Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37049
Docket No. MW-36150
04-3-00-3-311

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that

(1) The Carrier violated the Agreement when, beginning on Sunday, January 17, 1999 and thereafter, it changed the work week of El Paso Terminal Track Foreman L. Gomez, Jr., Truck Driver C. Price and Trackmen G. J. Houston and A. Moreno from Monday through Friday with Saturdays and Sundays designated as rest days to Sunday through Thursday with Fridays and Saturdays designated as rest days (Carrier's File 1184221 SPW).

(2) As a consequence of the violation referred to in Part (1) above, Claimants L. Gomez, Jr., C. Price, G. J. Houston and A. Moreno shall each be compensated, in addition to what they have already received, eight (8) hours at their respective time and one-half rates of pay for Sunday, January 17, 1999 and each Sunday thereafter, continuing until the work week assignment violation ceases."

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.

Prior to mid-January 1999, the Claimants (the incumbents of Extra Section Gang XG 7363) were regularly assigned to five day workweeks, Monday through Friday, with Saturday and Sunday designated as rest days. So far as the record shows, it is undisputed that the rest days of that Gang had been Saturday and Sunday since at least 1950. The issue in dispute in this case is whether the Carrier violated the Forty Hour Work Week provisions of the Agreement when, effective January 17, 1999, it changed the Claimants' workweek from Monday through Friday with Saturday and Sunday designated as rest days to a workweek of Sunday through Thursday, with Friday and Saturday designated as rest days.

The operative contract language invoked by both Parties in support of their opposing positions is found in Rule 18, which was taken virtually verbatim from the 1949 National Forty Hour Work Week Agreement, and reads as follows:

> "Rule 18
>
> Note: The expressions "position" and "work" used in this Rule 17 refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees.
>
> General (a) There is hereby established for all employees covered by this agreement, subject to the exceptions contained hereafter in this rule, a work week of 40 hours, consisting of five days of eight (8) hours each, with two (2) consecutive days off in each seven (7), the work weeks may be staggered in accordance with the Management's operational requirements, so far as practicable the days off shall be Saturday and Sunday. The foregoing is subject to the provisions of this rule which follows:

'Five-day Positions (b) On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.

* * *

Seven-day Positions (d) On positions which are filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday.

* * *

Deviation from Monday-Friday Week (f): If in positions or work extending over a period of five (5) days per week, an operational problem arises which the Company contends cannot be met under the provisions of paragraph (b) above and requires that some of such employes work Tuesday to Saturday instead of Monday to Friday, and the employes contend the contrary, and if the parties fail to agree thereon, then if the Company nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under the rules agreement.'"

The issue presented by this claim is hardly a matter of first impression in the annals of railroad industry arbitration. No useful purpose would be served in reviewing once again herein the long line of arbitral precedent which has applied an interpretive gloss to the above cited language endorsed by many decisions of the Board. Any interested reader will find such a detailed historical analysis in Third Division Award 35564 and the myriad of cases cited therein. See also Cases 9, 10 and 11 of Public Law Board No. 4104. The following limited quotation from Award 35564 suffices to establish the analytical framework for reaching the correct result in the present 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 15 (a) and (b) creates a rebuttable presumption that existing five-day operations be staffed by positions with a Monday-Friday work week and Saturday-Sunday rest days should not unilaterally changed to seven-day operations with other than Saturday-Sunday rest days. A Carrier invoking the language of Rule 15 (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 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 Third Division Award 17593 which cites Award 7370 in concluding as follows (Emphasis added):

> '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 Second Division Award 8289; Third Division Awards 23461, 28307, 32795; Public Law Board No. 2166, Award 1; Special Board of Arbitration UP/BLE; Public Law Board No. 4104, Awards 2, 3, 9, 10, 11 and Public Law Board No. 5565, Award 8."

When applied to the facts of the present case, fundamental principles established in this long line of cited precedent leads the Board to conclude that the Carrier failed to carry its burden of rebutting the presumption by 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. Aside from rhetoric, there is insufficient probative evidence in this record to support the Carrier's insistence that the challenged workweek/rest days change was necessitated by "material operational changes."

As we pointed out in Award 35564, it is well established that railroading has always been a "24/7" operation and the necessity 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. See, e.g., Board of Arbitration NMB Case No. 212 (Cole); Special Board of Adjustment 488 B&O/BMWE, Award 35 (Lynch); Third Division Awards 6695, 7370, 14098, 17343 and 19622; Special Board of Arbitration UP/BLE (Van Wart). In this case, the Carrier argues the obverse of that theorem, i.e., the primary reason advanced on the property by the Carrier to justify the unilateral change in workweek was a claimed difficulty, bordering on impossibility, of reaching any of the Claimants for occasional emergency overtime calls on Sundays. The sole evidence offered in support of that contention, anecdotal recollections by MTM Caston of having to call "MOP Agreement people" when he could not reach "SP Western Lines people" to take occasional weekend overtime calls is not persuasive of a "material operational change" sufficient to justify implementing the unilateral change from five-day Monday through Friday positions to seven-day positions with other than Saturday - Sunday rest day.

