Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42418
Docket No. MW-41626
16-3-NRAB-00003-110277

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(Union Pacific Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier:

(a) Improperly changed and assigned the work week of Gang 4878 at Oshkosh, Nebraska to a work week of Tuesday through Saturday with Sunday and Monday as rest days effective February 11, 2010.

(b) Improperly changed and assigned the work week of Gang 4179 at Lusk, Wyoming to a work week of Tuesday through Saturday with Sunday and Monday as rest days effective February 18, 2010.

(c) Improperly changed and assigned the work week of Gang 4191 at South Morrill, Nebraska to a work week of Sunday through Thursday with Friday and Saturday as rest days effective February 18, 2010.

(d) Improperly changed and assigned the work week of Gang 4192 at Gering, Nebraska to a work week of Tuesday through Saturday with Sunday and Monday as rest days effective February 18, 2010.

(e) Improperly changed and assigned the work week of Gang 4193 at Oshkosh, Nebraska to a work week of Sunday through Thursday with Friday and Saturday as rest days effective February 18, 2010 (System File R-1026U-302/1533585).

(2) As a consequence of the violations referred to in Part (1) above, Claimants J. Krajewski, D. Shelly, R. Kramer, J. Hairgrove, A. Rojas, R. Van Dell, N. Stahly, J. Fitzwater, A. Hrasky, J. Soto, F. Zamarripa, J. Brunner, R. Godfrey, T. Schmidt, A. Hodges and/or any other employe subsequently assigned to the aforesaid gangs, shall now '. . . each be compensated for an additional eight (8) hours at their respective straight time rates for each applicable Friday and Monday work days that they were not allowed to work, and the difference of pay between their applicable straight time and overtime rates for each applicable Saturday and Sunday that they worked 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 dispute involves a change in scheduling for several welding gangs on the South Morrill Subdivision that had previously worked Mondays through Fridays. The Carrier determined that its production needs required employees to work regularly seven days a week. Sometime in January or early February 2010, it re-bulletined the positions with schedules that ran either Sunday through Thursday or Tuesday through Saturday. The employees who successfully bid for the positions were

assigned to the new workweeks effective either February 11, 2010, or February 18, 2010. Subsequently, the employees on all of the affected gangs invoked their rights under Rule 40(b) of the Agreement to elect an alternative work period of four days a week for ten hours a day.

The Organization filed a claim by letter dated March 11, 2010, alleging that the Carrier had violated Rule 26 of the parties' Agreement because it had never established any operational requirement that could not be met with a Monday through Friday workweek. The Organization also contended that the Carrier had violated Rule 26(f) because it had failed to meet to discuss any proposed schedule changes with the Organization.

Rule 26 of the parties' Agreement states, in relevant part:

> **"(a) Subject to the exceptions contained in this Agreement, a work week of forty (40) hours, consisting of five (5) days of eight hours each, with two (2) consecutive days off in each seven (7) is hereby established. The work weeks may be staggered in accordance with the Company's operational requirements. So far as practicable, the days off shall be Saturday and Sunday. This work week is subject to the provisions which follow:**
>
> **NOTE: The expression "positions" and "work" refer to service, duties, or operations necessary to be performed the specified number days per week, and not to the work week of individual employees.**
>
> **(b) FIVE-DAY POSITIONS. On positions the duties of which can reasonably be met in five (5) days, the days off will be Saturday and Sunday.**
>
> **(c) SIX-DAY POSITIONS. Where the nature of the work is such that employees will be needed six (6) days each week, the rest days will be either Saturday and Sunday or Sunday and Monday.**
>
> **(d) SEVEN-DAY POSITIONS. On positions which are filled seven (7) days per week, any two (2) consecutive days may be the rest days with the presumption in favor of Saturday and Sunday.**

*** * ***

(f) DEVIATION FROM MONDAY – FRIDAY WEEK – 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 section (b) of this rule, and requires that some of such employees work Tuesday through Saturday instead of Monday through Friday, and the employees 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 this Agreement.

*** * ***

(m) ALTERNATIVE WORK WEEK AND REST DAYS

(1) Production crews* may be established of five (5) eight (8) hour days followed by two (2) consecutive rest days. One of those rest days will be either a Saturday or a Sunday, and both weekend days will be designated as rest days where there is no need for weekend work.

(2) Production crews* may be established consisting of four (4) ten (10) hour days, followed by three (3) consecutive rest days, in lieu of "five (5) eight (8) hours days." The rest days of such compressed work week will include either Saturday or Sunday. However, where there is no carrier need for weekend work production crews will be given both weekend days as rest days.

