

PUBLIC LAW BOARD NO. 6867

AWARD NO. 17

CASE NO. 17

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier arbitrarily established a new compressed work cycle of nine (9) workdays, from the previously established eight (8) days, on July 23, 2001 for all employees assigned to System Gang 8501 (System File W-0140-152/1286999).

(2) As a consequence of the violation referred to in Part (1) above, the employees assigned to System Gang 8501 shall now be compensated as follows:

1. Each employee must be allowed overtime at the time and one-half rate for all hours worked for all services rendered on the ninth (9th) work day of their scheduled eight (8) day assignment for the last half of July 2001.

2. Each employee must be allowed their full contractual amount of hours at the straight time rate for their normal scheduled hours for the remaining eight (8) days of their assignment as established by rule 20."

FINDINGS:

Upon the whole record, after hearing, this Board finds that the

parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

This claim involves the application of Rule 40, Alternative Work Periods, to System Gang 8501, a production crew working a consecutive half workweek arrangement, during the second half of July 2001. What is in dispute is Carrier's assignment of work based on hours rather than work days. The applicable portions of Rule 40 appear below.

(a) With the election in writing from the majority of the employees working on a project and with the concurrence of the appropriate Manager, a consecutive compressed half work period may be established where operations permit. The consecutive compressed half will consist of consecutive workdays that may be regularly assigned with eight (8) or more hours per day (i.e. 8, 9, 10, 11 or 12 hour workdays) and accumulated rest days. The consecutive compressed half will commence on the first calendar day of the payroll period unless changed by mutual agreement between the Manager and a majority of the employees. The consecutive compressed half arrangement will equal the number of hours worked as if the assignment was for a normal half with 8-hour workdays. Accumulated rest days for employees assigned to a gang working a consecutive compressed half arrangement will consist of the remaining days in the payroll period.

(c) Where it would be required to work a fraction of a day on a consecutive compressed work period arrangement under (a) or (b) in order to equal the number of hours in the period, respectively, the remaining hours will be distributed and worked

throughout the compressed work period unless agreed to work a partial day at the end thereof.

(l) Employees working a compressed work period under paragraph (a) will have their workdays and rest days set forth in writing a minimum of five (5) workdays in advance of the beginning of the work period arrangement and said written notice will be posted at convenient locations accessible to the employees affected.

This dispute involves the issue of whether Claimants, members of System Gang 8501, were assigned to an eight (8) day compressed half as alleged by the Organization, or a ten (10) hour workday compressed half under Rule 40(a) as asserted by Carrier. The importance of this distinction, for purposes of this claim where the compressed half involved included 96 work hours, concerns whether Carrier had the right to schedule Claimants to work nine 10 hour days with the remaining 6 hours distributed over those nine days or was required to schedule Claimants to eight 12 hour days. The time period in issue is July 23-31, 2001, and payroll records of some Claimants reveal that the gang worked eight 11 hour days (July 23-30) and one 8 hour day (July 31).

The record on the property also contains copies of nine 2001 job postings for various system gangs (including one for System Gang 8501 dated 5/10/01), where the comment section includes the following language: "Gang is subject to alternate work week conditions under PEB 219. Works last 8 days of 1/2. Rest days at beginning of 1/2. Works amount of hours in 1/2 in 8 days." Another three postings for System Gang 8501 have different comments. Two (1/4/01 and 3/8/01) indicate that the gang's rest days are Saturday and Sunday and have no comment after a reference to it being subject to alternate work week conditions.

The third, dated 7/12/01 for a multicar operator to commence 7/19/01 (during the second half of July) also indicates Saturday and Sunday as rest days and states in pertinent part: "Gang is working last eight days of the half with rest days at the beginning of the 1/2, hours to be determined by the numbers of hrs. required in the half."

