

PUBLIC LAW BOARD NO. 7098

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYEES DIVISION
(
(UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when, on March 7, 11, and 14, 2005, the Carrier issued abolishment notices for all positions on Seniority District 4 on Gangs 3416, 3432, 3421, 3444, 3405, 3418 and 3477, each with an assigned work week of Monday through Friday with Saturdays and Sundays designated as rest days and then improperly advertised and assigned such District 4 positions as Gangs 3408, 3407, 3409, 3417, 3420, 3455 and 3458 with an assigned work week of Sunday through Thursday with Friday and Saturday designated as rest days, each beginning March 20, 2005 (System File 4KB-6882T/1421140 CNW).
- (2) The claim* referenced in Part (1) above, as appealed by General Chairman K. L. Bushman on May 18, 2005, shall be allowed as presented because said claim was not disallowed by Director Labor Relations D. A. Ring in accordance with Rule 21.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, all employees assigned to Gangs 3408, 3407, 3409, 3417, 3420, 3455 and 3458 shall now ‘*** each be compensated eight (8) hours straight time for each Friday they are not allowed to work and the difference from straight time and overtime for all assigned straight time hours worked on Sundays from March 20, 2005 until the Carrier ends the violation of the Work Week Rule.’

*The initial letter of claim will be reproduced within our submission.”

FINDINGS:

Public Law Board No. 7098, 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.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This matter involves a change in the work schedule of the Carrier's High Production Undercutter Gang and of the Gangs used in conjunction with their work. The Undercutter is a large machine used to reclaim and clean fouled ballast and return the clean ballast to the track. Various gangs must work in a supporting role in conjunction with the Undercutter Gang to accomplish the task.

On March 4, 2005, Corridor Manager Weisgerber emailed a request to the Director of Track Maintenance and the General Superintendent HDC requesting that the Gangs working in connection with the undercutting work on the Clinton Subdivision have their work schedule changed from a Monday to Friday workweek to a Sunday to Thursday workweek. In a detailed memorandum the Corridor Manager explained why, in his opinion, the change was necessary. In essence, according to the memorandum, the principal reason for the request was that the existing Monday to Friday work schedule was endangering the Carrier's ability to meet its commitment time to UPS for two of its east-bound daily trains carrying UPS packages to arrive in Chicago.

On Fridays five more scheduled trains per day passed in the corridor over a single track in 9.15 territory (47 as opposed to a maximum of 42 on Sundays and the remainder of the week). In addition to the 47 trains, every day 20 to 25 coal and grain trains passed over the single track in the corridor, or a total of 67 to 72 trains, including the two UPS trains. According to the Corridor Manager's memorandum, the two UPS trains "have a little extra time for UPS commitment on the Saturday and Sunday arrivals at Chicago. . . ." Five more trains going over a single track, the memorandum stated, cause more congestion and delay "and will affect the UPS committed trains."

The Corridor Manager's memorandum concluded as follows:

We have always tried in the past to work system gangs on a Sunday thru Thursday or Sunday thru Wednesday work schedule due to the amount of train traffic and committed ups trains. We have tried compressed halves and found out we cannot work 8 straight and recover the railroad for the next day's work. The Sunday thru Thursday has seemed to work the best on the Clinton and Boone Subs. This double undercutter gang is a big project which we need to make happen. We only have these machines until the end of March and we have to get these slow orders repaired before the P-811 arrives. We have

been unable to work these gangs on Friday the last 2 weeks and we, at the HDC, feel strongly that by working Sunday thru Thursday with this group, we should be able to get the gang their track time more consistently.

We need this gang to start working Sunday thru Thursday as soon as it is possible to make the change.

On Sunday, March 20, 2005, the Sunday through Thursday schedule was instituted for the Undercutter Gang and the supporting Gangs. On March 21, 2005, General Chairman Kent L. Bushman filed the present claim with the Carrier in behalf of all employees working on the gangs listed in the claim filed with the NRAB who were assigned a Sunday through Thursday workweek beginning March 20, 2005. According to the March 21 claim filed with the Carrier, the Gangs working the Monday through Friday workweek were abolished, and the Gangs working the Sunday through Thursday workweek were advertised, as follows:

On March 7, 11 and 14 the Carrier issued abolishment notices for Seniority District 4 Gangs 3416, 3432, 3421, 3444, 3405, 3418 and 3477 which consisted of forty four (44) positions with Saturday and Sunday as assigned Rest Days. (copies attached)

The Carrier advertised Gangs 3408, 3407, 3409, 3417 and 3420 on March 10, 2005 and Gangs 3455, 3407 and 3458 on March 17, 2005 consisting of fifty four (54) positions with Friday and Saturday as assigned Rest Days. (copies attached)

According to the Organization's claim letter, it learned of the abolishments and advertisement of positions with Friday and Saturday rest days on Thursday, March 10, 2005. On the morning of March 11, 2005, the General Chairman called the General Director Labor Relations Wayne Naro to inquire about the changes and to inform him that no Carrier representative had communicated with the Organization about the rest day changes. Mr. Naro said that he would check and get back to the General Chairman.

