proven violation. The appropriate remedy is to direct Carrier to compensate Claimants C. H. Morgan, G. J. Remenaric and J. J. Gresh four hours pay for each work week between August 24, 1995 and the end of the 1995 Daylight Savings Time season. [It is noted that Claimants T. Wisnoski, and S. F. Smith resigned from Carrier's employment while this claim was pending and each executed full and final releases of any and all claims against Carrier.]

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of March 1999.