Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36722
Docket No. MW-36281
03-3-00-3-449

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood

1) The Agreement was violated when the Carrier improperly changed the work week of Omaha Section Gang 4883 from a Monday through Friday work week with Saturdays and Sundays designated as rest days to a Sunday through Thursday work week with Fridays and Saturdays designated as rest days, beginning Sunday, February 21, 1999 and continuing (System File D-9926-1/1191270).

(2) The Agreement was violated when the Carrier improperly changed the work week of Council Bluffs Section Gang 4751 from a Monday through Friday work week with Saturdays and Sundays designated as rest days to a Tuesday through Saturday work week with Sundays and Mondays designated as rest days, beginning Monday, February 22, 1999 and continuing (System File D-9926-2/1191271).

(3) As a consequence of the violation referenced in Part (1) above, all employes assigned and/or who will be assigned to Section Gang 4883 shall now be allowed an additional eight (8) hours at their respective straight time rates for each Friday they were denied their right to work and the difference between the straight time rate they received and the time and one-half rate to which they were entitled for each Sunday beginning Sunday,

February 21, 1999 and continuing until the violation is corrected.

(4) As a consequence of the violation referenced in Part (2) above, all employes assigned and/or who will be assigned to Nebraska Division Gang 4751 shall now be allowed an additional eight (8) hours at their respective straight time rates for each Monday they were denied their right to work and the difference between the straight time rate they received and the time and one-half rate to which they were entitled for each Saturday beginning Monday, February 22, 1999 and continuing until the violation is corrected."

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.

This case involves the Carrier's unilateral scheduling change of two Section Gangs from a Monday through Friday workweek with Saturdays and Sundays designated as rest days (Omaha Section Gang 4883) to a Sunday through Thursday workweek with Fridays and Saturdays designated as rest days, beginning Sunday, February 21, 1999 and continuing; and from a Monday through Friday workweek with Saturdays and Sundays designated as rest days (Council Bluffs Section Gang 4751) to a Tuesday through Saturday workweek with Sundays and Mondays designated as rest days, beginning Monday, February 22, 1999 and continuing. For more than 50 years prior to the last week of February 1999, when the Carrier implemented the described schedule changes, the positions on these two gangs had

been regularly assigned to five day workweeks, Monday through Friday with Saturdays and Sundays designated as rest days.

In staking out their respective positions in this matter, each of the Parties cites and relies on different portions of Rule 26, which indisputably emanates from the Emergency Board created October 18, 1948 (NMB Case A-2953) and the Forty Hour Work Committee (1949). See BMWE and Union Pacific Railroad Company Special "Work Week" Arbitration Award (A. T. Van Wart, June 8, 1989) and Third Division Awards 6502 and 11370 cited therein. Thus, the confronting claim presents issues which are hardly matters of first impression in this industry because during the last 50 years a legion of precedent decisions establish the principles which govern proper disposition of the claim.

In that connection, after an exhaustive review of the arbitral history, Special Board of Adjustment No. 1107, Award 1 summarized those authoritative precedents, as follows [Rule 17 in that case was virtually indistinguishable from Rule 26 in this case]:

> "These early cases laid down the guiding principle, followed in all of the better-reasoned cases decided in the last forty years, that the language appearing in Rule 17 (a) and (b) creates a rebuttable presumption that existing five-day operations staffed by positions with a Monday-Friday work week and Saturday-Sunday rest days should not unilaterally be changed to seven-day operations with other than Saturday-Sunday rest days. A Carrier invoking the language of Rule 17 (a) and (d) to alter this status quo and justify implementing such a change from five-day Monday through Friday positions to seven-day positions with other than Saturday-Sunday rest days, bears the heavy burden of rebutting that presumption by producing clear and convincing evidence of necessity due to a material change of operational requirements, i.e., a bona fide operational need to make the change.
>
> Typical of this long line of cases is NRAB Award 3-17593 (Gladden, November 25, 1969), which cites Award 7370 (Carter) in concluding as follows:

'We believe Rules 7 (a) and 7 (d) authorized the Carrier to establish seven day positions on positions which had, prior to September 1, 1949, been filled seven days per week. We likewise are of the opinion that this language prohibits Carrier from creating additional seven-day positions absent a showing by it of a material change of operational requirements of the Carrier.'

See also NRAB Award 2-8289 (Kasher, 1980); NRAB Award 3-23461 (Scheinman, 1981); PLB 2166, Award No. 1 (Eischen, 1981); Special Board of Arbitration UP/BLE (Van Wart, 1989); PLB 4104 Awards 2, 3, 9, 10, 11 (Scheinman, 1989); NRAB Award 3-28307 (Lieberman, 1990); PLB 5565, Award 8 (Eischen, 1996). . . ." (Emphasis added)

The principles established in this long line of cited precedent to the facts of the present case leads to the conclusion that the Carrier failed to rebut the presumption because it did not produce clear and convincing record evidence of the operational necessity of changing the Claimants' long-established Monday-Friday five-day positions, with Saturday - Sunday rest days so as to provide seven-day coverage with rest days other than Saturday - Sunday. The primary reasons advanced on the property by the Carrier to justify the change were "management rights," efficiency and avoidance of overtime.

Notwithstanding the holding in Third Division Award 30011, which the Carrier relies upon for equating an understandable management objective of avoiding overtime payments with a bona fide "operational necessity" within the meaning of that term of art in the Forty Hour Work Week Rule, it is well established that avoidance of overtime payments to incumbents of five-day positions for occasionally necessary Saturday - Sunday work is not alone an "operational necessity" sufficient to overcome the presumption discussed supra. See, e.g., Board of Arbitration NMB Case No. 212; Special Board of Adjustment No. 488, Award 35; Third Division Awards 6695, 7370, 14098. 17343 and 19622; Special Board of Arbitration UP/BMWE (Van Wart); Special Board of Arbitration CSXT/BMWE (D. E. Eischen).