Shortly thereafter Assistant Director Labor Relations Ray Winkenbach and Manager Track Projects and NPS Specialist Paul Weiss called the General Chairman and asked what the problem was with the District 4 Bulletins. The General Chairman stated that five-day a week positions were to have Saturday and Sunday rest days unless the Carrier had an operational problem that could not otherwise be met and that nobody had contacted him (the General

Chairman) with information about such a problem. The General Chairman was told that Manager Track Projects Ron Callaway said that the Bulletins were for support gangs for the Undercutters.

On Monday, March 14, 2005, at 6:30 a.m. the General Chairman left a message on Assistant Director Labor Relations Winkench's voice mail that he had not received anything from the Carrier to show an alleged operational need to work five-day positions Sunday to Thursday on District 4. Shortly after noon the same day Manager Track Projects Ron Callaway called and asked the General Chairman if he had heard anything from Assistant Director Labor Relations Winkench about the Friday and Saturday rest days. The General Chairman said that he had not heard or received anything about the Carrier's alleged operational need to work Sunday to Thursday. Mr. Callaway said that he would get something and asked the General Chairman for both his fax number and email address. The General Chairman provided this information. Mr. Callaway also asked the General Chairman for Mr. Winkench's telephone number, which the General Chairman also gave him.

Early Wednesday morning, March 16, 2005, Mr. Winkench returned the General Chairman's call about a claim settlement. In that conversation Mr. Winkench said that he was informed that there was a hot train that could not be delayed on Fridays and that this was the reason for the rest day changes. The General Chairman said that there was a double main line across District 4, that trains run past the crews all day every day, and that he saw no reason the hot train could not do the same. A few hours later Mr. Winkench again called the General Chairman regarding the claim settlement and also asked where they were at with the rest day issue. The General Chairman said that the Carrier had not talked to the Organization prior to posting the positions with Friday and Saturday rest days and that they had not given the Organization anything showing an operational need. Mr. Winkench said that he would get the General Chairman something.

On March 16, 2005, at 6:14 a.m. Mr. Callaway attempted to send to the General

Chairman, by email, a copy of the Corridor Manager's memorandum explaining why, in his opinion, it was necessary to change from a Monday to Friday to a Sunday to Thursday work schedule. Unbeknownst to Mr. Callaway the memorandum was not received by the General Chairman because Mr. Callaway had used a wrong email address.

By letter dated May 11, 2005, Manager Labor Relations Pam Allen replied to the General Chairman's March 21, 2005, appeal letter. She stated that as a result of her investigation she determined that the Carrier did not violate Rule 23 of the Agreement, but had complied with the procedures of Rule 23 F and provided documentation "that based on operational needs, the Buc undercutter could only obtain adequate tracktime working a Sunday through Thursday work schedule." Claimants, she noted, "were assigned to Seniority District 4 Gangs, and as such, they were supporting the Buc undercutter." She explained that according to information presented by Corridor Manager Weisgerber, there are more trains on Friday than on any other day, and "the higher volume of trains, all of which are trying to go over a single track, would cause congestion and delay, and ultimately would affect the UPS committed trains." The Manager Labor Relations stated, in conclusion, that the Carrier had demonstrated "a bona fide operational problem, which could not be met by working employees on a Monday through Friday workweek," and had properly invoked the provisions of Rule 23 F of the Agreement. She denied the claim.

By letter dated May 18, 2005, the General Chairman appealed the Manager Labor Relations denial of the claim to the Director Labor Relations. The General Chairman repeated the substance of the original claim and specifically objected to the Carrier's making a decision to change the workweek based on operational need without the Brotherhood's input "prior to the Carrier implementing said alternative workweeks."