Note: * - Production crews include locally based g BMWE forces whose assignment is associated with that of a production crew to the extent that a different work week or rest days for such crews, on the one hand, and such supporting forced, on the other, would delay the work or otherwise interfere with its orderly progress.

(3) As it relates to this section, a production gang or crew is defined as a mobile and mechanized gang consisting of ten employees or more."

By letter dated May 4, 2010, the Carrier denied the claim, contending that the positions had been bulletined with either Sunday-Monday or Friday-Saturday rest days "due to the need for these positions to work to best provide coverage in the respective areas." The Organization appealed by letter dated June 3, 2010, asserting that the Carrier had failed to produce any evidence of any operational necessity for deviating from a Monday-Friday work week; the letter included an employee statement expressing his opinion that the work could be done during a Monday-Friday work week. The Carrier responded by letter dated July 26, 2010, denying the Organization's assertions. The letter included two statements from local managers. The statement from Gerald Allen indicated that the changes were made following consultation with the Organization in order to have "seven day a week coverage on the red x coal line." The statement from Bob Mumm was more specific:

"[W]e have had 7 day coverage on South Morrill Sub for the past 12 yrs . . .

We need this coverage for following reasons:

—respond to track defects-broken rails-broken concrete ties-profile deviation-crossing maintenance-etc-the list is endless

—response time to these problems are automatic when we have the forces on duty in morning-7 days a week

—we do not "meltdown" our train movement waiting for forces to show up on weekends to fix track related problems – 4 to 5 hours to show up at headquarters

—ensures the men have 2 rest days-quality of life-same employees working on weekend on overtime-no days off

—Monday-Friday is out of date – need to spread out MOW gangs to fix track and run trains in a safe and efficient manner

—welding gang – welded 2 joints – mp 28.50 Sunday-7/25/10-Keystone switch – derailment prevention

—section forces – replaced broken concrete ties – mp 83.20 – mp 103.45 – no 1 track – Sunday- 7/20/10- 10 mph slow order and out of service at these 2 locations-both fixed within 2 hours

WE NEED 7 DAY COVERAGE"

The parties having been unable to resolve the claim through the grievance process, they submitted it to the Board for a final and binding decision. The arguments submitted by the parties at the hearing reflected those that they had raised with each other during the processing of the claim. The Organization contends that the Carrier's decision to deviate from the standard Monday-Friday work week was arbitrary and unsupported by any operational need; the Carrier contends that the change was permitted by Rule 26 and, moreover, the claim was made moot by the employees' decisions to elect alternative 4/10 work weeks under Rule 40(b).

Under Rules 26(a) and (b), employees' work weeks will consist of five eight-hour days with two consecutive days off; they establish a presumption that the work week will be Monday—Friday and the days off will be Saturday and Sunday – but only "so far as practicable." Rule 26(d) addresses positions that are filled seven days a week: "any two consecutive days" may be assigned as days off, again with a preference for Saturday and Sunday days off.

Schedule changes are not a new topic for the Board, which addressed a similar situation between these same parties, where crews that had been working Monday-Friday were changed to Sunday-Thursday and Tuesday-Saturday schedules, in Third Division Award 30011. In finding that the Carrier had not violated Rule 26, Referee Herbert L. Marx held:

"[Rules 26(a), (b) and (d)] make it clear that there is a strong emphasis on granting Saturdays and Sundays as rest days, whether under a five-day or seven-day work schedule. It is also clear that, under the Rule, the Carrier retains the right to utilize a 'staggered work week," but this right is not unfettered; it must be in accordance with the Carrier's "operational requirements.'"

Regarding "operational requirements," the Award continued later:

"As the Board views it, the Carrier has demonstrated a substantial level of activity required of the Section Gangs on seven days a week, as evidenced at

> **least by the amount of overtime work previously assigned for Saturdays and Sundays. The Organization argues that the purpose of changing to staggered workweeks was to avoid overtime work at premium pay; the Carrier's Manager of Track Maintenance certainly confirms this. However, the Board sees no reason why the Carrier may not consider this as "operational requirements" under Rule 26. . . . Whatever the actual cause or causes, the Carrier has demonstrated that Saturday-Sunday track maintenance work is required, and Rule 26 provides a means to meet this need through staggered work week scheduling."**

Award 30011 makes it clear that while Rule 26(a) establishes a presumption that employees will work a Monday-Friday work week, the Carrier maintains the right to institute a staggered work week if necessitated by its operational requirements.

