PUBLIC LAW BOARD NO. 1573

Brotherhood of Maintenance of Way Employees

Soo Line Railroad

Case No. 1

QUESTIONS AT ISSUE:

Is the Carrier in violation of Rule 14-1(c), six-day positions, by its continuation of requiring employees in extra gang service to work six days per week at their respective straight time rates of pay?

Is Rule 14-3, Accumulation of Rest Days, applicable to employees assigned to extra gangs, or are relief assignments to be established as provided by Rule 14-1(e) and 14-2, which result in non-consecutive rest days for employees as provided by Rule 14-1(g)?

ANSWER:

In the 1975 maintenance season the Carrier was not in violation of Rule 14-1(c), six-day positions, by requiring seasonal Extra Gangs Nos. 1 and 2 (ballast gangs) and Nos. 901 and 904 (tie gangs) to work six days per week at their respective straight time rates of pay. Rule 14-3, Accumulation of Rest Days, is therefore applicable to employees assigned to these gangs for the period in question.

However, in the 1975 maintenance season the Carrier was in violation of Rule 14-1(c), six-day positions, by requiring Extra Rail Gang No. 1 to work six days per week at their respective straight time rates of pay. Rule 14-3, Accumulation of Rest Days, is therefore inapplicable to employees assigned to this gang for the period in question.

Fred Blackwell

Fred Blackwell,
Neutral Member

O. M. Berge,
Employee Member

D. L. Borchert,
Carrier Member

February 25, 1976

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES		
v.		CASE NO. 1
SOO LINE RAILROAD		QUESTIONS AND OPINION

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Is Rule 14-3, Accumulation of Rest Days, applicable to employees assigned to extra gangs, or are relief assignments to be established as provided by Rule 14-1(e) and 14-2, which result in non-consecutive rest days for employees as provided by Rule 14-1(g)?

OPINION OF NEUTRAL

Issue

While a number of rules are referred to in the statement of "Questions at Issue," the parties agreed at the hearing that the basic issue to be decided here is whether the positions in extra gang service are six-day positions within the meaning of the parties' local Agreement to implement the National 40-Hour Work Week Agreement which became effective September 1, 1949. Rule 14-1(c) of the local Agreement provides that a position is a six-day position "Where the nature of the work is such that employees will be needed six days each week." The parties also agree that if the positions under consideration are properly six-day positions, the Carrier has not violated any of the rules referred to in the statement of "Questions at Issue," but that, if the positions are not properly six-day positions, rule violations have occurred.

Facts

Each year the Carrier establishes and maintains extra gangs to perform maintenance work such as distributing ballast, track surfacing, tie renewal, and relaying rail. The extra gangs are established and abolished each year coincident with the beginning and the end of warm weather which extends from about April 14 to the end of October. At other times of the year, the ground is too hardened by cold weather to permit the maintenance work to be performed.

Regularly assigned section gangs, which are in service the entire year, have been assigned to a five-day work week with Saturday/Sunday rest days. However, for many years the Carrier has assigned the extra gangs to work a six-day week, Monday through Saturday.

In 1972, and continuing in the 1973 and 1974 seasons, a dispute arose in connection with the Carrier's administration of the accumulated rest day provision in Rule 14-3(b). In regard to such dispute the Employees allege that the laborers and the small machine operators were told that, if they took the period of rest accruing from accumulated rest days, they would not be returned to service at the end of the rest period; that they could work through their rest period at straight time; and that anyone who filed a claim would be disciplined for one reason or another. The Employees also allege that the affected Employees have refused to file claims because of the threat of retaliation. In view of the foregoing, particularly the last cited allegation, the Employees gave the Carrier notice on January 20, 1975 that the Employees would insist that the extra gangs be assigned a five-day work week, with Saturday/Sunday rest days, during the 1975 extra maintenance program. On January 23, 1975, the Carrier replied that such demand was improper, and on April 2, May 5, and May 19, 1975, the Carrier established extra gangs and required the laborers and small machine operators to work a six-day work week at straight time, Monday through Saturday.

Position of the Parties

The parties agree that the propriety of the Carrier's use of the accumulated rest day procedure (Rules 14-1(h) and 14-3) depends upon whether the practice of working the extra gang positions as six-day positions is proper under Rule 14-1(c). If such practice is within Rule 14-1(c), the propriety of the use of the accumulated rest day procedure will follow because the other rest day alternatives, staggered work weeks and non-consecutive rest days, are not feasible in the confronting situation. The parties also agree that the establishment of six-day positions is proper only when the Carrier's "operational requirements" cannot be met by having the involved work performed in a five-day work week, Monday through Friday. However, the parties join issue on the question of whether the Carrier's operational requirements are such that the six-day extra gang positions are justified.