The appeal letter also asserted that "in fact Maintenance of Way forces did work on Fridays from date of claim to present with single track operations across Iowa on Seniority District 4" and that the Buc Undercutter did not work all of the Sundays after the workweeks

were changed. In addition, the appeal noted that the Carrier had abolished all of the Sunday - Thursday workweek positions effective May 19, 2005, and bulletined them for a Monday - Friday workweek effective May 23, 2005. Further, the appeal stated, no documentation of the operational need had yet been provided to the Organization.

On July 14, 2005, a Carrier representative obtained the agreement of the Organization to extend the time for the Carrier to reply to the Organization's appeal letter. The parties are in dispute regarding whether the extension was granted until July 19, 2005, or July 22, 2005.

By letter dated July 21, 2005, the Director Labor Relations of the Carrier replied to the Organization's appeal. The Director Labor Relation stated that he subscribed fully to the Manager Labor Relations's decision and incorporated it by reference. He asserted that "it was necessary to change the work schedule of UP System Undercutter Gang 9 39 0, and the District 4 Gangs in question working as support gangs thereto to Sundays through Thursdays, due to the urgent need to live up to UPS commitments for eastbound UPS trains ZSCCS and ZLTCS arrival and deramping schedules in Chicago, bearing in mind the highest number of trains through the territory on Fridays (47 scheduled trains on Fridays compared to between 39 and 42 scheduled trains on the other days of the week), and the resulting congestion and train delay associated with running the highest number of trains in a single track operation."

The Director Labor Relations noted in his July 21, 2005, letter that Maintenance of Way forces were not working on Sundays at other locations on the Clinton and Boone subdivisions so that train traffic would not be delayed at those other locations. Therefore any delay caused by the Undercutter and support Gangs here in question working on Sundays in the Clinton Subdivision would not cause the UPS trains to fail to meet their commitments as was the case when these gangs worked on Fridays. "Bearing in mind the magnitude of the BUC Undercutter project, which had to be completed prior to the arrival of the P-811/Triple Tie Gang and bearing in mind that the Harriman was unable to work these gangs on Fridays due to heavy train traffic," the Director Labor Relations stated, "the Carrier had experienced a bona fide 'operational need' to

deviate from the Monday-Friday work week, as envisioned By Rule 23 of the Agreement.”

The Director Labor Relations enclosed a copy of Corridor Manager Weisgerber’s March 4, 2005, memorandum explaining why there was an operational need for changing to a Sunday to Thursday work schedule and asserted that if for some reason the General Chairman did not previously receive a copy of the memorandum he was nevertheless orally notified of the operational need in his conversations with Assistant Director Winkenbach and Manager Track Projects Ron Callaway.

With regard to the General Chairman’s assertion that Maintenance of Way forces worked on Friday after the change in the workweek, the Director stated that none of the gangs in question worked and that the work was performed at other locations. With regard to the General Chairman’s contention that the BUC Undercutter did not work all of the Sundays after the workweeks were changed, the Director Labor Relations stated that he was informed by the Director of Track Maintenance that the BUC Undercutter discontinued Sunday operations with the arrival of the UP System Triple Tie Gang on the Boone subdivision.

The Director further stated that the Director of Track Maintenance informed him that the Sunday-Thursday workweek positions were abolished effective May 19, 2005, and replaced with the same number of Monday-Friday positions in connection with the UP System Triple Tie Gang working a Sunday through Wednesday schedule on the Boone subdivision. Upon the abolishment of the Sunday-Thursday positions, the Director asserted, any and all liability for the Organization’s claim necessarily ceased. Nor, in any event, the Director averred, would the Claimants be entitled to any payment for the Fridays that they did not work even if their claims were valid, which the Carrier denied was the case.

The Organization bases its claim herein both on procedural and substantive grounds. The Organization’s procedural argument will be addressed first. The Organization contends that the Carrier’s Assistant Director Labor Relations requested and received from the Organization agreement to extend the time of the Carrier to reply to the Organization’s appeal of the denial of

its claim to July 19, 2005. The Carrier maintains that the extension agreement was until July 22, 2005. The Carrier's reply letter to the appeal was dated July 21, 2005.

The applicable contract language is Rule 21, Time Limit on Claims:

RULE 21 - TIME LIMIT ON CLAIMS

All claims or grievances shall be handled as follows:

A. All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. If any such claim or grievance is disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances.

B. If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from receipt of notice of disallowance, and the representative of the Company shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any state of the handling of a claim or grievance on the property, extend the sixty (60) day period for either a decision or appeal, up to and including the highest officer of the Company designated for that purpose.

C. The requirements outlined in paragraphs A and B pertaining to appeal by the employee and decision by the Company shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Company to handle such disputes. . . .