Based upon all of the foregoing, we conclude that the Carrier did violate Rule 18 (a) (b) and (f) [as interpreted by Decision No. 7 of the Forty Hour Week Committee] when it unilaterally and without sufficient operational necessity changed former five day Extra Section Gang XG 7363 positions with Monday - Friday workweeks and Saturday - Sunday rest days to a Sunday - Thursday workweek with Friday - Saturday rest days. As remedy for that proven violation, the Carrier is directed to compensate the Claimants for an additional one-half hour's pay for each hour worked on Sundays on and after January 17, 1999 until the workweek assignment violations ceases. Just as in Award 35564, authority for the overtime "make whole" remedial damages for the Sundays covered by this claim is found in Third Division Awards 13738, 19947, 25968, 30662, 30987, 31453, 31590, 32107 and Public Law Board No. 2206, Award 52.

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 22nd day of June 2004.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 37049 (Docket MW-36150)
(Referee Eischen)

The issue in this dispute was whether the Carrier violated the Agreement when it established a maintenance of way gang at the busy El Paso Terminal with a workweek of Sunday through Thursday with Friday and Saturday as rest days. The gang was in addition to another gang, established at least since 1975, which had a workweek of Tuesday through Saturday with Sunday and Monday as rest days. The operational changes resulting from the merger of the Southern Pacific and the Union Pacific, the inability to obtain the necessary staffing on Sundays, as well as other factors that necessitated the changes were set forth in very great detail in the Carrier's letter dated August 9, 1999. Indeed, the on-property handling by the Organization shows that it did not even attempt, let alone prove, that the operational changes did not require seven-day coverage.

The provisions of the Forty-Hour Workweek Agreement explicitly provide for the action taken by the Carrier. Thus, the relevant portions of the Agreement are found in Rule 18 of the Agreement. Rule 18(a) provides that "work weeks may be staggered in accordance with the operational requirements; so far as practicable, the days off shall be Saturday and Sunday." Rule 18(d) recites: "Seven-Day Positions - (d) On positions which have been filled seven days per week, any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday."

As noted above, for approximately 25 years prior to the change made here, the operational needs of the Southern Pacific at the El Paso Terminal required that one of the two gangs working at the location have a workweek that included Saturday. With the addition of the traffic flow resulting from the merger of the Southern Pacific and the Union Pacific it became obvious that the Sunday operation could not be performed in the absence of a crew having Sunday as a workday. The inability of the Carrier to obtain necessary personnel through overtime was well documented in the statement of Manager Track Maintenance L.G. Caston attached to the Carrier's letter of August 9, 1999.

The Organization argued that the Agreement required the Carrier to consult with the Organization before changing the rest days of the assignment. Rule 18 has no such requirement. Furthermore, as noted by the Carrier in its August 9, 1999 letter, again, without refutation by the Organization, the Carrier had attempted to use employees on an overtime basis to work on their Sunday off day with no success. The Carrier wrote:

> "MTM Caston has advised this office that there had been several instances wherein the Carrier's concerns were conveyed to SPTCo. (Western Lines) BMWE representatives relative to the operational problem which directly resulted from the continued failure of the greater majority of SPTCo. (Western Lines) BMWE 'terminal gang' employees to respond and protect essential emergency repairs which occurred during their rest days. Specifically in that regard, MTM Caston related to this office the discussion of Track Inspector Tommy Vega with your office, wherein

he advised the repeated incidences to which 'Western Lines Terminal Gang' employees had been unreachable or unavailable for required emergency work on their assigned rest days. In response to Mr. Vega's concerns, it is reported that the BMWE General Chairman responded to the effect that '. . . you should be happy that the employees are enjoying their rest days.'"

The Majority describes the Carrier's contentions as "rhetoric" with "insufficient probative evidence." Given the extensive probative evidence supplied by the Carrier in this case, the Majority could have shortened its decision to the statement that Rule 18(a) of the Forty-Hour Workweek Agreement was being repealed via arbitration. Obviously, Rule 18(a) has not been repealed. Equally obvious, this Award cannot stand as valid precedent. We dissent.

Martin W. Fingerhut

Bjarne R. Henderson

John P. Lange

Michael C. Lesnik

June 22, 2004