

PUBLIC LAW BOARD NO. 6596

**Case No. 2
Award No. 2**

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly changed the work week of employees assigned to Nebraska Division Section Gang 4800 from Monday through Friday with Saturdays and Sundays designated as rest days to Sunday through Thursdays with Fridays and Saturdays designated as rest days (System File N-274/960385).**
- (2) The Agreement was violated when the Carrier improperly changed the work week of employees assigned to Nebraska Division Section Gang 4801 from Monday through Friday with Saturdays and Sundays designated as rest days to Tuesday through Saturday with Sundays and Mondays designated as rest days (System File N-273/960386).**
- (3) As a consequence of the violation referred to in Part (1) above, Messrs. S. D. Bradley, J. C. Turley, D. L. Chvala and C. K. Bradley shall each be allowed ‘ . . . eight (8) hours pay at the respective straight time rate for each Friday they have not been allowed to perform service during the valid regular eight (8) hour assignment. Further, the same employees must be allowed at the respective and applicable overtime rates, pay for all service performed each valid Sunday rest day. This claim shall include all Fridays and Sundays specified subsequent to January 21, 1996 until said violation of the Agreement ceases to exist.’**
- (4) As a consequence of the violation referred to in Part (2) above, ‘Each employee identified and working as a Gang 4801 crew member subsequent to and including January 2, 1996, must be allowed eight (8) hours pay at the respective straight time rate for**

each Monday they have not been allowed to perform service during the valid regular eight (8) hour assignment. Further the same employees must be allowed at the respective and applicable overtime rates, pay for all service performed each valid Saturday rest day. This claim shall include all Mondays and Saturdays specified subsequent to January 2, 1996 until said violation of the Agreement ceases to exist.'

FINDINGS:

This Board, after hearing upon the whole record and all the evidence finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given notice of hearing thereon.

In these two consolidated cases, the Organization alleges Carrier violation of the Agreement in its bulletining of new positions for Section Gang 4800 and Gang 4801. The Organization maintains that in each case, the Carrier acted without notification to advertise five day a week positions without valid rest days. In Section Gang 4800 headquartered at Lewellen, Nebraska, the Carrier designated the work week as Sunday through Thursday, with Friday and Saturday as rest days. In Section Gang 4801, headquartered at Northport, Nebraska, the Carrier designated the work week as Tuesday through Saturday, with Sunday and Monday as rest days. The Organization argues that the National Forty Hour Work Week Agreement requires Carrier consultation which did not occur and further, that five-day positions require that the rest days will be Saturday and Sunday. The Organization points to Rule 26, Sections (a), (b) and (f). The Carrier clearly violated the Agreement by its unilateral change without valid rest days.

The Carrier argues that Rule 26 provides in Sections (a) and (d) the right of the Carrier to shift from a five day a week to a seven day a week coverage of territory. In doing so, it was not obligated to provide a Saturday and Sunday as rest days. The Carrier argues that the Organization is wrong in maintaining that this required agreement between the parties (Section f) or represented a five day work week (Section b). In fact, the Carrier had sound operational requirements which required the change. It argues that its position was amply demonstrated through evidence presented.

The Rule herein applicable is the March 19, 1949 National Forty Hour Work Week Agreement Rule, which in this Agreement is Rule 26. That Rule states as follows:

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

(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.

(c) **SIX-DAY POSITIONS.** Where the nature of the work is such that employees will be needed six (6) days each week, the rest days will be either Saturday and Sunday or Sunday and Monday.

(d) **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.

(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 Company contends cannot be met under the provisions of Section (c) 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.

After a careful and thorough review of the record, it is clear to this Board that Rule 26 mandates a forty-hour work week of five eight-hour days with two consecutive days off out of each seven days. It does not mandate that those two days off be Saturday and Sunday. The choice of the language "so far as practicable" obligates the Carrier to Saturday and Sunday unless operations (see NOTE) require a change. If they do, then five day positions will have the preferred Saturday and Sunday off days, but six and seven day positions differ. In six day positions, the Carrier will make the off days either Saturday and Sunday or Sunday and Monday. In seven day positions, the Carrier must choose any two consecutive days with the presumption in favor of Saturday and Sunday.

The Organization has argued three major points. It maintains that the Carrier failed to meet and discuss the change with the Organization prior to putting the changes into effect. It operated unilaterally and in violation of Rule 26(f). It further argues that these are not seven day a week positions, but five day positions which require Saturday and Sunday as rest days as governed by Rule 26(a) and (b). It provides evidence which it argues substantiates that position. And lastly, the Organization denies that there is any support for an operational need for this change.

