

PUBLIC LAW BOARD NO. 7877

**Brotherhood of Maintenance Of Way Employees
Division - IBT Rail Conference**

**Case No.: 4
Award No.: 4**

vs.

**BNSF Railway Company
(Former Burlington Northern Railroad Company)**

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

- (1) The Carrier violated the Agreement when, with Bulletin G1402A-03 which opened on February 1, 2014, it bulletined and ultimately assigned Section TSEC1032 Sectionman position 53209 with headquarters in Galesburg, Illinois to a work week with rest days of other than Saturday and Sunday (System File 14-A040-5/10-14-0189 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Bernhart and any employee subsequently assigned to said position shall:**

'...be paid at the overtime rate of pay for all hours worked every Sunday that he is required to work and eight (8) straight time hours for every Friday when he is required to suspend work, commencing February 1, 2014 and continuing until the violation ceases.

Also, as settlement of this claim, I am requesting that this position be abolished and re-bulletined with a Monday through Friday work week and the rest days of Saturday and Sunday.

As this is a continuing claim, this would not only be a claim for the Claimant named in this claim, but any employees that would subsequently exercise their seniority to this position in any manner."

FINDINGS:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934. Public Law Board 7877 has jurisdiction over the parties and the dispute involved herein.

The facts in this matter are not in dispute. It arose on the BNSF Chicago Division. Prior to the events that led to this dispute, the Carrier advertised Sectionmen positions as five day a week positions. Employees on these headquartered gangs were previously assigned a traditional five days a week schedule with Saturday and Sunday rest days. According to the Carrier, the Maintenance of Way craft was the only craft of employees on the Chicago Division that did not have at least some of its members regularly assigned to work on Saturdays and Sundays. When Saturday or Sunday work was called for, members of the craft were called as the work demanded. When employees responded, they were paid at the overtime rate.

On or about February 1, 2014, the Carrier bulletined Galesburg, Illinois Section #1 Sectionman Position 53209 which would be assigned to Gang TSEC1302 with rest days of Friday and Saturday.

The Organization filed these claims, asserting that the Carrier has improperly created this Sectionman position with rest days of Friday and Saturday. The Organization claims that the position is assigned as a five days per week. The parties agreed to consolidate these claims before the Board. The Organization asserts that the Carrier has violated the Agreement by requiring the Claimants to work in positions assigned with rest days other than Saturday and Sunday. The Organization claims that the Carrier is requiring the Claimants to perform service on the required rest day of Sunday and to suspend work on Friday to absorb that overtime.

The Carrier denied the claims, arguing that it properly established seven-day positions according to the plain language of Rule 24. The Carrier contends that under Rule 24, it clearly and unambiguously has the right to establish seven-day positions with rest days other than Saturday and Sunday. The Carrier contends that it has the managerial right to conduct its business in an efficient manner. The Carrier argues that its need for Maintenance of Way forces is not abated on the weekends, and so it created gangs to provide seven-day coverage. The Carrier pointed out that when employees failed to respond to calls for weekend work, the Carrier had no right to compel them to work. The Carrier contends that the bulletins for these positions set forth the assigned workdays and rest days for the three crews involved, so that each employee would have the same earnings potential as with a 40-hour assignment.

The Board has reviewed the entire record in this case with care. The Organization bears the burden of showing that the Carrier's decision to bulletin these gangs with rest days other than on Saturday and Sunday violates Rules 24 (d) and (h) of the parties' Agreement.

The parties have a long history of dispute over the Forty Hour Work Week Rule, which emerged from the National Forty Hour Work Week Agreement of 1949. As such, the language of the rule appears in numerous collective bargaining agreements in nearly identical terms and has been addressed both on this property and others. The Rule at issue states, 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 "position" and "work" 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.

D. Five-day Positions -

On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.

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 employees of the same class in the same seniority district, provided they take the starting time, duties and work locations of the employee or employees 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 employees work Tuesday through Saturday instead of Monday through Friday, and the employees contend 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 under this Agreement.

The Organization insists that this matter has been settled by a long line of cases, including ones on this property, that have established that the Carrier may only change existing five-day operations to seven-day operations upon a showing of necessity due to a material change of operational requirements. This standard, construing Rule 15(a) and (b), which are identical to Rule 24(a) and (d), was firmly enunciated in Third Division Award 35564:

These early cases laid down the guiding principle, followed in all of the better-reasoned cases decided in the last forty 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 15 (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 heavy 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.

The Organization points out that these positions have been bulletined as five-day positions with Saturday-Sunday rest days for decades, and the Carrier does not dispute that fact, conceding that the Maintenance of Way craft was the only craft of employee on the division that did not have at least some of its members regularly assigned to work Saturdays and Sundays. The Carrier bulletined positions which perform the same duties and are headquartered as before, but unilaterally changed them from five-day to seven-day positions. The Organization argues that an unbroken line of cases since 2001 has consistently held that in order to do so, the Carrier must demonstrate operational need to unilaterally change five-day positions to seven-day positions.

The Carrier contends that it is not required to show operational necessity, because it has established that these are seven-day positions. The Carrier asserts that it has shown that seven days of work exist, and therefore, this case should be decided under Rules 24 (f) and (g). According to the Carrier, it is irrelevant that the position-holders previously worked five days a week, because it is the position, not the assignment, that governs, pointing to the Note to Rule 24:

“NOTE: The expressions ‘position’ and ‘work’ 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.”

