

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43549
Docket No. MW-43260
19-3-NRAB-00003-150487**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 failed to allow the members of Gangs 1802, 1805, 1806 and 1865 to work their regularly scheduled work week and instead required them to lay off and observe the July 4th holiday on Thursday, July 3, 2014 (System File UP654BT14/1612047 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants K. Malzner, P. Seifert, J. Barnhart, G. Robinson, V. Barbarick, C. Caton and R. Kolkmeier shall each be allowed compensation of eight (8) hours at their respective straight time rates of pay and two (2) hours at their respective time and one-half rates of pay.”**

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 established and hold seniority in the Maintenance of Way and Structures Department. During the time relevant to this dispute, they were assigned to various positions on Gangs 1802, 1805, 1806, and 1865. The Claimants worked Monday to Thursday from 7 am to 5:30 pm., referred to as “B” calendar, or 4/10s schedule, as provided by Rule 27 of the Agreement. A few days before the 2014 Fourth of July holiday, the Carrier directed the Claimants that they were not to report for their regularly assigned work day on Thursday, July 3, 2014 and, that, in lieu thereof, they would be compensated with approximately eight (8) hours of holiday pay.

The Organization filed a claim on July 23, 2014, seeking compensation for 8 hours at the straight time rate for each of the Claimants, because Claimants were forced to observe a holiday on July 3. The Carrier denied the claim on August 7, 2014. The parties were unable to resolve the claim on-property and it is now properly before this Board for final adjudication.

The Organization contends that the Claimants were forced to observe the Fourth of July holiday on July 3, 2014, rather than allowing them to work their regularly assigned work day on July 3 and receive holiday pay for July 4, 2014, in violation of Rule 27. The Organization contends that the Carrier’s improper action resulted in the Claimants suffering a loss of their regular assignment and of the holiday compensation for the Fourth of July holiday. The Organization contends that the circumstance here is not addressed in the parties’ Agreement, so the Carrier did not have the right to force the Claimants to observe the holiday on July 3 rather than July 4. The Organization contends that the Carrier’s reliance on the 2013 letter from Organization Vice President Tanner is misplaced, as he was only resolving an issue with Thanksgiving and the Day after Thanksgiving Holidays.

The Carrier contends that it has the right to change the Claimants’ schedule and to force them to observe the holiday on July 3. The Carrier contends that the Claimants were properly afforded their 40 hours work week, as they worked 32 hours between June 30 and July 2 and were given 8 hours of straight time holiday pay on July 3. The Carrier contends that when a holiday falls within the work week of a Calendar B schedule, the hours are reduced by eight hours. The Carrier contends that this same

interpretation was applied to the Thursday and Friday holidays of Thanksgiving 2013. The Carrier contends that the parties' Agreement is silent with respect to how to treat a recognized holiday that falls on a Friday, and therefore, the Organization has failed to show a violation of the Agreement. The Carrier contends that the parties could not have intended that employees working alternative schedules be paid for 48 hours during a week in which a recognized holiday falls on a Friday when their fellow employees working five eight-hour days would only be paid for 40 hours.

Rule 27 of the parties' Agreement provides, in part,

- “(i) If the work week is Monday through Thursday and one of the recognized holidays provided for in Rule 31 (Holiday Pay) of this Agreement occurs on Monday or Thursday, employees assigned to work such work week will work ten (10) hours and forty (40) minutes on the three remaining work days of that work week at the straight-time rate of pay.
- (ii) Employees who qualify for holiday allowance under existing rules will be paid eight (8) hours at the straight time rate for such holiday.
- (iii) If one of the recognized holidays provided for in Rule 31 of this Agreement occurs on Tuesday or Wednesday, employees assigned to such work week will observe Thursday as the holiday and will work ten (10) hours and forty (40) minutes on the three remaining work days of that work week at the straight time rate of pay. Employees who qualify for holiday allowance under existing rules will be allowed eight (8) hours at the straight time rate for Thursday observed in lieu of the holiday.”