The Board finds no support for the Organization's arguments associated with a unilateral change. Our findings conclude that these are seven day positions as will be discussed. We do note that the Carrier argued on property that there was discussion with the Organization about the impending change in rest days. In the Organization's letter of February 23, 1996, the General Chairman admits to contacts with the Carrier on the "operational problem" that was behind the decision to create seven-day positions. There was disagreement between the parties and the Carrier moved ahead. Rule 26(f) was created for deviations from section (b) work weeks and is now properly a claim before this tribunal. There are numerous awards which point to a conclusion that if the work requires six or seven day positions, then no prior consultation is necessary (Public Law Board No. 2166).

As for the Rule, the Gangs were set up as seven day a week positions. Therefore, the Rule has a "presumption in favor of Saturday and Sunday" rest days, which the Carrier deviated from in both Section Gang 4800, when it changed its rest days to Friday and Saturday rest days and Section Gang 4801, which was changed to Sunday and Monday as designated rest days.

The Board has studied the probative evidence evaluating the Organization's other

allegations alleging that this work could be “reasonably” performed in a five-day schedule and further, that there was no proof that would permit the Carrier to avoid this preference toward a Saturday and Sunday rest days “so far as practicable.” We have done so with attention to the several Awards cited and conclude from this evidence that the Carrier made a substantial case that the work required maintenance staggered over a seven-day work week. The Carrier provided statements from both the Manager of Track Maintenance and Director of Track Maintenance about the operational need for seven day a week operations. The Manager of Track Maintenance states that:

... the amount of trains we run here in a 24 hour time frame change dramatically. We have gone from 24 trains a day in 1990 to almost 60 trains a day.. We do not have the physical plant needed to run this amount of trains on a daily basis without giving the track 7 day coverage.

The Carrier provided detailed graphs and maps to indicate that there had been a substantial increase in train traffic over the lines impacted. The Carrier also provided information on Project Yellow and the added construction to carry traffic over the subdivision. There was additional evidence by way of the amount of overtime worked and statements of the “extraordinary problems being encountered with broken rails and pull aparts.” While challenged, the evidence did support that this is not just an attempt to avoid overtime as was the case in prior awards (Third Division Award 35740; Special Adjustment Board No. 1107, Award No. 1). This record indicates substantial increased rail traffic requiring overtime that was worked around eighty-five per cent of the year on a weekend day and that in the previous year, seven days service was performed nearly sixty percent of the year. The Carrier states that “in the last quarter of 1995, there were no weekend days (Sat or Sun) that were not worked.” The operational shift to more traffic requiring seven day a week service is supported in the record.

We have reviewed the Organization’s rebuttal and do not find it persuasive to overcome the case presented by the Carrier for the need to shift to a seven day a week operation. There clearly is in this instance necessary work remaining to be performed well after the five day, forty hour a week regular assignments. There is in this record an operational shift that supports a shift from Rule 26 (a) and (b) to maintenance work required seven days a week as per Rule 26 (d). While there is a presumption in favor of Saturday and Sunday, the Carrier’s rights under Rule 26 in this case are not violative of the Agreement.

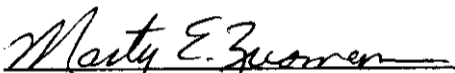
The Board has studied this record with great attention as the Carrier has a major

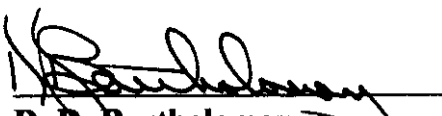
burden to support any change from a Saturday and Sunday rest days. The Carrier must demonstrate with clear and strong evidence that a real bona fide necessity exists for a change against the favored Saturday and Sunday rest days. The Carrier must produce substantial probative evidence to prove a major change in operational requirements or lose. Certainly, minor operational needs or avoidance of overtime is not an operational necessity to change the workweek of the employees.

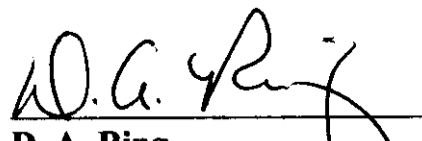
Our study of this record is that the Carrier has a bona fide operational change which we conclude is supported by the evidence and not persuasively rebutted by the Organization. The increased traffic was proven and the impact on operations was demonstrated, as well as impacts on the employees which were not rebutted. Carrier's arguments that "some employees.. have not had a complete day off for over 30 days because of being called in on weekends to correct operational track related problems" stands as fact. We are forced to conclude against the presumption in favor of Saturday and Sunday as days off that this was not "practicable" in this instance of increased traffic (Public Law Board No. 2960; Third Division Award No. 30011).

AWARD:

Claim denied.


Marty E. Zusman, Chairman
Neutral Member


D. D. Bartholomay
Organization Member


D. A. Ring
Carrier Member

Date: 6/30/03