

PUBLIC LAW BOARD NO. 7877

Brotherhood of Maintenance of Way)	
Employes Division – IBT Rail)	AWARD NO. 17
Conference)	CASE NO. 17
)	
and)	NRAB – 00003-150324
)	
BNSF Railway Company)	

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it scheduled a Track Subdepartment truck driver position (#15172) to a work week with rest days of other than Saturday and Sunday beginning January 10, 2014 and continuing (System File S-P-1838-G/11-14-0155 BNR).
- (2) The Carrier violated the Agreement when it scheduled a Track Subdepartment truck driver position (#15173) to a work week with rest days of other than Saturday and Sunday beginning January 10, 2014 and continuing (System File S-P-1839-G/11-14-0156).
- (3) The Carrier violated the Agreement when it scheduled a Track Subdepartment truck driver position (#15171) to a work week with rest days of other than Saturday and Sunday beginning January 10, 2014 and continuing (System File S-P-1840-G/11-14-0157).
- (4) As a consequence of the violation referred to in Part (1) above, any employee assigned to said position shall ‘...receive eight hours pay at the time and one-half rate for each and every Saturday worked commencing January 10, 2014 (the date the bids close). We further request that any truck driver assigned to this position receive eight hours straight time pay for each and every Monday, when they are required to suspend work, commencing January 10, 2014. This claim is to continue until such time as the position is properly assigned with Saturday and Sunday rest days.’
- (5) As a consequence of the violation referred to in Part (2) above, any employee assigned to said position shall ‘...receive eight hours pay at the time and one-half rate for each and every Sunday worked commencing January 10, 2014 (the date the bids close). We further request that any (sic) assigned to this position receive eight hours straight time pay for each and every Friday, when they are required to suspend work, commencing January 10, 2014. This claim is to continue until such time as the position is properly assigned with Saturday and Sunday rest days.’
- (6) As a consequence of the violation referred to in Part (3) above, any employee assigned to said position shall ‘...receive eight hours pay at the time and one-half

rate for each Saturday and Sunday worked commencing January 10, 2014 (the date the bids close). We further request that any truck driver assigned to this position receive eight hours straight time pay for each and every Tuesday and Wednesday, when they are required to suspend work, commencing January 10, 2014. This claim is to continue until such time as the position is properly assigned with Saturday and Sunday rest days.'

OPINION OF BOARD:

Public Law Board No. 7877, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

In rendering our findings, the Board has considered only the arguments and evidence raised during the on-property handling of this claim.

On or about January 1, 2014, Carrier advertised several Track Subdepartment truck driver positions as seven day week positions with rest days other than Saturday and Sunday. There is no dispute that the new positions had the same headquarters and job duties as they had historically maintained. There is also no dispute that the positions previously worked a five day a week schedule with Saturday and Sunday rest days.

The Organization filed three separate claims which have been consolidated herein. The claims assert that the Carrier improperly created these positions with rest days other than Saturday and Sunday. The Organization contends that the positions are in fact assigned as five (5) days per week and are not filled or working on a seven (7) day per week basis. According to the Organization, the Carrier violated the controlling Agreement by requiring the Claimants to work positions assigned with rest days other than Saturday and Sunday. Further, the Organization asserts that Carrier improperly required Claimants to suspend service on one of their workweek days. In support of its position, the Organization relies on Rule 24, which provides in relevant part:

RULE 24. FORTY HOUR WORK WEEK

- A. Subject to the exceptions contained in this Agreement, 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) is hereby established. The work weeks may be staggered in accordance with the Company's operational requirements. So far as practicable the days off shall be Saturday and Sunday. This work week rule is subject to the provisions which follow.

NOTE: The expressions 'positions' and 'work' refer to services, duties, or

operations necessary to be performed the specified number of days per week, and not to the work week of individual employees.

D. 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.

E. Six-day Positions – Where the nature of the work is such that employes will be needed six (6) days each week, the rest days will be either Saturday and Sunday, or Sunday and Monday.

F. Seven-day Positions – On positions which are filled seven (7) days per week any two (2) consecutive days may be the rest days with the presumption in favor of Saturday and Sunday.

G. Regular Relief Assignments

- (1) All possible regular relief assignments with five (5) days of work and two (2) consecutive rest days will be established to do the work necessary on rest days of assignments in six (6) or seven (7) day service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned. Relief assignments will not be required to have five (5) days of work per week.
- (2) Assignments for regular relief positions may on different days include different starting times, duties and work locations for employes of the same class in the same seniority district, provided they take the starting time, duties and work locations of the employe or employes whom they are relieving.

