

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40333
Docket No. MW-40217
10-3-NRAB-00003-070441
(07-3-441)**

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 Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier changed the workdays of Southern District Tie Gang 3807 after June 1, 2006 and continuing (System File MW-06-74/1455955 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimants (employees assigned to Southern District Tie Gang 3807) shall now be compensated ‘. . . for Sixty Six (66) hours each at their respective straight time rate of pay starting from June 2, 2006 through June 7, 2006 and for Seventy seven (77) hours each at their respective overtime rate of pay from June 9, 2006 through June 15, 2006, and continuing.’”**

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 Organization filed the instant claim on the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it changed the workdays of Southern District Tie Gang 3807.

The Organization initially contends that the record establishes that prior to the start of the Ennis Subdivision renewal project at issue, Gang 3807 had voted in favor of and had been granted authority to work a T-1 alternative work schedule. Under this schedule the Gang's scheduled workdays were June 1 through June 8, 2006. The Organization asserts that, as contemplated by Rule 25(k) and pursuant to the parties' past practice, once a gang votes in favor and is authorized to work an alternative work period, then that alternative work period will be observed for the duration of the entire work project. The Organization argues that the Carrier's action of forcing Gang 3807 to change alternative work schedules was a clear violation of the parties' Agreement.

The Organization maintains that the Carrier's defenses are spurious and without merit. Addressing the Carrier's assertion that Supervisor Daniels had reported that the gang had not voted to work a compressed schedule during this project as of June 1, 2006, the Organization submits that the Carrier failed to produce any evidence to support this contention. The Organization further points out that in light of the undisputed facts that the project being performed by Gang 3807 commenced on March 16, 2006, and that the Carrier's own documentation shows that Gang 3807 was working a T-1 alternative work schedule on June 1, 2006, there can be no question that Gang 3807 had already voted in favor of working the agreed-to T-1 alternative schedule for the duration of the Ennis Subdivision tie renewal project. The Organization emphasizes the Carrier's statement regarding a

required gang vote once per project under Rule 25(k) characterizing this as a tacit admission that one vote per project was the common and accepted practice on the property.

The Organization then asserts that the Carrier failed to provide the General Chairman with a copy of the gang's vote, as required by Rule 25(k). The Organization contends that this failure on the Carrier's part constitutes yet another clear violation of Rule 25(k). The Organization also argues that the Carrier's allegations regarding the gang's vote on the T-2 schedule and the gang's continuing to work a T-2 schedule through the end of the project are nothing more than a misguided attempt to disparage the Organization and create confusion.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that Gang 3807 did, in fact, vote to work a T-2 compressed work period starting in June 2006 and continuing until the project was over. The Carrier asserts that contrary to the Organization's position, Gang 3807 never voted for a T-1 compressed work period pursuant to Rule 25(k) prior to the June 1, 2006 vote on the T-2 schedule. On June 1, 2006, the employees were given the opportunity to vote under Rule 25(k) and the majority voted for a T-2 schedule, which then was implemented.

The Carrier contends that nothing in the record demonstrates that the employees had the Agreement right to work June 1 through 8 and then rest June 9 through 15, 2006. The Carrier insists that the June 1, 2006 vote was the first and only vote for the project. It suggests that the Organization may have pursued the instant claim over the wrong period of time, and this claim does not establish a violation of Rule 25(k).

The Carrier points out that the General Chairman never attempted to deny that the June 1, 2006 vote for a T-2 work schedule was taken and provided to him. This fact stands in support of the Carrier's position.

The Carrier then asserts that the gang members voted to work the schedule they observed, and it therefore would be inappropriate to allow these employees additional pay. The Carrier emphasizes that the alternative to voting for a Rule 25(k) work period would be for the employees to work the schedule as assigned by bulletin. The Carrier submits that the gang would not be allowed to work a T-1 schedule without voting for the project and with the concurrence of management.

The Carrier emphasizes that there is no dispute that Gang 3807's members were paid at the overtime rate of pay for all hours worked on June 1, 2006. If the instant claim has any merit, all employees were overpaid on that day. The Carrier insists that it is false that Gang 3807 had the Agreement right to work a T-1 schedule on June 1 through June 8, 2008. The Carrier asserts that the gang members did not vote for such a schedule, and such a vote is the only manner in which these employees could have gained such a schedule.

The Carrier argues that all gang members were paid in accordance with the 40-hour workweek Rule. It contends that none of these employees were shorted any monies as a result of the Rule 25(k) vote, so no monetary harm occurred. It further asserts that the Organization failed to provide any support for its claim that the Claimants were entitled to the requested monetary remedy. The Carrier points out that the Organization never even alleged that the overtime Rule had been violated. The Carrier therefore submits that even if the Agreement was violated, no monetary remedy should be provided.

The Carrier reiterates that Gang 3807's members never voted to work a T-1 schedule under Rule 25(k). The Organization failed to meet its burden of proof in this matter, and it failed to cite any Agreement language that supports its contention that the Carrier was obligated to implement a work schedule upon which employees and management never agreed.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden to prove that the Carrier violated the Agreement when it changed the work days of Tie Gang 3807 after June 1, 2006. Although the Organization argues that the gang had accepted a T-1 schedule, the record only contains one vote by the gang and that vote resulted in the gang accepting a T-2 schedule. The Organization argues that the Carrier failed to supply the "earlier vote sheet" which allegedly demonstrated that the gang had selected a T-1 schedule, but the Carrier states that such a vote never occurred. The Organization offered no evidence other than its allegation that there was an earlier vote and the gang had accepted a T-1 schedule at that time.

It is fundamental that the Organization bears the burden of proof in cases of this kind. The Organization failed to meet that burden of proof in this case. The record clearly demonstrates that the majority of employees voted for the T-2 work schedule, and there was no showing that the election was improper or that there was any other election which had a different result. The record reveals that the Claimants were paid properly in accordance with the T-2 work schedule that they had selected. Consequently, this 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 1st day of March 2010.