

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42254
Docket No. MW-41984
16-3-NRAB-00003-120350**

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff 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 Zone Gang 7977's assigned work week of four (4) ten (10) hour days and three (3) consecutive rest days to a T-1 schedule (compressed half work period with consecutive work days starting with the first calendar day of the payroll period followed by consecutive accumulated rest days) beginning on March 16, 2011 and continuing (System File UPLW418-11/1553834 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Zone Gang employes M. Becerra, J. Morales, B. Morgan, J. Kebert, E. Jackson, J. Hutchens and G. Billington shall now each be compensated ‘ . . . for the difference in pay of straight time to overtime rates of pay for twenty six (26) hours each at their respective overtime rates of pay, including any and all extra overtime each, at full overtime rates of pay on last half of March, and 1st and last half of April, 2011, and on a continuing basis. . . .’”**

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 May 3, 2011, the Organization submitted a claim to the Carrier on behalf of all seven members of Zone Gang 7977 for the difference in pay between their straight time and overtime rates for 26 hours each for work performed during the second half of March (16 hours each) and both halves of April 2011 (eight hours and two hours each, respectively). Beginning March 16, 2011, the work schedule of Gang 7977 was changed from four ten-hour days followed by three consecutive rest days to a T-1 consecutive compressed half work period. The Organization's May 3 letter stated, "Gang #7977 was not allowed Rule 28.(e) and was forced by the Carrier to use Rule 28.(d) Temporary change of schedule"

The following provisions of Rule 28 are pertinent to a determination of this claim:

"CONSECUTIVE COMPRESSED HALF WORK PERIODS

Rule 28.(a) The Carrier may establish by bulletin gangs with an alternative work period of a consecutive compressed half work period. The consecutive compressed half will consist of consecutive workdays that may be regularly assigned with eight (8) or more hours per day (i.e., 8, 9, 10, 11, or 12 hour workdays) and accumulated rest days, with the preference being 10 or more hour workdays except in cases of operational necessity. The Carrier will provide written notice to the appropriate General Chairmen with a description of the operational necessity requiring the eight (8) or nine (9) hour workday schedule. The consecutive compressed half will commence on the first calendar day of the calendar period with scheduled work days followed by consecutive accumulated rest days (T1 schedule) or will begin with consecutive accumulated rest days followed by scheduled work days (T2 schedule). The consecutive compressed half arrangement will equal the number of hours

worked as if the assignment was for a normal half with 8-hour workdays. Accumulated rest days for employees assigned to a gang working a consecutive compressed half arrangement will consist of the remaining days in the payroll period. The work days and rest days of the consecutive compressed half work period may be scheduled on a non-consecutive basis for holidays or governmental regulations.

* * *

(c) Employees working a compressed work period under paragraph (a) will have their workdays and rest days set forth in writing a minimum of five (5) workdays in advance of the beginning of the consecutive compressed half work period arrangement and said written notice will be posted at convenient locations accessible to the employees affected.

(d) Temporary change of schedule

Employees assigned as local supporting crews to a production gang or employees working within the window of a production gang assigned to a consecutive compressed half work period may have their work week schedules changed with seven (7) calendar days' notice (with a copy to the appropriate General Chairmen) for the duration of the project. Notice will include information about the project schedule and when the employees will be returned to their regular work week schedule and shift. The intent of the schedule change is to take advantage of the track curfew and will not result in less than a 40 hour work week and will provide appropriate rest.

Example: The calendar below illustrates the application of this Rule when a local gang working a Monday through Friday eight (8) hour day schedule is assigned to provide support for a production gang working a compressed T1 schedule for one (1) payroll half. The local gang is afforded rest days on the first two days of their normal work week (Monday and Tuesday). The local gang then works the T1 schedule of the production gang, in this example eight (8) days of eleven (11) hours each, due to an eighty-eight (88) hour payroll half.

As the project is completed, the local gang then returns to its schedule on the following Monday, after observing four (4) rest days.

The local gang is compensated forty (40) straight-time hours as required in Rule 25 Work Week, and four (4) overtime hours to compensate for the additional time worked in the week.

