

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39369
Docket No. SG-39264
08-3-NRAB-00003-050649
(05-3-649)**

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Company:

Claim on behalf of M. A. Bitoni, C. T. Burbank, C. F. Parker, R. J. Parker and J. Spraker, for eight hours at their respective time and one-half rates of pay for the two-day weekend held away from their headquarters point, account Carrier violated the current Signalmen’s Agreement, particularly Rules 36, 80 and Appendix O ‘9-B’, account Carrier held the Claimants away from their assigned territory on their regularly assigned rest days on September 11 and 12, 2004, and failed to pay the required allowance while working at Colton, California: Carrier’s File No. 1412221. General Chairman’s File No. UPGCW-9B-1056. BRS File Case No. 13253-UP.”

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 Claimants are members of Signal Gang 2661, headquartered in Pocatello, Idaho. In September 2004, the Carrier assigned Signal Gang 2661 to perform work in Colton, California, approximately 810 miles away. Members of the gang would be working from 755 to 993 miles from home. In an effort to (1) better utilize the employees productive time (2) to reduce extensive commutes between Idaho and California and (3) allow for additional quality time at home with their families on rest days, the Signal Manager advised the gang that rather than working a five days on/two days off schedule, they could work eight consecutive ten-hour days followed by six consecutive rest days by majority agreement pursuant to Rule 5J (Accumulation of Rest Days) which provides, in pertinent part:

“1. Members of Signal Gangs may, by majority, elect to have their hours of assignment and work days established to work . . . eight (8) ten (10) hour consecutive work days and accumulate six (6) consecutive rest days or twelve (12) ten (10) hour consecutive work days and accumulate nine (9) consecutive rest days. . . .”

According to the Carrier's version of events, one member of Signal Gang 2661 raised Side Letter 9-B to Appendix O prior to the gang agreeing to the compressed workweek, asserting that the Carrier should pay overtime for the gang's former rest days. The Manager replied that in order for the side letter to be applicable, the gang would have to work five days at straight time, followed by two days at overtime, followed by five more days at straight time, followed by two days of rest - in other words, 12 days of eight hours of work and two rest days. Because this was not a palatable arrangement, the gang signed a petition to work eight consecutive ten-hour days followed by six consecutive rest days.

The gang began to follow the new schedule on September 7, 2004. However, by letter dated November 1, the Organization submitted a claim contending that the

Carrier had violated the parties' Agreement. The Organization's version of events is that Signal Manager L. Burden forced the employees to sign the paper agreeing to the compressed schedule by threatening them with an unsavory work schedule, and that the Carrier violated the Appendix 9-B Letter of Appendix O, as well as Rules 36 and 80. According to the Organization, Gang 2661 members were also told by Supervisor Rubio that even if they signed the paper agreeing to the new schedule, they would still get their Appendix O Side Letter 9B "entitlement." The Organization contends that Burden instructed the gang to change their workweek and threatened them with a 12 days on, 2 days off schedule if they did not sign the paper for the compressed work schedule. The Organization asserts that Foreman R. J. Parker's statement makes clear that the Claimants did not freely elect to change their regularly assigned workweek as the Carrier would have the Board believe. The Organization argues that:

"Signal Foreman R. F. Parker stated that on Aug. 23, 2004, Signal Construction Manager Burden told him that his gang was going to work eight days on and six days off. . . . On August 27, 2004, Supervisor Rubio wanted the Claimants to sign a statement indicating that they were willing to work an 8-day-on/6-day-off shift. Supervisor Rubio was advised about the eight hours overtime that would have to be paid to the Claimants for being held out of their headquarters. Supervisor Rubio replied that he would have to talk to Manager Burden about that. No statement was signed at that time. Later in the day, Supervisor Rubio advised the Claimants that Manager Burden would only pay the eight hours of overtime if they would work a 12-day-on/2-day-off schedule. Foreman Parker stated his crew did not want to work a 12-day-on/2-day-off schedule. Foreman Parker stated his crew did not want to work a 12-day-on/2-day-off schedule for eight hours of overtime. . . ."

It is the Carrier's position that Side Letter 9-B of Appendix O ceased to govern Signal Gang 2661 once the gang chose a compressed schedule rather than a schedule of five work days and two rest days. The gang did not work on their scheduled rest days, the Carrier argues, and, therefore, cannot be paid overtime for such days. The Carrier further asserts that Rule 36, cited by the Organization,

applies only to Zone Gangs, and that even the Organization concedes that Signal Gang 2661 is not a Zone Gang. With regard to the Organization's contention that the gang members were somehow "coerced" into signing the petition indicating the selection of an eight days on, six days off schedule, the Carrier points out that Manager Signal Maintenance Burden stated that the gang was asked to work the compressed schedule and even the Claimants' statement substantiated that the gang was asked. The Carrier contends that the Organization's contention that Signal Gang 2661 was threatened into changing its workweek is without merit, that the gang members did not work their scheduled rest days, and that they returned to headquarters at the end of each work cycle.

Key to the resolution of the instant case is which party's version of events is correct. Were the members of Signal Gang 2661 simply asked whether they would rather opt for a compressed week of eight days on and six days off so as to increase the proportion of their time at home to that of their time travelling? Or is the Organization correct in its assertion that the members of the gang were threatened with having to work 12 days on with only two days off in order to force them to sign an agreement to work the compressed schedule?

It is a well-established matter of arbitral precedent that an appellate board such as this Board does not have the authority to resolve factual differences between the parties. The Board finds, therefore, that the evidence in the record in the instant case presents an irreconcilable dispute of fact that the Board is without authority to resolve. The Board is unable to determine from the record whether the Organization or the Carrier's version of events is true and no decisive evidence one way or another has been presented as a matter of record. Without authority to resolve this factual dispute in the Organization's favor, the Board is unable to reach the issue of whether the Carrier violated the parties' Agreement as the Organization alleges. Because the Organization failed to present evidence sufficient to meet its burden of proof regarding the material facts of its claim, the Board must dismiss it.

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AWARD

Claim dismissed.

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 21st day of October 2008.