H. 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 Company contends cannot be met under the provisions of Section D of this rule, and requires that some of such employes work Tuesday through Saturday instead of Monday through Friday, and the employes contend the contrary and if the parties fail to agree thereon, then if the company nevertheless put such assignments into effect, the dispute may be processed as a grievance or claim under this Agreement.

The Organization asserts that Rule 24(A) and (D) are clear and unambiguous in providing for Saturday and Sunday as rest days when positions have duties which can reasonably be met in five days. Consistent with this Agreement language, the positions established herein have historically been assigned a five-day work week with Saturday and Sunday as rest days. The Organization argues that Carrier has not shown any change in operational need to bulletin these positions with other than Saturday and Sunday as rest

days nor has Carrier established that the duties of these positions cannot be met in five days. In such a circumstance, the Organization points to the many precedent awards on this subject which have concluded that Carrier cannot overcome the heavy presumption that positions are to be assigned work weeks consisting of five days with Saturday and Sunday as rest days. See, PLB 4014, Cases 9, 10, 11; SBA 1107, Award No. 1 (Eischen, 1999); Third Division Awards 35564; 35805; 36055; 36722; 37049; 41561; PLB 7656, Award 4 (Strongnin, 2014).

In addition, the Organization contends that Rule 24(H) requires Carrier to contact the Organization and discuss the issue if an operational problem arises which cannot be met under Rule 24(D). No attempt by the Carrier was made to contact the Organization prior to implementing the positions at issue. The Organization argues that the first time the matter was brought to its attention was when the positions were posted for bulletin.

In response, Carrier contends that it fully complied with the provisions of the controlling Agreement. It argues that Rule 24(F) recognizes that seven-day positions may be created and any two consecutive days may be the rest days. A seven-day assignment can be established where, as in this case, there exists seven days of work. On five of those seven days, the work is performed by the regular (seven-day) position/gang, with the remaining two days of work performed by its bulletined regular relief crew in accordance with Rule 24(G). Rule 24 allows it to stagger the work weeks of truck drivers so as to maintain seven day a week coverage.

The Carrier contends that there is no agreement language in Rule 24 (F) or (G) that requires it to show any operational need. Even if such a showing is necessary, however, Carrier asserts that it has the managerial right to determine the efficient conduct of its business. Track maintenance issues require Carrier to respond on a seven day per week basis. Equally important, the fact that there is coverage assigned seven days per week is evidence in and of itself that there is an operational need; otherwise the Carrier would simply pay overtime rates for occasional work instead of paying an additional 40 hours of straight time pay to an additional employee.

Carrier recognizes that Rule 24 (A) and (D) are applicable when there is a change in the workweek situation, where a five-day assignment for operational reasons cannot be performed on a Monday through Friday basis. In that situation, Carrier acknowledges it would have to prove operational need to schedule a change in the work week and rest days. Here, the positions in question are regular seven-day assignments to cover seven-day service requirements and their relief positions were created to relieve the rest days of the seven-day assignments. Since the Carrier may designate seven days of work where there is such need, it is not required to inform the Organization beforehand. In support of its position, Carrier cites a line of cases which have reached the same conclusion in similar factual circumstances. These prior awards, in Carrier's view, should be deemed controlling in the instant case. See, e.g., Third Division Award 21428; PLB 2960, Award 80 (Vernon, 1985) Appendix K SBA, Award 23 (O'Brien, 1977).

The Board has reviewed the considerable arbitral precedent provided by the parties. It is clear that we are not operating in uncharted waters. Notwithstanding the holdings in some earlier cases, upon which the Carrier relies, the better reasoned and majority view has adhered for decades to the principles set forth in Special Board of Adjustment No. 1107, Award No. 1 (Eischen) when interpreting the Forty Hour Work Rule:

These early cases laid down the guiding principle, followed in all of the better-reasoned cases decided in the last 40 years, that the language appearing in Rule 15(a) and (b) creates a rebuttable presumption that existing five-day operations staffed by positions with a Monday-Friday work week and Saturday-Sunday rest days should not unilaterally be changed to seven-day operations with other than Saturday-Sunday rest days. A Carrier invoking the language of Rule 17(a) and (d) to alter this status quo and justify implementing such a change from five-day Monday through Friday positions to seven-day positions with other than Saturday-Sunday rest days, bears the burden of rebutting that presumption by producing clear and convincing evidence of necessity due to a material change of operational requirements, i.e., a bona fide operational need to make the change.