Sun	Mon	Tues	Wed	Thurs	Fri	Sat	Hours
29 REST	30 REST	31 REST	1 11 HRS	2 11 HRS	3 11 HRS	4 11 HRS	40 ST 4 OT
5 11 HRS	6 11 HRS	7 11 HRS	8 11 HRS	9 REST	10 REST	11 REST	40 ST 4 OT
12 REST	13 8 HRS	14 8 HRS	15 8 HRS	16 8 HRS	17 8 HRS	18 REST	40 ST

In this example, notice would have been given at least by the 23rd of the prior month (seven (7) days prior to the change of schedule).

(e) Regular change of schedule

Employees assigned by bulletin to a consecutive compressed half work period may have their work period changed by Notice from the Carrier from a T1 to a T2 schedule or vice versa or changed from a consecutive compressed half work period to either a 4-10 or 5-8 work week arrangement or vice versa. For changes from a compressed half work period, the notice shall be at least from the beginning of the payroll period prior to the schedule change. For changes from a work week arrangement, the notice shall be at least from the beginning of the work week prior to the schedule change. Such change will be in effect for a minimum of a payroll period. An employee who has their work period rearranged in this manner will have the privilege of exercising seniority in accordance with Rule 2, upon written notification to his Manager within three (3) calendar days of the notice. The employee may rescind his decision by written notice to the Manager prior to the end of the work cycle. Such exercise of seniority will be granted at the end of the payroll period or work week just prior to the change in schedule.

(g) Except for any distributed hours provided for in paragraph (c) time worked prior to or after the assigned daily hours will be paid at the overtime rate in accordance with the overtime provisions of the Agreement.”

The following provision from Rule 29 - Hours of Service Overtime and Calls, is also pertinent to a determination of this claim:

“(f)

* * *

Work in excess of forty (40) straight-time hours in any workweek will be paid for at one and one-half times the basic straight-time rate except where such work is performed by an employee due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under Rules 27 or 28 of this Agreement.

Employees worked more than five (5) days in a work week will be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work week except where such work is performed by an employee due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under Rules 27 or 28 of this Agreement.”

The Carrier replied to the Organization’s May 3, 2011 claim by letter dated June 27, 2011, stating that on February 24, 2011, “Gang 7977 and the General Chairmen were informed by the Carrier that they were to have their work period changed pursuant to Rule 28(d).” A copy of the February 24, 2011 notice was enclosed. Apparently, the Carrier understood the Organization to be contending that the Claimants were not being paid in accordance with the table included in Rule 28(d) as an example of how an employee working a compressed T1 half work period schedule should be paid. Thus, in its June 27 letter the Carrier stated, “The example given in the agreement is just that, an example. It guarantees that employees will not be shorted any work opportunity and it is not disputed [the] Claimants were not shorted any opportunity in this case.” As evidence that the new assignment was made pursuant to Rule 28(d) and not Rule 28(e), the Carrier stated,

“It is also not disputed that Gang 7977 supported Gang 9102 while it worked on the rail between MP 258 and 223 on the Herrington Subdivision.” The Carrier stated that the claim was declined in its entirety.

The copy of the February 24, 2011 written notice enclosed with the Carrier's letter of June 27, 2011 was addressed to four General Chairmen in different cities and stated as follows:

“Dear Sirs:

This letter is to serve as notice per Rule 28 of the January 1, 2011 Agreement. Gangs 7977 and 7978 currently observe a 4-10 work schedule. On March 16, 2011 they will temporarily be changed to work a compressed T1 work schedule. The change is to allow the gangs to work in support of Gang 9102 while it is installing rail between MP 258 and 223 on the Herrington Subdivision. They will return to their 4-10 work schedules when the project is completed, but no later than June 1, 2011.”

