

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 34181
Docket No. MW-32719
00-3-96-3-23

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned Trackman (Flagman) P. Swetlik a tour of duty with rest days of Friday and Saturday by Advertisement No. 020-CHI-0694 dated June 15, 1994 and effective June 26, 1994 (System File BMW-TC-241 NRP).
- (2) As a consequence of the aforesaid violation, Mr. P. Swetlik shall be allowed pay at his applicable overtime rate for all services rendered on each Sunday subsequent to and including June 26, 1994 and he shall be allowed eight (8) hours' pay at his respective straight time rate for each Friday the Carrier denied and denies him the right to work.”

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.

The facts at bar are clear and undisputed. The Carrier bulletined a trackman position by Advertisement No. 028-CHI-0694. That position bulletin of June 15, 1994 was awarded to the Claimant. The Claimant worked the position from June 26, 1994 until it was abolished on May 1, 1995. Importantly, the Organization alleges violation of Rules 9 and 10 in that the position had a tour of duty of 10:00 P.M. to 6:30 A.M. and worked daily with rest days of Friday and Saturday.

The Rules central to this dispute are as follows. Rule 9 (Hours of Service) and Rule 10 (Shifts, Starting Time and meal Periods) state:

“Rule 9

Except as provided herein or in Rule 29, employees will be assigned to positions scheduled to work eight (8) hours per day exclusive of meal periods, five (5) days per week with two (2) consecutive rest days. On position the duties of which can reasonable be met in five (5) days, the rest days will be Saturday and Sunday.

Rule 10

One, two or three shifts may be established where necessary to meet service requirements. The starting time of any shift or position may be changed on thirty-six (36) hours notice to the employee effected (sic). Employees working single shifts regularly assigned exclusively to day service will start work between 6:00 a.m. and 8:00 a.m. The starting time for employees assigned to a second shift will be according to requirements. Where three shifts are regularly established no shift will have a starting time between 12:00 o'clock midnight and 6:00 A.M.”

The Organization alleges that the Rules clearly mandate that “on position the duties of which can reasonably be met in five (5) days” the Claimant will be assigned Saturday and Sunday as rest days. The Claimant was not. The Organization argues that the Claimant worked his trackman (flagman) position five days and therefore the Carrier violated Rule 9. Likewise, the Claimant worked a one shift position and the starting time as per Rule 10 was to be between 6:00 and 8:00 A.M. The Organization

requests compensation of eight hours straight time pay for each Friday the Claimant was not permitted to work, but was instead assigned as a rest day. It further requests overtime pay for each Sunday he is required to work, while only being paid at the straight time rate of pay.

The Carrier argues that the language of Rule 9 support its actions. In fact, the Carrier maintains it has an Agreement with Union Switch & Signal allowing them to set an appropriate schedule to perform work on an Interlocking project. The position provides the contractor flagging protection. The nature of the construction project requires shutting down sections of the railroad interlocking. The Carrier argues that the work schedules "create optimum work windows allowing for higher productivity without impeding railroad traffic and keeping costs down." It did not violate the Agreement in that the flag protection "could not reasonably have been met Monday through Friday during daylight hours because the contractor was unable to schedule his work during those days and hours." The Carrier contends the claim lacks merit and is excessive.

Central to the interpretation of Rule 9 is the phrase "On positions the duties of which can reasonably be met in five (5) days, the rest days will be Saturday and Sunday." The Carrier argues that the Board should interpret this to permit a schedule for a position to be created which is different due to the needs of an outside contractor, higher productivity, "costs" and other factors. There is nothing in the language of the Rule that includes exceptions due to a contractor's operational requirements. Nor do we find an exception for costs, higher productivity or railroad traffic. We cannot by means of an award create exceptions not written into the language of an Agreement. The only exception herein is that the "duties" can reasonably be met in five days. It is a five-day position and the duties of the position can be met within five days. Thus specifying this exception excludes all others by inference (Second Division Award 12025). In such a case, the parties negotiated a proper tour of duty and the Carrier violated the Agreement bargained between itself and its employees.

With respect to the issue of remedy, the Carrier argues that the claimant was properly paid and suffered no loss of compensation. It maintains that the request is excessive as the Claimants are not entitled to additional compensation. The Board disagrees. The Claimant worked his off day of Sunday which is best viewed as due overtime compensation. For each Sunday worked the Claimant is to be compensated the difference between his straight time and overtime rate. For not being permitted to work

a day (Friday) when he should have been allowed to work under the Agreement, the straight time rate of pay is ordered (Third Division Awards 27848, 27751, 26519).

AWARD

Claim sustained.

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 20th day of July, 2000.