Contrary to Carrier's position, we are persuaded that Rule 24 cannot be properly interpreted at this point in time as authorizing the Carrier to unilaterally abolish historic five-day positions and to re-establish them as seven-day positions so as to avoid the plain reading of Rule 24. The Agreement is clear that a Monday through Friday eight hour per day work week is the contractually preferred schedule. Although deviation from the Monday through Friday schedule is permitted, Rule 24(A) nevertheless requires a showing that there are "operational requirements" which necessitate the change and, further, that it is not "practicable" to have Saturday and Sunday rest days. Notably, the presumption in favor of Saturday and Sunday rest days applies equally to seven-day positions under Rule 24(F).

Thus, Carrier's assertion that it need not establish any change in operational requirements is inconsistent with the language of Rule 24 and the long line of cases interpreting the Forty Hour Work Rule which require Carrier to show operational necessity in order to change a long-established Monday through Friday five-day position with Saturday and Sunday rest days so as to provide seven-day coverage with rest days other than Saturday and Sunday.

Carrier's alternative argument is that track maintenance issues and the need for seven-day coverage rebut the presumption in favor of the Monday through Friday workweek with rest days on Saturday and Sunday. In our view, however, that argument is equally problematic, for two reasons. First, there is no evidence in the record to support the Carrier's position that there have been material modifications in conditions which justify a change in work schedules that have been in existence for decades. The burden was on the Carrier to establish that point. In contrast to Third Division 36999, where Carrier

introduced probative evidence that it was unable to meet service demands by the use of overtime on weekends and where the duties of the positions could not reasonably be met on a Monday through Friday schedule, no substantive evidence was offered to support Carrier's position in this case.

Second, railroading has always been a 24/7 operation. Without substantiation to rebut the presumption of the Monday through Friday workweek with Saturday and Sunday rest days, we are compelled to conclude that what Carrier is attempting to do is rearrange work schedules of positions that were historically assigned five day service Monday through Friday to schedules that are still five-day a week service but overlapping these positions to provide seven day coverage with rest days of other than Saturday and Sunday. The effect is to avoid the payment of overtime on weekends. It has been consistently established, however, that avoidance of overtime payments for Saturday/Sunday work is not an operational necessity sufficient to overcome the presumption that the existing five-day operation staffed by positions with a Monday through Friday work week and Saturday- Sunday rest days should not be unilaterally changed. See, e.g. Third Division Awards 36722. We therefore find that Carrier's assertion that the work was seven days per week work is not sufficient in light of the fact that the work has previously been and continues to be performed on a five day per week basis with relief. As the Board stated in Third Division Award No. 36722: "...the record in this case shows that before, during and after the disputed changeover by the Carrier, the work performed remained de facto a five-day operation, despite the Carrier's unilateral de jure declaration that...it would henceforth be scheduled and compensated as a seven-day operation."

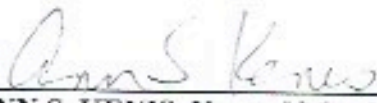
Based on the foregoing, we find that Carrier violated Rule 24 of the Agreement when it unilaterally changed the Track Subdepartment truck driver positions' Monday through Friday workweek with Saturdays and Sundays designated as rest days to a work week with rest days of other than Saturday and Sunday. As a remedy for the proven violation, the Carrier is directed to compensate Claimants in an amount equal to the difference between what they actually earned under the contractually invalid schedule and what they would have earned but for the violation of Rule 24 and until such time as the positions are properly bulletined. Carrier shall compensate the employees assigned to the positions after the invalid change the difference between the overtime and straight time rate of pay for each hour worked on the former rest days commencing January 10, 2014, when the bids closed. The Organization's request for additional straight time damages for the "lost work opportunity" is hereby denied, consistent with the reported decisions on this subject.

AWARD

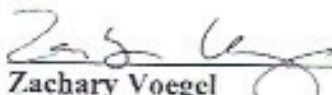
Claims sustained in accordance with the Findings.



Joe Heenan
Carrier Member



ANN S. KENIS, Neutral Member



Zachary Voegel
Organization Member

Dated January 18, 2019.