The Organization appealed the denial of the claim by letter dated July 29, 2011. The letter stated that the claim was presented “. . . because the Union Pacific would not allow Rule 28(e) to be applied as was negotiated between the parties and agreed upon.” The fact that the General Chairmen were informed that the work period would be changed pursuant to Rule 28(d), the July 29 appeal letter stated, “. . . does not have anything to do with Rule 28(e).” The February 24, 2011 written notice addressed to the General Chairmen, the Organization asserted, stated that Gang 7977 would return to their 4-10 work schedules no later than June 1, 2011, but as of July 28, 2011, Gang 7977 was still assigned to a T1 work schedule. This was proof, the Organization argued, that the Carrier violated Rule 28 of the Agreement.

The Carrier responded by letter dated September 9, 2011. It stated that the schedule change in question was a “temporary” change pursuant to Rule 28(d), not a “regular” change pursuant to Rule 28(e). This is evidenced, the Carrier asserted, by the notice sent to the General Chairmen because no notice would have been necessary for a regular change of schedule. In answer to the fact noted by the Organization that as of July 28, 2011, Gang 7977 was still working a T1 schedule, the Carrier stated that in June 2011, the Supervisors of Gang 7977 determined that operations would be best served if Gang 7977 continued on the T1 schedule. “Though the schedule was remaining the same,” the Carrier asserted, “. . . the

Carrier did look at this alteration as a 'regular' change of schedule per Rule 28(e).” In conjunction with this “regular” change of schedule, the Carrier stated, the employees were given the opportunity to exercise seniority away from the gang. The Carrier enclosed copies of email correspondence between the Supervisor of Gang 7977 – Barry Hinkle – and Labor Relations management that purported to show this.

In its September 9, 2011 letter the Carrier indicated its understanding that the Organization was requesting payment pursuant to the chart in part (d) of Rule 28 for the entire time that Gang 7977 was observing a temporary change of schedule. The Carrier rejected that position and stated, “The chart within the Agreement was to demonstrate if a Gang was observing a temporary change for only one pay period.” That was not the case here, the Carrier asserted. “The chart does provide guidance on how to work employees when they are starting and ending the schedule change,” the Carrier opined, but “. . . was not to be utilized for the entire duration of a temporary change.” The Carrier argued that its position was supported by the language above the chart, which stated that it illustrated the application of Rule (d) “. . . when a local gang working a Monday through Friday eight (8) hour day schedule is assigned to provide support for a production gang working a compressed T1 schedule for one (1) payroll half.” The Carrier stated that “. . . [t]he purpose of the chart was to ensure employees were not over or under paid when they were observing a temporary change and to allow for proper rest.” The letter concluded that the claim was denied in its entirety.

The Organization replied on December 20, 2011, confirming that the matter was conferenced on November 29, 2011, and responding to the Carrier's letter of September 9, 2011. The letter noted that during the conference, the Carrier was informed that as of August 16, 2011, Gang 7977 was still working a T1 schedule in Dalhart, Texas, extending a yard track. Further, the letter stated, “[O]ur Organization General Chairman discussed this situation with General Director Dominic A. Ring and he said the Carrier will just have to pay under Rule 28(d), because he was not allowing Rule 28(e).” The letter labeled “incorrect” a Carrier statement that “no employee ask[ed] for a cut off under Rule 28(e)” and said that a statement had been received from Claimant M. T. Becerra, a copy of which was enclosed. “The Organization has progressed this claim on behalf of all claimants,” the letter continued, “. . . because they were not properly paid for their work days.”

The Organization's December 20, 2011 letter enclosed the following statement signed by Michael T. Becerra and stamped received on August 20, 2011:

“In March, 2011, I was working on Gang 7977. Supervisor Barry Hinkle informed us we were switching from [a] four 10-hour day schedule to[a] T1 schedule. Seth Judd and I gave him written notice two days later, that we would like to exercise our rights under Rule 28e. We were told by Supervisor Hinkle that Rule 28e didn’t apply because this was a temporary change under Rule 28d. Five months later, Gang 7977 is still working [a] T1 schedule without Rule 28d being applied as to the rate of pay for overtime.”

