

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35025
Docket No. MW-32780
00-3-96-3-24**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(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) J. Mims a tour of duty with rest days of Friday and Saturday by Advertisement No. 040-CHI-1094 dated October 5, 1994 and effective October 16, 1994 (System File BMWE-TC-245 NRP).**
- 2. As a consequence of the aforesaid violation, Mr. J. Mims shall be allowed pay at his applicable overtime rate for all services rendered on each Sunday subsequent to and including October 16, 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.

On October 25, 1994, the Organization filed a claim on behalf of the Claimant, alleging that the Carrier violated Rules 9 and 10 of the parties' Agreement. The Claimant bid on and was awarded a Trackman (Flagman) position on Advertisement No. 040-CHI-1094, dated October 5, 1994 and effective October 16, 1994. The tour of duty for the position was 10:00 P.M. to 6:30 A.M., with rest days of Friday and Saturday.

The Organization argues that the position assigned the Claimant was a single shift, five-day position which, according to Rules 9 and 10, required that the Claimant have Saturdays and Sundays as the designated rest days and a start time of work between 6:00 A.M. and 8:00 A.M. The Organization contends that those requirements were not met by the Carrier and that the Claimant is entitled to be paid the difference between the overtime and straight-time rate for the hours of his tour of duty that he worked on Sundays and eight hours of straight-time pay for each Friday that the Carrier suspended the Claimant's work, commencing October 16 until November 23, 1994, when the Claimant was removed from his position as a result of his disqualification. The Organization argues that the Board has issued monetary Awards in similar instances involving similar Rules and the Carrier. The Organization also argues that the Carrier be required to re-advertise the position in question in compliance with the Agreement. The Organization further maintains that the Carrier's alleged operational necessity and work schedule argument cannot be used to abrogate the Agreement and validly be considered an exception to the clear terms of Rule 9. Lastly, the Organization contends that Rule 29, which is the only exception to five-day positions being assigned Saturday and Sunday rest days, has no valid application to the case at hand.

The Carrier denied the claim. The Carrier contends that the Claimant's Trackman/Flagman position was within a contractor protection gang providing protection for contractors working in the Chicago area at night and that the current applicable Agreement specifies the only time a position other than daylight may not commence is between the hours of midnight and 6:00 A.M. The Carrier argues that since the Claimant's position began at 10:00 P.M. each day, no violation of Rule 10

occurred. In addition, the Carrier argues that the nature of the work that the Claimant performed required him to work the same schedule as the contractor or project he was protecting and it was reasonable to expect the Claimant to commence work at the same time. The Carrier argues that the Organization's narrow reading of the Rules would place an unreasonable restraint on the Carrier's ability to provide protection to contractors working on the Carrier's property when their schedules do not coincide with the provisions of the labor Agreement. The Carrier argues that the contractor's work schedule was dictated by track availability and, thus the duties of the position could not reasonably have been met Monday through Friday. The Carrier maintains that the contractor designed its work schedule to insure maximum efficiency and productivity. Therefore, the Carrier argues that no violation of Rule 9 occurred since the Claimant's work week consisted of five days per week with two consecutive rest days, in accordance with Agreement requirements. The Carrier also maintains that the Claimant was fully compensated for the work he performed, which amounted to 40 hours per week in accordance with the current Agreement, and suffered no loss of compensation. The Carrier further contends that there is no need to re-advertise the position in question as it already had been done so in accordance with the current Agreement.

The parties being unable to resolve the issues at hand, this matter came before the Board.

The Board reviewed the record in this case, and we find that the Organization has not met its burden of proof that the Carrier violated the Agreement when it assigned the Trackman (Flagman) a tour of duty with rest days on Friday and Saturday. Therefore, the claim must be denied.

The record reveals that the job was advertised for a Flagman to work between the hours of 10:00 P.M. and 6:30 A.M., with rest days of Friday and Saturday. The reason for this was that the flagman was to protect a subcontractor that would be performing work overnight on the Carrier's tracks in order to cause the least disruption to the Carrier's traffic. It would make no sense for the Carrier to place a Trackman during regular working hours when the subcontractor whose work was being protected by his flagging duties would be working overnight. In this case, Amtrak supported the contractor's schedule and provided flagging protection for the contractor's employees. Although the Rule calls for rest days on Saturday and Sunday when the duties can be reasonably met in five days, the Board finds that these duties

could not be reasonably met in the usual five days and, therefore, the rest days had to be different than called for by the Rule.

The Carrier made an effort to utilize its own forces which are made up of Organization members to provide the flagging for the subcontractor. Consequently, there has to be some flexibility on the part of the Organization to allow that work to take place within the current Rules.

The Claimant was properly paid at the straight-time rate for all of the hours worked on the advertised assignment. Any additional pay would be excessive and unsupported by the Agreement.

For all of the above reasons, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 25th day of October, 2000.

LABOR MEMBER'S DISSENT
TO
AWARD 35025, DOCKET MW-32780
(Referee Meyers)

The Majority clearly failed in its responsibility to review and properly render a decision in this docket. The facts and a prior award of this Board, involving these parties and an identical situation, were ignored when the Majority issued its erroneous award to further deprive the Claimant of his contractual rights. This award is palpably erroneous and should not be considered as precedent.

While the Majority is correct when it stated that Rule 9 (Forty-Hour Work Week) gives the Carrier some discretion in the establishment of work weeks and rest days, the issue joined in this case simply did not comply with any provision of the rule. If the Carrier desired to operate a position outside of the clear and unambiguous language of the rule, it was contractually obligated to discuss the matter with the General Chairman. Instead, the Carrier ignored its responsibility to discuss the matter and simply plowed ahead with its plan to operate a position outside the parameters of the rule. Not only did the Majority endorse the Carrier's improper assignment of the position in question, it ignored a recent award of this Board, involving these parties, that correctly decided an identical dispute. In Award 34181, the Board held:

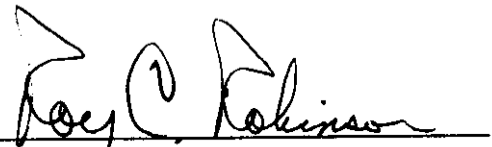
"Central to the interpretation of Rule 9 is the phrase 'On positions the duties of which can reasonably be met in five (5) days, the rest days will be Saturday and Sunday.' The Carrier argues that the Board should interpret this to permit a schedule for a position to be created which is different due 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."

As it alleged in the above-cited case, the Carrier asserted operational difficulties. However, it will be noted that such mitigating factors cannot validly serve to alter the clear language of Rule 9. As mentioned above, this is especially true where, as here, the Carrier completely bypassed the General Chairman when it forged ahead with its plan to operate a position outside the parameters of Rule 9.

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Therefore, I dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson", written over a horizontal line.

Roy C. Robinson
Labor Member