As the parties have observed, their Agreement is silent as to how employees working a 4/10 schedule are to observe recognized holidays that fall on Fridays. They provided for scheduling and payment for holidays that fall on Monday (i), Tuesday (ii), Wednesday (ii) and Thursday (i), but said nothing about Fridays, a typical rest day for those working this schedule.

Not only is their Agreement silent, but neither party has pointed to a single Award addressing the phenomenon. This appears to be a case of first impression, at

least with respect to the work schedule of employees working 4/10s when the Fourth of July holiday falls on a Friday.

The question is whether the Carrier may, in the absence of an express contractual provision directing it, schedule the Claimants to observe the holiday on July 3 and to compensate them on that day for the holiday. The Carrier argues that in a retained rights industry, it may do so unless the Agreement prohibits it.

On the other hand, the Organization contends that if the parties had intended for the Carrier to have the right to rework schedules when the holiday falls on a Friday, they would have made provision for that occurrence, just as they did for holidays that fall on Monday, Tuesday, Wednesday, and Thursday. In other words, the parties must have meant something when they excluded Friday holidays from the Rule 27 contingencies.

However, the parties' omission of Friday could stem from a simple fact. On its face, the rule applies to employees with work weeks of Monday through Thursday; since Friday is not a regularly scheduled day of work for employees on this schedule, the parties did not address what would happen when a holiday fell on a rest day. The Board finds that this silence renders this provision ambiguous with respect to recognized holidays that fall on Fridays. As a result, it is appropriate to consider the parties' past practice regarding this issue.

The Carrier points to the agreement reached regarding scheduling for employees working four ten-hour days for Thanksgiving and the Day after Thanksgiving, which are both recognized holidays under Rule 31. In 2013, the Organization's then Vice President David Tanner summarized the agreement,

"This letter is in reference to our telephone discussions November 20, 2013 concerning Gangs who are working a compressed work week consisting of four (4) work days at ten (10) hours each with rest days of Friday, Saturday and Sunday and how that schedule will accommodate the upcoming Thanksgiving Holidays.

It is recognized that the provisions of the Agreement dated March 12, 2012 do not specifically address the scheduling of holidays for gangs working Four (4) ten (10) hour days. We also discussed and it is recognized that

Managers have applied the holiday provision in different ways across the property for the Thanksgiving Holiday for such gangs.

We agreed that a consistent approach to the Thanksgiving Holidays was in the best interests of the employees and the managers. We therefore agreed that for the upcoming Thanksgiving Holidays, Thanksgiving and the day after Thanksgiving, which fall on Thursday November 28 and Friday November 29 this year, the Holidays will be recognized on Wednesday November 27 and Thursday November 28, 2013. Accordingly, the number of hours for this work week will be reduced by the sixteen (16) paid holiday hours and the remaining twenty four (24) hours will be worked on Monday and Tuesday November 25 and 26, 2013. We also agreed that this schedule will be followed for the Thanksgiving Holidays in subsequent years for gangs working four (4) ten (10) hour days.”

The Carrier contends that this has been the consistent practice of the parties since the 2013 agreement, and that prior to this claim, no objection has been raised by the Organization. The Organization provided no evidence to refute this assertion by the Carrier. These factors serve as strong indicators that the parties intended to permit the Carrier to alter schedules of employees who work 4/10s during weeks in which recognized holidays fall on Fridays in the manner agreed to.

Additionally, this Board recognizes that if the Agreement were to be interpreted in the manner suggested by the Organization, employees working 4/10s would be paid for 48 hours in weeks where a recognized holiday falls on a Friday, while those working 5/8s would only be paid for 40 hours. The Organization has not identified any language in the Agreement that would justify such a disparity and we have no authority to read one into the Agreement.

In consideration of the foregoing reasons, the claim must be denied.

AWARD

Claim denied.

Form 1
Page 6

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19-3-NRAB-00003-150487

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 27th day of March 2019.