The Carrier replied by letter dated January 13, 2012, that Claimant Becerra's statement supports the Carrier's position, because the schedule change in March was temporary, and a walk-off is not allowed for a temporary schedule change. However, the Carrier stated, a permanent schedule change then occurred in June, at which time employees were offered a walk-off, and no one chose to exercise their seniority. The Carrier's January 13, 2012 letter also referred to the Organization's statement in its December 20, 2011 letter that the General Chairman discussed the present dispute with General Director Dominic Ring. “However,” the Carrier remarked, “. . . it fails to provide any documentation or evidence of this conversation such as date, time, phone notes or statement from the General Chairman.”

The Board agrees with the Organization's position that the change in work schedule effective March 16, 2011 that is the subject of the instant claim was a regular change of schedule in accordance with Rule 28(e) and not a temporary change of schedule pursuant to Rule 28(d). Rule 28(d), at least for the first week of the temporary schedule change, expressly provides for the payment of overtime pay for hours worked above 40 in the week, and the Carrier did not make any such payment to the employees on Gang 7977 either the first week of their assignment, or any other week. If one examines the Work History Report provided by the Carrier for Claimant Becerra, for example, one would see no difference in pay between his Report and the Work History Report for any other employee on a regular consecutive compressed half work period schedule.

A careful reading of the language contained in Rule 28(d) reveals that nowhere in that provision is the temporary change of schedule of the local supporting crew referred to as a consecutive compressed half work period. For example, the first sentence of Rule 28(d) reads as follows: “Employees assigned as local supporting crews to a production gang or employees working within the window of a production gang assigned to a consecutive compressed half work period

may have their work week schedules changed with seven (7) calendar days' notice (with a copy to the appropriate General Chairmen) for the duration of the project.” It is the “production gang or employees” who are “assigned to a consecutive compressed half work period,” and not the local supporting crew.

The second paragraph of Rule 28(d) reads as follows:

“Example: The calendar below illustrates the application of this Rule when a local gang working a Monday through Friday eight (8) hour day schedule is assigned to provide support for a production gang working a compressed T1 schedule for one (1) payroll half. The local gang is afforded rest days on the first two days of their normal work week (Monday and Tuesday). The local gang then works the T1 schedule of the production gang, in this example eight (8) days of eleven (11) hours each, due to an eighty-eight (88) hour payroll half. As the project is completed, the local gang then returns to its schedule on the following Monday, after observing four (4) rest days.”

Here again it is the production gang that is referred to as working a compressed T1 schedule for one payroll half and not the local gang. The third sentence of the “Example” paragraph states that the local gang, after being afforded rest days on the first two days of their normal work period, “. . . works the T1 schedule of the production gang,” but it does not state that the local gang is on a consecutive compressed half work period. In fact, as noted, Rule 28(d) never states that the local supporting crew is on a consecutive compressed half work period. At a minimum, this creates an ambiguity concerning how Rule 28(d) is to be applied in a situation other than that covered in the “Example” paragraph of the Rule.

The Carrier provided no reasonable explanation why, in the example given, the employees on the local supporting crew receive four hours of overtime pay in each of two weeks in which they work 44 hours if they are on a consecutive compressed half work period. Rule 29(f) expressly excludes overtime pay for work in excess of 40 hours “. . . where days off are being accumulated under Rules 27 or 28 of this Agreement.”

In its letter of September 9, 2011 in response to the Organization's appeal, the Carrier stated, “The purpose of the chart was to ensure employees were not over or under paid when they were observing a temporary change and to allow for

proper rest.” That sentence hardly explains why an employee who works 60 or 72 hours in a workweek during a consecutive compressed half work period without receiving overtime pay is not considered to be underpaid, but an employee who works 44 hours would be considered underpaid unless the employee receives overtime pay. Nor does the consideration of proper rest explain the overtime payment if the employee covered by the chart is on a consecutive compressed half work period because in each of the two weeks shown on the chart where the employee received four hours of overtime pay, the employee had three consecutive days of rest.