In this case, the Carrier has argued that increased traffic and tonnage on the South Morrill Subdivision requires increased track maintenance and that it needs seven-days-a-week welding crew coverage on the South Morrill Subdivision. This argument was supported by the statement from manager Bob Mumm, who provided a number of detailed reasons for scheduling crews regularly on Saturday and Sunday. Trains run seven days a week, and coordinated crew coverage is needed not only to keep up with routine track maintenance but also to minimize the down time associated with various breakdowns and emergencies. Scheduling crews seven days a week gives employees who would otherwise be called out on overtime the rest they need to be able to work safely and efficiently during their normal workweek. The Organization contends that Mumm's statement is not sufficient to establish the need for seven-day scheduling. The Organization submitted a statement from a single employee to the effect that his job did not require seven-day coverage. While his opinion is valuable, it is only the perspective from one individual, who has a limited view of the overall scene. By virtue of their positions, managers have more of an overview. Mumm's statement reflects the opinion of someone who has had experience over time with conditions on the ground in the area where the extra crew coverage is needed. In the absence of more evidence from the Organization that Mumm's statement was incorrect, the Board finds his statement credible and convincing.

The evidence overall establishes that the Carrier had an operational need to switch to seven-day-a-week welding crew coverage in the areas where the affected crews worked. Under Rule 26(a) those operational needs permit the Carrier to implement staggered workweeks, which is what it did here. Employees were still

scheduled to work five consecutive days, with two consecutive days off work, and they were scheduled so that they had either Saturday or Sunday off.[1] The Carrier did not violate the Agreement when it rescheduled and rebulletined the affected positions to meet its seven-days-a-week track maintenance needs.

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 31st day of October 2016.

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[1] **The Carrier raised the argument that the claim was moot because the affected crews all voted to adopt a 4/10 workweek under Rule 40(b). Given the Board's ruling, it is not necessary to address that argument, especially when there is no evidence as to why the crews elected to make the change.**

LABOR MEMBER'S DISSENT
TO
AWARD 42418, DOCKET MW-41626
(Referee Knapp)

The Majority's finding in Award 42418 is based upon facts that did not represent the actual dispute before the Board. The fact that this award was rendered nearly a year and a half after the referee hearing obviously contributed to this convoluted decision. This is obvious because the Majority provided confusing findings of fact and the final decision is contrary to the evolution of this dispute as pointed out by the Carrier Member's asserted position during oral argument. Needless to say there are numerous problems with this award and a dissent is required.

Findings of Fact Are Convoluted

The findings of fact are inconsistent with the on-property record and one only has to review the text of the award to reach this same conclusion. The findings of fact on Pages 2 and 3 of the award differ from a determination made on the last page. First, we direct attention to Pages 2 and 3 of the award that states the Claimants' involved in this case elected a 4/10 workweek. The pertinent part of the award reads:

> *"*** The employees who successfully bid for the positions were assigned to the new workweeks effective either February 11, 2010, or February 18, 2010. Subsequently, the employees on all of the affected gangs invoked their rights under Rule 40(b) of the Agreement to elect an alternative work period of four days a week for ten hours a day." (Emphasis added)*

Next we direct attention to the last page of the award where the findings in a footnote acknowledge this was an unproven Carrier assertion and held:

> *"The Carrier raised the argument that the claim was moot because the affected crews all voted to adopt a 4/10 workweek under Rule 40(b). Given the Board's ruling, it is not necessary to address that argument, especially when there is no evidence as to why the crews elected to make the change."*

This was a very important fact pattern to be determined and the Majority's back and forth on this issue is disturbing because this represented the specific issue to be dealt with in this case.

Not only did the Carrier's oral argument at the referee hearing solidify the issue, the fact that the Carrier abandoned its contention that there was a bona fide operational need and contended that Rule 26 did not apply in this instance, is obvious from the on-property record. We direct attention to the Carrier's July 26, 2010 appeal denial letter which asserted that the

Claimants voluntarily elected this alternative work week and that Rule 26 was not applicable. The pertinent part of that denial letter reads:

> *"As far as the Carrier's right to require employees to work other than Monday through Friday, the employees listed in your claim voted to a work week consisting of 4 days at 10 hours per day pursuant to Rule 40. Enclosed are their payroll records.*
>
> *It is my understanding that the employees on these gangs elected to work pursuant to Rule 40. Clearly the employees voluntarily elected to observe their work aand (sic) rest days they are working and allowed by agreement. Rule 40 allows all gangs to vote for their work week and does not restrict the vote to only production gangs. Rule 26 (f) and (m) and rule 35 do not apply in this situation." (Emphasis added).*

