

PUBLIC LAW BOARD NO. 6867

AWARD NO. 20

CASE NO. 20

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 improperly changed the compressed work schedule for all employees assigned to System Gangs 9062, 9063, 9065, 9083, 9075, 9083 and 9085 in the second half of February 2005 and failed to allow said employees to observe the Presidents' Day holiday pursuant to Rule 40(f) (System File C-0543-101/1421130).

(2) As a consequence of the violation referred to in Part (1) above, the Claimants, all employees assigned to System Gangs 9062, 9063, 9065, 9073, 9075, 9083 and 9085 shall now each '... be allowed overtime compensation at their respective applicable rates of pay for all hours worked on February 28, 2005. Each Claimant must also be allowed nine (9) hours of compensation that they were not allowed to work on their scheduled work day of February 21, 2005, without reason. ***"

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 the named system gangs working a consecutive half workweek arrangement, during the second half of February, 2005 when the Presidents' Day holiday fell. 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.

(f) Observance of holidays will be handled as follows:

(1) Unless agreed otherwise by a majority of the gang members and the appropriate Manager, if a holiday falls on a Monday, Tuesday, Wednesday, Thursday,

Friday or Sunday, the holiday will be observed at the end of the compressed work period and the amount of service hours ordinarily scheduled in line with the terms of this Agreement will be reduced by eight (8).

(4) Employees who qualify for holiday allowances under existing rules will be compensated eight (8) hours at the straight time rate for the holiday involved.

(5) If required to perform service during the hours at the end of the compressed work period observed as the holiday, employees will be compensated at the overtime rate.

This dispute involves Carrier's scheduling of the Presidents' Day holiday during the second half of February, 2005 for each of these named gangs. Rule 40(f)(1) requires that a holiday be observed at the end of the compressed work period "unless agreed otherwise by a majority of gang members and the appropriate Manager," and that the amount of service hours during the half be reduced by the 8 hours attributable to the holiday. Rule 40(f)(5) requires that employees required to work on the day observed as a holiday will receive compensation at the overtime rate.

In this case, Claimants observed their rest days at the beginning of the compressed half, worked during the end of the half, and were regularly scheduled for nine hour workdays. The Presidents' Day holiday fell on Monday, February 21, 2005, which was normally the first day of their compressed work period. During the last half of February, 2005 Carrier scheduled Claimants to work from February 22 through February 28, 2005, and Claimants observed the holiday on February 21 rather than on the last day of their work cycle. The second compressed half of February, 2005 had 72 hours scheduled, 8 of which were attributable to

the holiday. Employees worked nine hours on each of February 24-28 and nine and one-half hours on February 22 and 23, totaling the 64 work hours in the half, and were paid 8 hours holiday pay for February 21, 2005. The issue in this case is whether there was agreement to observe the holiday at the beginning, rather than the end, of the compressed work period.

The Organization contends that the holiday should have been scheduled for February 28, 2005, the end of the compressed work period under Rule 40(f)(1), and the remaining 64 hours spread over the prior seven day compressed half commencing on February 21, 2005. By Carrier scheduling the holiday for February 21, and requiring employees to work on February 28, which they should have observed as their holiday, the Organization believes that employees should be compensated for the 9 hours of work opportunity missed on February 21 as well as payment at the overtime rate for work performed on February 28, 2005. The Organization questions the self-serving nature of the managers' statements that votes were taken, asserting that its investigation disputes this fact. It argues that Carrier's failure to produce copies of the actual votes, after requested to do so, requires an adverse inference and a finding that such contention is not supported in the record, relying on Third Division Awards 15444, 19447, 20892.

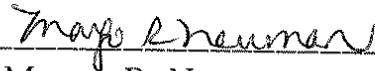
Carrier argues that it did not fail to comply with Rule 40(f)(1) since the record contains statements from Managers of Track Programs Haverstick and Heuner that a vote was taken and a majority of the members of the gangs voted to take the holiday on the first day back and work the last day of the half. It contends that the Organization's failure to submit first hand evidence refuting this fact is fatal to its claim, and, at

best, its questioning the accuracy of such evidence creates an irreconcilable dispute in fact supporting the dismissal of the claim, citing Third Division Awards 33487, 33895; Public Law Board No. 2960, Award 154.

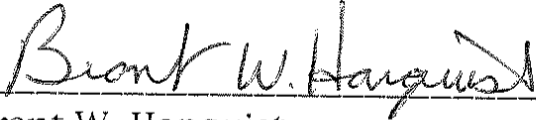
A careful review of the record and arguments of the parties convinces the Board that the Organization has failed to meet its burden of proving that Carrier violated Rule 40(f)(1) when it scheduled the Presidents' Day holiday on the first rather than the last work day of the compressed half in this case. While the Organization asserted that no agreement of a majority of gang members was obtained to change the date the holiday was celebrated as required by Rule 40(f)(1), it did not present any statements from Claimants to that effect after Carrier had included with its denial two written statements of the managers so contending. Unlike the language in Rule 40(a) requiring the election to work a compressed to be in writing, there is nothing contained in Rule 40(f)(1) requiring that the agreement to change when the holiday is scheduled must be in writing. Thus, Carrier's failure to produce any written votes does not call for an adverse inference or defeat its position that a verbal vote was taken to support the change. At best, the record contains an irreconcilable dispute of fact with reference to whether there was an agreement under Rule 40(f)(1) which the Board is not empowered to resolve, and which requires that the claim be denied. Third Division Award 33487.

AWARD:

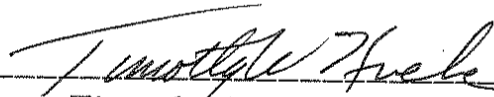
The claim is denied.



Margo R. Newman
Neutral Chairperson



Brant W. Hanquist
Carrier Member



Timothy K. Kreke
Employee Member

Dated: 4-23-08

Dated: April 23, 2008