The Employees say, first, that working extra gangs on a six-day work week basis is not within the intent of Rule 14-1 and that they are now insisting upon strict compliance with the rule, notwithstanding the past practice of a six-day work week. On the question of the intent of Rule 14-1, the Employees call attention to a February 29, 1949 statement issued by the Presidential Emergency Board which recommended the 40-Hour Work Week. The Employees also take the position that the six-day work week cannot be justified by the Carrier's operational requirements and, in this regard, the Employees submit the following assertions:

(1) The General Chairman in office when the 40-Hour Work Week Agreement became effective in 1949 and his successor in office, did not concede that it was proper to work the extra gangs as six-

day positions, but, because they did not actively oppose the practice, it has existed for a number of years.

(2) Extra gang positions are today considered five-day positions throughout the railroad industry, including the railroads in Canada where the cold weather conditions are more adverse than the conditions affecting this Carrier.

(3) The foremen, the assistant foremen, and the large machine operators of the extra gangs in question here have been paid for Saturday work at time and one-half, while the laborers and the small machine operators have been paid straight time for Saturday.

(4) One of the gangs, the rail gang, was abolished during June of the 1975 season and re-established at another point in mid-July.

(5) The Carrier's operation as a common carrier is not dependent upon the extra gangs' work being performed on Saturdays, because, although these gangs work for only a relatively short period each year, the Carrier's operation as a common carrier does not change materially from one season to another.

(6) There are no extra gangs during the winter months and the Carrier's service to its shippers continues unaffected in the winter.

(7) The gangs work only five days in a week in which a holiday falls, whereas, if the work is necessary six days each week, it would continue to be necessary irrespective of the holiday.

(8) By the use of more equipment, which the Carrier could obtain by purchase or renting, the maintenance program could be carried out on a five-day basis.

The Carrier's position is that the practice of working the extra gangs as six-day positions is well within the intent of Rule 14-1 and that operational requirements justify the practice because, in the absence of six-day operations, major maintenance and upgrading of the right of way would be deferred with the ultimate result of a deterioration in the quality of service to customers and comcomitant financial detriment to Carrier. The Carrier also asserts that, in the confronting circumstances, the accumulation of rest days is the only practicable way to handle the extra gangs' rest days. In support of these basic positions the Carrier submits the following assertions:

(1) In the hearings which led to the 40-hour week recommendation that was made by Presidential Emergency Board No. 66, it was brought out that while the work performed by regular section gangs might be adjusted to a five-day week, by increasing the size of the gang or shortening the section assigned to the gang, the heavy repair and renewal work performed by extra gangs involved different

considerations. According to the hearing testimony, heavy repair and renewal work could be conducted year-round in the far South, but in the northern regions such work would have to be compressed into the seven to eight months of the warm season; such work could be deferred to some extent, but a pile-up of deferred maintenance would ultimately impair operations seriously; and since the size of the extra gang that can be productively used is determined by the machinery and equipment being used, the addition of more employees to an extra gang would not increase production sufficiently from Monday through Friday, to offset the loss of Saturdays' production. In recognition of these considerations, the National 40-Hour Agreement and the herein parties' local Agreement provided some flexibility for handling the rest days in non-typical situations, such as extra gang service, without penalty pay. When the rules affording flexibility, accumulation of rest days, rules 14-1(h) and 14-3, were adopted on this property, their only application was to extra gang service and all other assignments at that time under M/W Schedule were treated as five-day positions.

(2) Extra gang service on this property had been conducted six days a week before the institution of the 40-Hour Work Week in 1949 and have been so conducted ever since. For 25 years the Employees did not question that such service was six-day service and the Employees successfully progressed claims for excessive accumulation of rest days under Rule 14-3 in 1967 on behalf of seven extra gang employees.

(3) The abolishment of the steel gang in 1975 was a temporary cut-back due to economic considerations and does not negate that the six day operation is necessary for operational requirements.

(4) The reason for the payment of Saturday overtime to the foremen, the assistant foremen, and large machine operators, is that these kinds of personnel are in short supply, which is not the case with the laborers and small machine operators, and the overtime is paid to keep the former personnel on the job. However, this is a discretionary judgment which is within the Carrier's prerogatives, and which is not required by the Agreement. Thus, the payment of Saturday overtime to some personnel, but not all, has no relevance to whether the six-day operation is justified by the Carrier's operational needs.

(5) The Employees' proposed solution of obtaining additional equipment, in order to perform in five days the work now performed in six, is not adaptable to and cannot be tailored to remedy the confronting rest day problem. The size of each of the extra gangs is geared to the equipment it uses and in addition the various gangs use different equipment to do different kinds of work. The acquisition of additional equipment, which would require the hiring of additional employees to operate it, would thus result in a maintenance operation which either fails to fit the Carrier's needs, or which is in excess

of such needs.

