

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44714  
Docket No. MW-45229  
22-3-NRAB-00003-210500**

**The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division –  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(The Kansas City Southern Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier violated the Agreement when it bulletined and assigned the auto tamper position on Gang 745 and the ballast plow position on Gang 751 headquartered in Kansas City, Missouri to work weeks with rest days of other than Saturday and Sunday beginning February 3, 2017 and continuing (System File KCS262KM17/K0417-7120 KCS).**
- (2) The claim\* as presented by Vice Chairman K. Malzner, by letter dated March 16, 2017 to Director Labor Relations T. Hardge Stephenson, shall be allowed as presented because said claim was not disallowed by the Carrier in accordance with Rule 14.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. Noel and any employe subsequently assigned to the auto tamper position on Gang 745 and Claimant A. Hook and any other employe subsequently assigned to the ballast plow operator position on Gang 751 must be allowed eight (8) straight time hours on each Monday they were not allowed to work and allowed all hours worked on each Saturday at their overtime rates of pay beginning February 3, 2017 and continuing.  
\*The initial letter of claim will be reproduced within our initial submission.”**

**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 February 3, 2017, the Carrier assigned the auto tamper position on Gang 745 and the ballast plow operator position on Gang 751 headquartered at Kansas City, Missouri to work weeks with rest days other than Saturday and Sunday. The bulletining of those positions resulted from January 20, 2017 abolishments of positions which had Monday through Friday work days.

This claim followed with the Organization asserting that the Carrier violated Rules 17(b) and (f) which provide:

**17(b) Five day positions.**

On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.

\* \* \*

**17(f) Deviation from Monday-Friday Week.**

In positions of work extending over a period of five days per week, where the Carrier contends its operational requirements cannot be met under the provisions of paragraph (b) of this rule, and some employees are required for service Tuesday through Saturday, such assignments may be agreed upon between the parties signatory hereto.

In the claim and in its responses on the property, the Organization asserts that it was not contacted about changing the work days of the two specific positions in this case from Monday through Friday positions to Tuesday through Saturday positions. See e.g., Organization Exhibits A-1, A-3; Attachment No. 1 to Employees' Exhibit A-4; Employees' Exhibit A-5 at Sheets 2-3.

The Carrier asserts that the reasons for the schedule change were because there are two additional trains at the Joint Agency on Mondays from which Engineering gets little or no time to work on the tracks and that there are no jobs on Saturdays, thus allowing the Engineering staff to get more work done. Employees' Exhibit A-2 at Sheet 1.

The Carrier also asserts that for a number of years Gangs 003 and 006 have been working a Tuesday through Saturday work schedule at Kansas City. *Id.*

The Organization has carried its burden to demonstrate a violation of the Agreement.

Rule 17(b) clearly provides that five-day positions are to be Monday through Friday work days. Rule 17(f) provides for deviation from that schedule, but "such assignments may be agreed upon between the parties". There is no evidence of such an agreement to deviate from the requirement in Rule 17(b) for Monday through Friday work days. The Organization's position that it was not contacted about the deviation has not been sufficiently rebutted. Similar disputes have resulted in sustaining awards. See Third Division Award 35805 and awards cited therein.

The Carrier's argument that there is a past practice allowing the deviation in this case is not persuasive. The language in Rules 17(b) and (f) is clear – five-day positions are to be Monday through Friday and deviations must be agreed upon. Past practice is not relevant when the Agreement language is clear. Third Division Award 42067 ("... the language in Rule 46 is clear ... thus making past practice irrelevant"). In any event, giving the Carrier the benefit of the doubt that for several years it had two gangs working a deviated schedule and assuming that the language in Rules 17(b) and (f) is ambiguous (which it is not), that is not sufficient to establish a past practice. *Id.*:

"To be a past practice, the conditions in dispute must be unequivocal, clearly enunciated and acted upon and readily ascertainable over a

reasonable period of time as a fixed and established practice accepted by both parties.”

Even assuming the language is ambiguous allowing consideration of past practice, two remote incidents concerning establishment of a deviated schedule for Gangs 003 and 006 do not meet that requirement to show a past practice.

The claim therefore has merit.

With respect to a remedy, “... it has long been held that arbitration tribunals have substantial discretion for crafting a remedy to fit a particular circumstance.” First Division Award 26088.

The remedy in this case shall be as follows:

First, because the schedule for the two positions was shifted from Monday through Friday to Tuesday through Saturday in violation of Rules 17(b) and (f), the Saturday work must be considered as overtime work, therefore requiring compensation to the adversely affected employees for time and one-half for that one day (a four-hour differential from straight time as opposed to their regular straight time payments for Saturdays).

Second, by Bulletin No. 19-17 dated October 11, 2017, the Carrier abolished the Tuesday through Saturday workday positions in dispute in this case and re-bulletined both positions as Monday through Friday positions. Attachment No. 3 to Employees’ Exhibit A-6 at Sheets 1-2. The remedy period shall therefore cease as of the date the Carrier re-established the positions as Monday through Friday positions.

Third, according to the Carrier, the incumbent on Gang 745 (Claimant Noel) resigned from service on March 17, 2017. Employees’ Exhibit A-4 at Sheet 1. Claimant Noel’s entitlement to the remedy under this award shall therefore run from the effective date of the schedule change (February 3, 2017) until his resignation. Noel’s replacement (if any) shall thereafter be entitled to the four-hour per week remedy commencing as of that individual’s assignment to take Noel’s position until the date the position was re-established as a Monday through Friday position.

Fourth, the record reveals that Claimant Hook was on leave of absence due to an injury on January 19, 2017 and as of at least September 8, 2017, remained in that status. Employees' Exhibit A-4 at Sheets 1-2. Claimant Hook is therefore not entitled to relief under the remedy for any periods he was not capable of working, but his replacement (if any) shall be entitled to relief until the date the position was re-established as Monday through Friday position.

The Organization's procedural arguments need not be addressed as they are moot.

**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 6<sup>th</sup> day of May 2022.