No doubt, positions that are initially established as seven-day positions are governed by Rules 24 (f) and (g), as was recognized by Third Division Award 37049 quoting from Third Division Award 17593, to wit, “We believe [these rules] authorized the Carrier to establish seven day positions on positions which had, prior to September 1, 1949, been filled seven days per week.”

However, that Board went on to say, “We likewise are of the opinion that this language prohibits Carrier from creating additional seven-day positions absent a showing by it of a material change of operational requirements of the Carrier.”

The Carrier points out that the area in dispute is very busy, operating trains seven days a week and that the business of running them does not stop. The Carrier argues that its operation requires Saturday and Sunday work by the Claimants herein. The Carrier points to the fact that it has had to regularly call forces to work on Saturdays and Sundays and pay them at the overtime rate. Further, it argues, the unwillingness of gangs to cover the overtime has jeopardized efficient operations. In order to cover all seven days, the Carrier established seven-day positions covered by three crews. In addition, relief positions were established to work on the rest days of the assignees to the seven-day positions. The Carrier argues that the establishment of the relief crew distinguishes these claims from the ones previously considered because it has shown that the duties of these positions cannot reasonably be met in five days. If they could, the Carrier argues, it would not have incurred the expense of creating relief crews.

This argument ignores that for decades, the Carrier’s forces have performed the required work in a traditional Monday-Friday work week, without the need for a staggered work week. Clearly, the duties of these gangs could reasonably be met in five days a week. The reasons offered by the Carrier to show why these positions must be created as seven-day positions are the same reasons given by this Carrier and others to justify a unilateral change from five-day to seven-day positions, but which did not persuade those Boards. The Carrier has failed to explain how these positions, which have been bulletined as five-day positions for decades, are, in fact, seven-day positions. There is no change in the positions, except for their rest days. Under these circumstances, there is no question that the Carrier is imposing a unilateral change.

As noted, there is a long line of arbitral precedent that establishes a rebuttable presumption in favor of maintaining the status quo. “The presumption is overcome only by Carrier’s production of ‘...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.’” Third Division Award 36055 (Wallin). We see no reason to quarrel with this long-standing precedent. At the same time, we have reviewed the precedent cited by the Carrier, and are not persuaded that it requires a different result.

In order to rebut the presumption, this Carrier need look no further than Third Division Award 36999 (Newman), in which that Board found that clear and convincing evidence of the necessity of making a change was presented. Here, however, the Carrier has not presented any evidence of necessity, because it argued it only needed to show that five-day positions with Saturday and Sunday rest days were not practicable in a legitimate business sense. This argument, however, ignores the burden of proof enunciated in Special Board of Adjustment 1107, Award 1, and followed by numerous Boards since then. Third Division Awards 35564, (Eischen) 35740 (Kenis), 36055 (Wallin), 36722 (Eischen), 36999 (Newman), and 37049 (Eischen). This Board finds, in accord with this precedent, that the Carrier was required to present clear and convincing evidence of a bona fide operational need to make a change.

The contentions that the work must be performed each day and that overtime must be paid when work is required on the employees' rest days are not new arguments. They were considered and rejected in Third Division Award 35564 (Eischen), wherein the Carrier argued that "efficiency and avoidance of overtime," "round-the-clock 24 hour/7 day operations," "traffic and train density" and "safety of trains and the traveling public" demanded that the positions be converted from five-day to seven-day positions. There, the Board wrote,

Application of the principles established in this long line of cited precedent to the facts of the present case leads the Board to conclude that the Carrier failed to rebut the presumption because it did not produce clear and convincing record evidence of the operational necessity of changing the Claimants' long-established Monday-Friday five-day positions, with Saturday-Sunday rest days so as to provide seven-day coverage with rest days other than Saturday and Sunday....Moreover, it is well established that railroading, per se, has always been a "24/7" operation and avoidance of overtime payments to incumbents of five-day positions for occasionally necessary Saturday-Sunday work is not alone an "operational necessity" sufficient to overcome the presumption discussed supra.

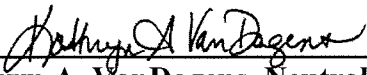
In sum, the creation of the gangs as seven-day positions when they have historically been five-day positions is permitted when clear and convincing evidence of a bona fide operational need is demonstrated. Here, no evidence was presented to show that new operational problems had arisen which would justify the change. We find that the record does not support a finding of material operational changes. To the contrary, the evidence suggests that the situation has persisted for some time. The Carrier has failed to rebut the presumption against its unilateral action. The claims must be sustained.

As a remedy, it is the Board's intention to provide a remedy that will make the Claimants whole, in other words, to place them in the position they would have been in but for the Carrier's violation of their Agreement. The Carrier shall compensate each of the Claimants in an amount equal to the difference between the overtime rate and the straight

time rate for each hours of work which they performed on their former Saturday/Sunday rest days because of the new schedule. The Organization's request that the Claimants also be compensated at their straight time rate for days they were required to rest is not persuasive and is denied.

AWARD

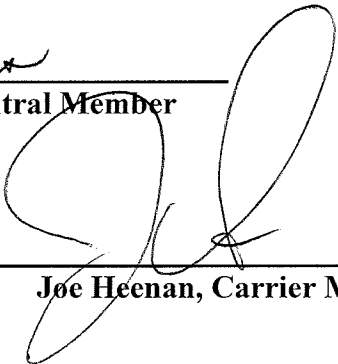
Claim sustained in accordance with the Findings.



Kathryn A. VanDagens, Neutral Member



Zachary Voegel, Organization Member



Joe Heenan, Carrier Member

Dated: January 18, 2019