Rule 26 and the interpretive gloss applied by a half century of arbitral precedent establish the premise that days off for five-day positions should ordinarily

be Saturday and Sunday, if possible and so far as practicable in accordance with the Carrier's operational requirements. Evidently, such scheduling was possible and practicable for nearly 50 years prior to the rescheduling which gave rise to this claim in February 1999. The presumption in favor of Saturday and Sunday days off may be rebutted by the Carrier's showing that such scheduling was no longer possible and/or practicable due to changed operational requirements. In this case, the Carrier failed to meet that burden of persuasion in handling on the property.

Under the principles established by the overwhelming weight of arbitral authority, supra, the reasons advanced by the Carrier for making the schedule change simply do not rise to the level of material operational necessity sufficient under Section 26 (d) to rebut the imbedded presumption of Rule 26(b) and justify unilateral change of the status quo. As the cited precedents all recognize, railroading has always required 24/7 operations, but for more than 50 years the work required of these gangs was performed Monday through Friday, with Saturday - Sunday rest days. Just as in Award 35 of Special Board of Adjustment No. 488, supra, the record in this case shows that before, during and after the disputed changeover by the Carrier, the work performed remained de facto a five-day operation, despite the Carrier's unilateral de jure declaration that, effective the last week of February 1999, it would henceforth be scheduled and compensated as a seven-day operation.

Based upon all of the foregoing, we conclude that the Carrier did violate Rule 26 of the Agreement when it unilaterally changed the Omaha Section Gang 4883 Monday through Friday workweek with Saturdays and Sundays designated as rest days to a Sunday through Thursday workweek with Fridays and Saturdays designated as rest days, beginning Sunday, February 21, 1999 and continuing; and Council Bluffs Section Gang 4751 from a Monday through Friday workweek with Saturdays and Sundays designated as rest days to a Tuesday through Saturday workweek with Sundays and Mondays designated as rest days, beginning Monday, February 22, 1999 and continuing.

As remedy for that proven violation, the Carrier is directed to compensate the Claimants in an amount equal to the difference between what they actually earned under the contractually invalid schedule and what they would have earned but for the violation of Rule 26.

Specifically, the Carrier shall compensate the employees assigned to these gangs after the invalid change an additional half-hour's pay for each hour worked on the former Saturday - Sunday rest days from and after the dates of the respective February 21 or 22, 1999 changes. As authority for the overtime "make whole" remedial damages for the Saturdays and Sundays covered by these claims, we rely on Third Division Awards 13738, 19947, 25968, 30662, 30987, 31453, 31590, 32107 and Public Law Board No. 2206, Award 52. The Organization's plea for additional straight time damages for the "lost work opportunity" on Mondays and Fridays covered by these claims is not persuasive. In short, we concur with the majority of reported decisions which hold that the appropriate rate for calculating damages in such cases is the rate the injured employee would have earned but for the violation of Rule 26.

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 17th day of September 2003.

Dissent of Carrier Members
to Award 36722 Docket 36281
(Referee N.F. Eischen)

The instant dispute consisted of two claims, both of which challenged the Carrier's right to establish seven day positions in the Omaha-Council Bluffs area. In one case, the seven day position had off days of Friday and Saturday, in the other Sunday and Monday. The result of the changes was to provide seven day coverage at a location which has heavy train operations 7 days a week and 24 hours per day.

In support of its position the Carrier cited another Award involving the same parties and issues. Thus, in Third Division Award 30111 the Board upheld the Carrier's workweek change on the grounds that the Carrier's evidence had demonstrated the large amount of overtime work that existed on the weekends. It concluded:

> "Whatever the actual cause or causes, this Carrier has demonstrated that Saturday - Sunday track maintenance work is required, and Rule 26 provides a means to meet this need through a staggered work week scheduling."

In response to the contention that the Carrier had not previously changed the work week, the Board concluded:

> "...the fact is that the Carrier has demonstrated 'operational requirements' for Saturday/Sunday work sufficient to permit staggered workweek schedules. This preserved right under Rule 26 cannot be made inapplicable even if the Carrier did not previously exercise this right with these Section Gangs and even if the Carrier reverted to a Monday-Friday workweek for the Section Gangs at a later date."

As demonstrated by the Carrier, the amount of overtime was reduced from an average overtime of 806.2 hours in the six month period prior to the change and 492 hours during the next six months. In addition, Manager Hecker related the extreme difficulty he had experienced in obtaining members of the existing gangs to come in on their off days to handle serious derailments and track defects on the weekends. He concluded: "We still have trouble today getting people to come into work on the weekends, but having a section on duty gives us the help to address some of the problems." Finally, the Carrier attached reports concerning derailments and run through switches during the period which further showed that the operation at the location was 24/7 in nature.

The Carrier pointed out that its action was entirely in keeping with the Board's decision in Award 30011 and the doctrine of stare decisis fully supported its entitlement to a denial Award citing numerous Awards for this proposition. In summary, the Carrier's right to establish seven-day positions is entirely a question of fact. Rule 26 (a) provides that work weeks "may be staggered in accordance with the Company's operational requirements." The Carrier has presented overwhelming evidence that such operational need existed.

Nothing in the Majority's Opinion dealt with the evidence presented by the Carrier. The Opinion is wrong and will not be recognized as precedent.

Martin W. Fingerhut

Bjarne R. Henderson

Michael C. Lesnik

Paul V. Varga