In its letter of September 9, 2011 the Carrier also stated, “The chart does provide guidance on how to work employees when they are starting and ending the schedule change.” That is an acknowledgment that at least for the first half work period of a temporary change of schedule pursuant to Rule 28(d), the chart in Rule 28 (d) should apply. Claimant Becerra's first day of work on March 16, after his schedule change, was on a Wednesday - the same as shown in the chart in Rule 28(d). He worked 12 hours each on Wednesday, Thursday, Friday, and Saturday, or a total of 48 hours (as opposed to 11 hours each of those days as shown in the chart). If Rule 28(d) was being applied in accordance with the guidance of the chart, he should have received eight hours of overtime pay for that week (as opposed to four hours of overtime shown in the chart for 11-hour days). He received no overtime pay for that week. Nor did Claimant Becerra receive any overtime pay for the second week, when he again worked four consecutive 12-hour days. The chart shows the employee receiving four hours of overtime pay for the second week for working four consecutive 11-hour days in the week.

Based on the foregoing discussion, the Board concludes that the schedule change here in question was made pursuant to Rule 28(e) and not Rule 28(d). Paragraphs (a) and (c) of Rule 28 require notice to the General Chairmen when an alternative work period of a consecutive compressed half work period is established, and the required notice was given in this case. The Board does not make any definitive interpretation of Rule 28(d) other than to state that the Rule is ambiguous. So far as appears in the record, the wage payments to the Claimants were properly made in accordance with Rule 28(e). The payments would not have been correct under Rule 28(d), at least for the first compressed half work period. Rule 28(e) provides, however, that an employee who receives notice that his work schedule is to be rearranged pursuant to Rule 28(e) “. . . will have the privilege of exercising seniority in accordance with Rule 2, upon written notification to his Manager within

three (3) calendar days of the notice.” The Rule places the burden on the employee to initiate the process of exercising seniority.

According to the unchallenged statement of Claimant Becerra, at least two employees gave proper written notification to the Carrier of their desire to exercise their seniority in accordance with Rule 2 - Becerra and Seth Judd. The Carrier denied their request. In the Board's opinion, that was a violation of Rule 28(e). Becerra is one of the Claimants in this case. Judd's name does not appear among the employees named as Claimants in this case. In the Board's opinion, those employees who gave notice of a desire to exercise their seniority and were denied that right have a legitimate claim for lost overtime wages. It is not possible to state with certainty how much overtime, if any, each employee would have earned if permitted to exercise their seniority. However, that uncertainty arises from the Carrier's violation of the Agreement and should not be a basis for denying any relief to eligible employees. The Board believes that there is a reasonable likelihood that they would have exercised their seniority onto positions where significant overtime opportunities would have been available. The requested amount in the claim for the difference in pay between straight-time and overtime for 26 hours for each eligible Claimant for the period of March 16 through April 30, 2011 would be reasonable and appropriate.

For the month of May 2011, the Board would find 18 hours to be reasonable and appropriate, calculated on the same basis for the difference in pay between straight time and overtime for each eligible Claimant for each hour. Each eligible Claimant would therefore be entitled to receive the difference in pay between his straight-time and his overtime rate for a total of 44 hours (26 plus 18). The foregoing remedy should apply to Claimant Becerra and to any other named Claimant who served timely notice on his Manager or Supervisor of his desire to exercise seniority in accordance with Rule 2. The Board lacks authority to provide a remedy in this proceeding for any employee who was not named as a Claimant.

The Board will not award any reimbursement for the period of time after May 31, 2011. That is so because the notice dated February 24, 2011 per Rule 28 of the change in work schedule clearly stated that employees would return to their 4-10 work schedules no later than June 1, 2011. Thus, in any event, June 1, 2011 was the cut-off date for a temporary change of schedule. Any employee on the gang should have known that there was no basis for claiming the change of schedule to be temporary after that date. If an employee on the gang wished to exercise his seniority at that time, he should have provided notice that he was doing so within

three calendar days of June 1, 2011, even if a previous request to exercise his seniority had been turned down. In addition, the email correspondence between Labor Relations and Supervisor Hinkle shows that as of June 2011, the Carrier was prepared to permit any employee on the gang who wished to exercise seniority to do so. Accordingly, no reimbursement for lost overtime will be allowed for the period after May 31, 2011.

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 29th day of February 2016.