The Board finds it unnecessary to rule on whether the extension was until July 19 or July 22, 2005, because we find merit to the Carrier's alternative argument. The Carrier contends that even if the parties agreed to extend the time for it to reply to the appeal to July 19 only, its reply was nevertheless timely because it was dated and mailed on July 21, 2005, which was 59 days after receipt of the Organization's appeal letter. The Organization does not deny that the Carrier's reply would have been timely if the appeal was received on May 23, 2005. Its only argument made on the property was the following statement in the General Chairman's letter dated November 9, 2005, to the Director Labor Relations: "If in fact the Carrier received the

appeal on May 23, 2005 as you are now claiming there would have been absolutely no reason for the Carrier to request an extension to either July 19 or 22, 2005.”

Contrary to the General Chairman’s assertion, there was a very good reason for the Carrier to request an extension until either July 19, or July 22, 2005, even if the appeal was received on May 23, 2005. The reason for this is that Rule 21 A gives the Carrier 60 days “from the date same is filed” to notify whoever filed the claim of its disallowance. The language “from the date same is filed” is ambiguous. Does it mean from the date of mailing the appeal by the Organization or the date that the appeal was received by the Carrier? If the former, then the Carrier’s reply was due no later than Monday, July 18, 2005, since the appeal was mailed on May 18, 2005, and the 60th day thereafter fell on Sunday, July 17, 2005. To avoid any argument as to whether the date of mailing or the date of receipt governed, the prudent thing to do would be to request an extension of time to reply to the appeal.

The Organization does not contest that the Carrier’s reply to the appeal was timely if the appeal was not received by the Carrier until May 23, 2005. The Organization’s appeal letter is dated May 18, 2005; postmarked May 19, 2005; and the copy of the letter in the record is stamped “REC’D MAY 23 2005 Labor Relations.” May 18, 2005, was a Wednesday, and May 23, 2005, a Monday. The General Chairman’s office is in Rock Falls, Illinois, and the Director Labor Relations’s, in Omaha, Nebraska. It is entirely reasonable and regular on its face that a letter mailed on Wednesday, May 18, 2005, in Rock Falls, Illinois, would not be received in Labor Relations by the Carrier until the following Monday, especially if the Labor Relations office did not work during the weekend. From May 23, 2005, until July 21, 2005, is only 59 days.

The Board does not pass on the question of how the 60-day period should be calculated since, in the present case, the Organization has not questioned the Carrier’s position that the 60 days run from the date of receipt of the appeal. Since the Board finds no reason to doubt the Carrier’s position that the appeal was received on May 23, 2005, the Board finds that the

Carrier's disallowance of the appeal was timely.

The Carrier's Manager Labor Relations, in denying the claim, took the position that the Carrier did not violate Rule 23 of the Agreement and had complied with the provisions of Rule 23 F. The Director Labor Relations, in denying the organization's appeal, adopted and incorporated by reference the Manager Labor Relations's decision. Paragraph F of Rule 23 applies only to positions and work extending over a period of five days per week.

The Board agrees that the Undercutter and supporting Gangs involved in this dispute were all five-day positions. According to the evidence, before the positions were abolished the Gangs all worked a Monday-Friday workweek, and after they were abolished and rebulletined, a Sunday-Thursday workweek. There is no evidence that they were scheduled to work a six-day workweek, and certainly no indication they were assigned a seven-day workweek. Rule 23 B clearly states, "On positions the duties of which can reasonably be met in five days, the days off shall be Saturday and Sunday."

The introductory paragraph to Rule 23 states:

The expressions "positions" and "work" used in this Agreement 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.

Accepting the foregoing definition, the Board nevertheless finds no evidence that the duties and operations necessary to be performed by the Undercutter and supporting Gangs required them to work more than five days per week. Moreover, by relying on Rule 23 F in this case, the Carrier has acknowledged that the positions involved are five-day positions since paragraph F, by its terms, applies only to five-day positions.

For purposes of this award, without deciding the issue, the Board will assume for the sake of argument that the Carrier had an operational problem which could not be met under the provisions of paragraph B of Rule 23. Paragraph F then comes into play and provides as follows:

F. Deviation from Monday-Friday week - If, in positions and work extending over a period of five days per week, an operational problem arises which the Company contends cannot be met under provisions of paragraph B hereof and requires that some of such

employees work Tuesday to Saturday instead of Monday to Friday, and the employees contend to the contrary, and if the parties fail to agree thereon, then if the Company nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim.