Carrier's response to these postings on the property was that the bulletin clerk had made a mistake and could not change the interpretation of Rule 40(a) by such an error. It pointed out that there are so many bulletins posted that they could not all be reviewed by managers or Labor Relations to assure their accuracy, and that the practice was stopped when it was brought to its attention. Carrier noted that the gang was bulletined as five days per week, 8 hours per day with Saturday and Sunday as rests days, and contended that it is not able to bulletin a compressed half gang, since that is only an option available to the gang by election after it is bulletined in the normal course.

The record does not contain the original election form of System Gang 8501. Carrier did submit copies of the generic form used to make such election. Such form has a space to indicate agreement to working a compressed half under Rule 40(a), a compressed work week of four 10 hour days under Rule 40(b), or to accumulate rest days due to a forthcoming holiday pursuant to Rule 40 (f-3). There is a space where each gang member writes his name, social security number and indicates either his agreement or disagreement with the proposed Rule 40 alternate work week arrangement.

The Organization contends that the record supports the finding that the agreed schedule of System Gang 8501 under Rule 40(a) was eight (8)

consecutive work days at the end of the compressed half period, pointing to both the actual hours worked over the prior periods and posted bulletins so indicating. It posits that Carrier's failure to produce a copy of the original written election by the gang which would be within its control, especially in response to the Organization's request, undermines its assertion that what was selected was 10 hour days rather than an eight consecutive day workweek, citing Third Division Awards 15444, 18447, 20892. The Organization argues that scheduling the gang to work for nine (9) days in the second half of July, 2001 violates the Agreement.

The Organization asserts that Carrier failed to comply with the Rule 40(c) by assigning an 8 hour shift at the end of the work period rather than distributing those hours throughout the compressed work period without agreement of the gang. It also alleges that Carrier violated the written prior notice requirement in Rule 40(1) for effecting a change in the schedule of System Gang 8501, and that the remedy it requested, which was not challenged by Carrier, is appropriate, relying on Third Division Awards 28307, 29542, 35066; Public Law Board 6206, Award 1 Remedy Ruling.

Carrier maintains that the stated purpose of the compressed half agreement was to maximize employee home time and give management the prerogative of scheduling to safely achieve productivity and maximum efficiency. It argues that the Organization is attempting to have the Board rewrite Rule 40 to be more restrictive concerning its managerial right to assign work as it deems appropriate to maximize efficiency, which the Board is not empowered to do, citing Third Division Awards 20383, 27931, 31999; Special Board of Adjustment No. 18 Decision 6024. Carrier states that there must be specific language in the Agreement to restrict

this inherent right, and asserts that Rule 40 does not support the Organization's interpretation. It points out that Rule 40(a) does not say anything about the number of days that can be scheduled in a consecutive compressed half, only that employees can elect to work consecutive workdays that may be regularly assigned with 8, 9, 10, 11 or 12 hours, citing Public Law Board 6867, Award No. 3. Carrier asserts that a clerical error in the language included in some bulletins cannot change what is permissible under the Agreement or the consistent manner in which Rule 40(a) has been interpreted and applied over time.

Carrier notes that under Rule 40, employees can elect to be governed by Rule 40(a), compressed halves, or 40(b) compressed workweeks, and that the form used does not permit them to vote on the number of days they wish to work. It asserts that the Organization failed to meet its burden establishing that the original election was for an 8 day workweek or that there was no proper advance notification of the employees' work schedule, and argues that mere assertions of violations are insufficient to constitute proof, relying on Second Division Award 9895; Third Division Awards 26033, 27851, 27895.

A careful review of the record and arguments of the parties, as well as prior Board precedent, convinces us that the Organization's claim for additional compensation for the second half of July, 2001 must be denied. The validity of the Organization's position is dependent not only upon a showing that what was elected by System Gang 8501 and concurred in by the Manager under Rule 40(a) was a compressed half consisting of 8 workdays, but that such an election is permitted by the Agreement. As this Board has held in Award No. 3, the plain language of Rule 40(a) does not contemplate a compressed half of any fixed number of days, but

speaks of their assignment by a range of a different number of hours. The only reference to "days" in Rule 40(a) is in the last sentence which states that the accumulated rest days will consist of "the remaining days" in the payroll period. The language of the rule does not support the Organization's interpretation.

