

PUBLIC LAW BOARD NO. 5567

AWARD NO. 8
NMB CASE NO. 8
UNION CASE NO.
COMPANY CASE NO.

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY
(former Missouri Pacific Railroad
Company)

- and -

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when, effective March 18, 1989, the Carrier established positions on Eastern District Tie Gang 9163 with a Saturday through Tuesday work week and Wednesday through Friday rest days (Carrier's File 890557 MPR).
2. As a consequence of the aforesaid violations, the employees assigned to the Eastern District Tie Gang listed below* shall each be allowed:

'... payment of time and one-half for the week end work of Saturday, and Sunday, and eight (8) hours each day for Wednesday to Friday, which would have been their regular work days, if these positions had been advertised properly, in line with the Agreement. This claim for thirty four (34) hours for each claimant, per week, from Saturday, March 18, 1989, continuing thereafter, until such time that these positions are readvertised, and established in line with the Agreement as outlined above.'

*J. L. McCleave	K. E. Halstead	L. M. Steel
G. S. Turner	G. G. Martin	K. L. Barnhart
T. L. Niemeier	T. D. Conner	J. L. Kaesberg
C. I. Futrell Jr.	M. W. Dobson	J. E. Olive
D. A. Crowley	G. O. Deaner	T. L. Wengert
R. J. Wengert	M. G. Mattingly	G. K. Hawkins
W. F. Campbell	P. L. Colandro	P. J. Desrochers
K. D. Eppes	J. D. Hays	M. A. Bader

"*N. G. Minor	C. L. Anderson	L. Spradling
B. R. Thies	F. L. Sevier	G. P. Polk Jr.
J. A. Warner	B. J. Buckley	J. R. Anderson
R. A. McKinney	H. L. Barber	R. L. Herron
D. L. Lowry	D. Lain	K. D. Justice
V. K. Davis	J. E. Willard	A. R. Manis
C. F. Furry	L. R. Steele	K. E. Wengert
R. C. Benson Jr.	M. L. Camp	C. A. Flowers
P. H. Pickens"		

OPINION OF BOARD:

The Parties have cited Agreement Rule 14 ("Work Week") and the Memorandum of Agreement (MOA) dated August 1, 1974 as pertinent to this dispute:

Rule 14

"WORK WEEK:

Rule 14. Section 1.

Note: The expressions 'positions' and 'work' used in this Section 1 refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees.

(a) GENERAL. Subject to the exception contained in this agreement, the carrier will establish a work week of forty (40) hours, consisting of five (5) days of eight (8) hours each, with two (2) consecutive days off in each seven (7); the work weeks may be staggered in accordance with the carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday.

(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.

(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 carrier contends cannot be met under the provisions of this Section 1, paragraph (b), above, and requires that some of such employees work Tuesday to Saturday instead of Monday to Friday, and the employees contend the contrary, and if the parties fail to agree thereon, then if the carrier nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under the rules agreement.

August 1, 1974 MOA

"1. At the election of a majority of employees working in a gang with the concurrence of the District Engineer on the District where such gang is working, a work week of four (4) days of ten (10) hours may be established with work week Monday through Thursday, rest days Friday, Saturday and Sunday. By agreement between the majority of the employees working in such gang and the said District Engineer, three other consecutive rest days may be substituted therefor. The ten (10) hour day will include twenty (20) minutes for lunch without deduction of pay.

2. Rules in effect covering payment for service performed on rest days will apply.

3. Rules in effect covering payment for the performance of all overtime work other than on rest days is hereby amended to the extent that employees assigned to work as provided in paragraph 1 of this Agreement will be compensated at the overtime rate for work performed in excess of ten (10) hours on an assigned work day, except as provided in paragraphs 4, 5 and 6 of this Agreement."

In 1989, Carrier commenced a major cross tie renewal project on 81 miles of track in the Hoxie Subdivision, between Harviell Junction, Missouri and Tuckerman, Arkansas. Prior to February 10, 1989, District Tie Gang 9161 and Division Surfacing Gang 9183 worked on this project Monday through Friday, rest days Saturday and Sunday. Managerial dissatisfaction with the pace of the project led Carrier to invoke the "operational problems" provision of Rule 14 (f) and the MOA of August 14, 1974. After petitioning the members of the two existing gangs and eliciting majority concurrence, Carrier changed and compressed their workweeks for the duration of the project to ten-hour days, Saturday through Tuesday, rest days Wednesday to Friday.