Again, the Carrier Member clearly and unequivocally echoed this evolution of this dispute during oral argument and conceded that the Organization was correct in that there was an extremely high burden on the Carrier to establish an operational need. The Carrier contended that the point was irrelevant because its position was that the Claimants' elected this workweek schedule under Rule 40. Thus, the Majority misunderstood the actual dispute before it when it rendered an award based on whether the Carrier met an "operational need" under Rule 26. The primary issue to be decided as carved out by the parties was whether the Carrier could rely on Rule 40 and allow the Claimants' to elect an alternative work period AND whether the Claimants actually did elect a 4/10 workweek.

Carrier's Reliance on Rule 40 Was Invalid

As pointed out by the Labor Member during oral argument, the Carrier's Rule 40 contention was less than disingenuous considering the Organization claimed against advertisement bulletins and it is impossible to take a vote from employes when there is no way to tell the employes that will fill the jobs when the positions are first advertised. Moreover, elections for alternative work weeks under Rule 40 require an election in writing and the Carrier never produced any evidence to show that the Claimants made an election for alternative work weeks.

Attention is directed to the Carrier's May 4, 2010 denial letter which shows these positions were bulletined with other than Saturday and Sunday rest days and, in pertinent part, reads:

> *"The positions that have been bulletined with either Sundays and Mondays as rest days or Fridays and Saturdays as rest days ***"*

Clearly, the Carrier bulletined these positions with other than Saturday and Sunday rest days and it would have been impossible for the employes to make an election in writing for an alternative work period because the Carrier did not know which employe would subsequently bid on and fill the positions.

Next, while we do not necessarily agree with the Carrier's contention that Rule 40 - Alternative Work Periods applies to more than production crews, for the Carrier to even begin to rely on Rule 40, an election "in writing" by the employes has to be made. The Carrier never produced any documents whatsoever showing where the employes actually made this so-called election which is a necessary prerequisite for alternative work periods under Rule 40. Based on these facts, the claims should have been fully sustained.

The Majority Failed To Rule On Carrier's Failure To Hold A Conference Prior To Changing The Workweeks And Erred In Its Handling Of The Issue It Did Decide

If the above points were not bad enough, the Majority failed to rule on the Carrier's violation of the required conference as outlined in Rule 26(f) before changing workweeks and absolutely did not make the right decision on the issue that it did address. In connection with the issue it did decide, the Majority erred incredibly by ignoring decades of arbitral precedent and accepted Carrier supervisors' statements as overcoming an employe statement provided by the Organization. Had this been the dispute before the board, it would not have been a case of competing assertions because the burden of proof would have been on the Carrier to show that a change to operations created an operational necessity that could not be meet with Monday through Friday work schedules. Self-serving statements from managers who are the same individuals attempting to reduce financial liabilities and come in under budget for fat bonus checks at the costs of employes' quality of life is simply not acceptable evidence and the Third Division and other appropriate tribunals of consistently rejected self-serving manager statements.

The Majority focused on one single outlier award (Third Division Award 30011), and the unsupported assertions of a Carrier manager to deny the claim when a clear majority of awards have rejected these same Carrier tactics in the past. The fact is **on-property** Third Division Award 36722 clearly considered the findings of Third Division Award 30011 and rejected them based on the overwhelming arbitral precedent that Award 30011 did not contemplate. On-property Third Division Award 36722 was absolutely on all points with the instant claim and, in pertinent part, held:

"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."

Once the Carrier member of the Third Division made clear during oral argument at the referee hearing that it was not relying on an "operational need" defense under Rule 26, that should have been the end of discussion on the issue. But, since the Referee determined to look at the dispute through the "operational needs" lens, it was required at minimum to distinguish on-property Award 36722 (and the numerous award cited therein) which was cited in the Organization's submission. However, the Majority did not even mention that award.

SUMMARY

The Majority's finding in Award 42418 is based upon an issue that was not pertinent to the actual dispute between the parties as shown by the on-property correspondence and as articulated by the parties at the referee hearing. For that reason alone, Award 42418 should not be afforded any precedential value. But beyond that procedural point, 42418 is not simply wrong, but profoundly wrong on the issue it did determine because it is in deep conflict with decades of arbitral precedent. For all of these reasons, I vigorously and emphatically dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member