Unlike the situation in Award No. 3, this case contains evidence of both posted bulletins and the form election sheet. While Carrier is correct in asserting that the election sheet does not have a space for employees to select the number of days in the compressed half, and only whether they wish to work a compressed half under Rule 40(a), it also does not have a place to select the number of hours each day that will be worked in the compressed half schedule. That being said, the fact that the Organization requested the specific election sheet for System Gang 8501, which was not furnished by Carrier or placed into the record, cannot be determinative of the issue in this case. From what is in the record, that form would not indicate either an agreement to work a set number of days in the compressed half or a set number of hours. Under such circumstance, the Board is unable to draw an adverse inference from its failure to be produced. Whatever "agreement" may have been reached between the gang members and its manager is not contained in the record.

Similarly, absent specific proof that management knew of, and approved, the contents of the disputed jobs bulletins, the existence of bulletins for System Gang 8501, and others, that indicate an eight day work schedule cannot determine the contractual rights of system gang members and define contractual limitations to management's right to schedule hours to maximize efficiency. Some of the bulletins clearly contemplate a five day workweek, which both parties agree was changed

by election under Rule 40(a). The conflicts inherent in these bulletins cannot support the Organization's reliance on them to vary the language of the Agreement.

In this case, the record is unclear as to how management arrived at scheduling eight 11 hour days and one 8 hour day during the second half of July, 2001, rather than having nine 10 hour days with the balance of 6 hours being distributed throughout the compressed work period in accord with Rule 40(c). Carrier claimed throughout that this gang was scheduled to a compressed half with 10 hour workdays. The record contains no evidence of agreement by the gang to working a partial day. Neither is there evidence of what schedule was posted in advance or whether the assigned work hours for the second half of July, 2001 varied from that posted schedule.

The only payroll records of the gang contained in evidence appear to indicate that in the first half of July, 2001, the employees were scheduled for five 10 hour days, two 11 hour days and were paid for one 8 hour holiday at the end of the work period, totaling 80 hours. In the second half of June, 2001, it appears that the gang worked eight 10 hour days. In the first half of June, 2001, it appears that the gang was scheduled to work eight 11 hour days. These records show that the gang was scheduled to work (or celebrate a holiday) for eight days in these three preceding halves. However, since none of them contained 96 hours as did the second half of July, 2001, it cannot be said that these records support an agreed schedule of eight days rather than 10 hour days with the fraction of the remaining hours distributed throughout the work period, or a limitation on management's right to schedule nine days in a half containing 96 hours.

Thus, we find that the Organization has not met its burden of proving that Carrier violated the provisions of Rule 40(a) by assigning a ninth workday in the second half of July, 2001, or Rule 40(l), since it is unclear in this case if there was a schedule change for System Gang 8501 requiring written notice. However, in the absence of evidence of agreement from the gang to work a partial day, the Board concludes that Carrier's schedule of eight 11 hour days and one 8 hour day in the second half of July, 2001, rather than nine 10 hour days distributing the remaining 6 hours throughout the compressed work period, is inconsistent with its assertion that the gang was scheduled to work 10 hour days, and a violation of Rule 40(c). Since it is unclear whether such finding would result in any monetary relief owing to Claimants, the Board remands the case back to the parties for the purpose of arriving at an appropriate remedy consistent with our finding that Carrier did not violate Rule 40(a) by scheduling Claimants to a ninth day of work during the second half of July, 2001.

AWARD:

The claim is sustained, in part, in
accordance with our Findings.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

Brant W. Hanquist

Brant W. Hanquist
Carrier Member

Timothy W. Kreke

Timothy W. Kreke
Employee Member

Dated: 4-23-08

Dated: April 23, 2008