By telephone notification and letter of February 9, 1989, Carrier's Assistant Director Labor Relations notified the BMW General Chairman of the workweek changes for Gangs 9161 and 9183 and also of intent to establish of a new District Tie Gang 9163 with the same ten-hour day and four-day week schedule. Despite Organization protests, Carrier filled the positions on the new Tie Gang 9163 through a series of vacancy bulletins, commencing February 10, 1989. The bulletins established the gang with a work week of four (4) days of ten (10) hours each with Wednesday, Thursday and Friday designated as rest days. Claimants, most of whom were furloughed employees, bid in the vacancies as bulletined and worked under those conditions from March 18, 1989 through June 12, 1989.

On April 17, 1989, Assistant General Chairman G. Baker submitted the following to Carrier:

"I am presenting a grievance and protest by and in behalf of this organization concerning the manner in which several positions were bulletined and assigned to Eastern District Tie Gang (EDTG) 9163, in the vicinity of Hoxie, Sub., dated 2-24-89, effective 3-18-89.

Bulletin and new assignment notice numbers 10, 12 through 26, 28 and 29 for all new positions in establishing EDTG 9163, effective 3-18-89, indicate the work days of Saturday, Sunday, Monday and Tuesday, with rest days of Wednesday, Thursday and Friday. Under our current working Agreement, especially Rule 14, there is not provisions contained within, which will allow the Carrier to establish such work days as outlined above. The Agreement provides for the establishment of a work week consisting of five (5) working days with rest days of Saturday and Sunday. If it is the Carrier's intent to establish a four (4) day ten (10) hour work week, this must be accomplished by the provisions outlined in the Memorandum of Agreement of August 7, 1974, and only after the gang has been established with five (5) working days.

At no time has the Carrier approached the General Chairman and indicated a desire to have any conference concerning the work days outlined above. If the Carrier desires to change or deviate from our current working Agreement, the place to do so is at the bargaining table, and not through arbitrary actions such as these.

Therefore, we are requesting that these positions be readvertised with the work days of Monday through Friday, with rest days of Saturday and Sunday, as outlined in our current working Agreement."

Carrier denied the claim maintaining:

"As background, the Carrier's operational requirements due to traffic patterns and customer commitments were such that these were the only days where the Carrier could minimize to the extent possible traffic disruption and achieve production to get the job done as quickly as possible. The bulletins were issued as such to inform the employees that if bulletined the conventional way, the Carrier would be approaching them from day one to work out a similar work week arrangement. As information, due to the traffic, some of the Carrier's gangs on the Hoxie Subdivision achieved some of the poorest production of all gangs across the Railroad in 1988. As you well know, if the production cannot be achieved, then the Carrier does not require the services of a gang.

As to your contention that at no time has the Carrier approached the Organization about this, you are apparently misinformed. You should be aware, and I am in receipt of copy of same, that a letter was forwarded to General Chairman Borden on February 9, 1989, attempting to reach some type of agreement. The ultimate response from the Organization was 'no' the Organization was not agreeable, and likewise the Organization apparently did not request a conference. I do not concur that the Carrier's actions were arbitrary, but rather up front about the whole issue."

Rule 14 (f) and the MOA of August 14, 1974 establish a two-step process by which Carrier can gain relief from the Monday through Friday eight-hour day provisions of Rule 14 (b). Compliance with those Agreement provisions required Carrier first to establish District Tie Gang 9163 with a five (5) day work week, with Saturdays and Sundays designated rest days in accordance with Rule 14 (b). Once established, the members of Gang 9163 had a right of election to determine if a majority

concurrent with Carrier's proposed change to a ten-hour, four-day work week, with rest days Wednesday-Friday. By unilaterally establishing the new gang with that irregular schedule, Carrier deprived the employees of their right of election and violated both Rule 14 and the MOA of August 14, 1974.

The "operational problem" justification for Carrier's invocation of Rule 14 (f) and the legitimacy of the need to establish a work week consisting of four (4) ten (10) hour workdays, followed by three (3) rest days, is not in dispute. But Carrier's resort to self-help rather than complying with the requirements of the Agreement to obtain majority concurrence from the gang members compels a conclusion that Carrier violated the Agreement. The damages claimed are excessive, however, and the appropriate remedy is payment of time and one-half for the Saturdays and Sundays worked by Claimants between March 18, 1989 and June 12, 1989.

AWARD

Claim sustained to the extent indicated in the Opinion.
Carrier shall implement this Award within thirty (30)
days of its execution by a majority of the Board.



Dana Edward Eischen, Chairman

Dated at Ithaca, New York on April 19, 1995

Union Member

Dated at Chicago, IL
on April 25, 1995

Company Member

Dated at OMAHA, Nebraska
on April 24, 1995