NOTE: The following statement of principles shall be used as a guide in the future application of Rule 23 F:

1. There is no absolute right to make work assignments from Tuesday to Saturday on any positions the duties of which can be reasonably be met in five days as specified in paragraph B of this rule. Paragraph B governs such assignments.
2. Paragraph F, however, permits exceptions to paragraph B under certain conditions.
3. The first condition is that there must be an operational problem that cannot be met under the provisions of paragraph B.
4. The second condition is that the operational problem "requires that some of such employees work Tuesday to Saturday instead of Monday to Friday."
5. Another condition is that the operational problem and the necessary number of Tuesday to Saturday assignments to meet it must be explained to the duly accredited representative of the employees and an effort made to reach agreement.
6. If the parties fail to agree, the management may then put into effect the assignment it deems necessary to meet the operational problem, but it does so at its risk, because paragraph F gives the employees the right to process as a grievance or claim their contention that the assignment itself is improper.

The first sentence of Rule 23 F states that it applies to "positions and work extending over a period of five days per week. . . ." Paragraph F thus applies to five-day positions only. In addition, the only deviation contemplated by paragraph F is to a workweek of "Tuesday to Saturday instead of Monday to Friday. . . ." That the only deviation permitted is to a Tuesday to Saturday workweek is also evident from subparagraphs 1, 4, and 5 of paragraph F.

The Board has read all of the cases relied on by both parties. None of the cases permitted a carrier to schedule an employee assigned to a five-day position to have Sunday as a regular workday during his or her workweek. In Award No. 80, Public Law Board No. 2960, relied on by the Carrier, for example, the Board expressly found the positions in issue to be seven-day

positions. That is also true of Third Division Award No. 31295.

Rule 23 D is headed “Seven-day positions” and states, “Where the nature of the work is such that employees shall be needed seven days each week, any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday.” Some of the cases cited by the parties expressly recognize the right of a carrier to schedule Sunday as a regular workday on seven-day positions, where, for example, employees are assigned to staggered workweeks. None of the cases cited, however, permitted employees to be scheduled to work Sundays as part of their regular workweek in five-day positions. The Board finds that the Carrier violated the Agreement in the present case by assigning the Claimants to a Sunday-Thursday workweek since the Claimants all occupied five-day positions.¹

With regard to the remedy for the violation found, the affected employees are entitled to be paid time and one-half for all work performed on Sunday, their former rest day. They are not entitled to be paid for the Fridays that they did not work. See Third Division Awards Nos. 36722, 32795, and 31298, and Special Adjustment Board No. 1107, Award No. 1. Liability on the part of the Carrier ceased when the Sunday-Thursday workweek positions were abolished and replaced with Monday-Friday positions.

One additional comment is in order. The Corridor Manager’s memorandum quoted above at page 2 of this Award states that the Carrier has “always tried in the past to work system gangs on a Sunday thru Thursday or Sunday thru Wednesday work schedule due to the amount of train traffic and committed ups trains.” If such a practice exists, nothing contained in this Award should be interpreted as prohibiting or disapproving of such existing practices. There was no evidence in this case, however, of an existing practice involving Sunday - Thursday workweeks for the positions here involved.

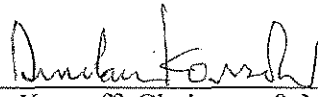
¹The Board notes that Rule 23 O, Alternate Work Weeks, permits Rail, Tie, and Ballast Crews established under Rule 47 or 49 to work five eight-hour days followed by two consecutive rest days which may include either Saturday or Sunday. There was no contention here that any of the Gangs was established pursuant to Rule 47 or 49.

A W A R D

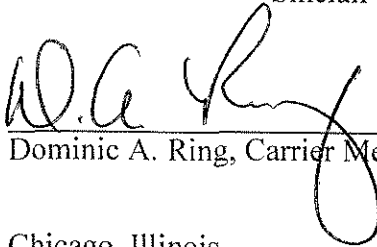
Claim sustained in accordance with findings.

O R D E R

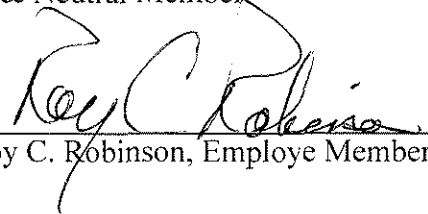
This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the award is transmitted to the parties.



Sinclair Kossoff, Chairman & Neutral Member



Dominic A. Ring, Carrier Member



Roy C. Robinson, Employee Member

Chicago, Illinois
Dated: October 26, 2008