Discussion

The record does not support the Employees' contention that Rule 14-1 reflects an intent to exclude extra gang service from the service permitted under Rule 14-1(c) to be performed as six-day positions. The hearings of Presidential Emergency Board No. 66 make it clear that extra gang service in the colder, northern regions was one of the prime examples of work which probably could not be performed in a five-day work week. Moreover, since the text of Rule 14-1(c) makes the "nature of the work" the determining factor in separating six-day positions from five-day positions, the text obviously requires a factual examination of particular work as it comes into dispute to determine whether its "nature" falls within Rule 14-1(c). Thus, the text cannot possibly be read as defining the particular kinds of work which may be performed as six-day positions. The parties' behavior before and after the institution of the 40-Hour Work Week, as evidenced by the 25 years practice of working extra gangs as six-day positions, and by the Employees successful progression of claims in 1967 premised on the practice, is consistent with the foregoing conclusion respecting the intent of the rule. This prior practice, it is noted, is relevant here in the limited sense of its evidentiary value in arriving at the intent of the rule, because it is well settled that prior practice is no bar to the enforcement of an unambiguous, contra provision in a rule. However, in this instance, the Employeees construction of the rule is not borne out by the record and, accordingly, there is no unambiguous provision which warrants enforcement.

As regards the aspect of the case involving operational requirements, it appears from this particular record that the Employees have the burden to prove that the sixth day of the extra gang work is not necessary to meet the Carrier's operational requirements. The facts of this case show that the six-day operation, as compared to a five-day operation, gains the Carrier from 24 to 26 days of work in a maintenance season and, thus, the Employees have the burden of showing that these 24 to 26 days are not needed for a sound maintenance program. Obviously, the most direct way to support this burden would be for the Employees to offer a body of technical information tending to show that maintenance could be kept at an adequate level without resorting to a six day week. However, the record contains no direct technical evidence of this kind and the issue must therefore be determined on the basis of the indirect or circumstantial evidence which is contained in the record. All but three of the items of evidence and assertions included in the Employees' presentation have been determined to be either irrelevant or to have no probative value in proving the fact at issue. The three items of evidence which tend to show that the extra gangs need not be on a six-day basis relate to: (1) the wage differential for Saturday work between the higher rated

employees and the laborers and small machine operators; (2) the changeover from a six-day week to a five-day week in a week in which a holiday falls; and (3) the abolishment of the steel gang for several weeks in June and July of the 1975 season. The Carrier has stated that the wage differential came about as a matter of management prerogative to hold particular kinds of personnel on the job, and this exaplanation satisfactorily dismisses foregoing (1) from the case. The Carrier offered no explanation for changing the work week in a holiday week and, thus, the factor in foregoing (2) weighs against the operation being needed on a six day basis; however, this factor alone is of insufficient weight to prove the non-necessity of the sixth day of the operation. The Carrier stated that the abolishment of the steel gang in 1975 was a temporary cut-back due to economic considerations; however, it is well settled that what the Carrier considers desirable, efficient, or preferable does not enter into a determination of operational requirements. Third Division Awards No. 6856, and No. 6695. Accordingly, the Carrier's decision to cancel several weeks of programmed steel gang work because of economics can only be evaluated to mean that this work was not needed on a six-day basis in the first instance and, thus, foregoing (3) satisfies the Employees' burden of proof in respect to the extra steel gang. The work of the other gangs was different from the steel work, however, so this finding does not apply to the other gangs. In sum, while the evidence fails to show that all of the work of the extra gangs was improperly conducted as six-day positions, the evidence does establish that the Carrier's operational needs did not necessitate working the positions in the extra steel gang as six-day positions. It is therefore concluded on the whole record that no violation of the Agreement has been established in respect to the extra gangs involved in the ballast and tie renewal work, but that the Carrier violated Rule 14-1(c) by requiring the positions in the steel gang to work as six-day positions.

It is noted in conclusion that, while the Employees' dissatisfaction with the administration of the rest day procedure in Rule 14-3(b) is not before the Board in this case, the Carrier was disposed to submit Exhibit 10 which reflects statements of field supervisors to the effect that they have never threatened to discipline employees for filing claims in connection with accumulated rest days. The Employees, not surprisingly, give these statements no credence and the Carrier should not be satisfied to let the matter rest here. In view of the fact that the Employees' dissatisfaction about the administration of Rule 14-3(b) is one of the major causes of the instant dispute, perhaps the sole cause, it would be appropriate for the Carrier to go one step further and demonstrate in an affirmative way that the Rule is being properly administered.

Fred Blackwell

Fred Blackwell
Neutral Member

February 25, 1976