

PUBLIC LAW BOARD NO. 7656

January 27, 2014

In the Matter of the Arbitration between-

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES**

-and-

**NATIONAL RAILROAD PASSENGER
CORPORATION (AMTRAK)**

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Case No. 4

STATEMENT OF ISSUES

1. Whether the parties' Agreement was violated when the Carrier changed the assigned work days and rest days of the 12 positions comprising Gang M4950 from a work week with assigned work days of Monday through Friday with Saturdays and Sundays designated as rest days to an assigned work week of Tuesday through Saturday with Sundays and Mondays designated as rest days (System File NEC-BMWED-SD-5048); and
2. Whether, as a consequence of the above-referenced violation, the disputed positions shall be restored to their former assigned work days and rest days and the employees that were awarded, or who subsequently filled or displaced to, or filled vacancies for, or are force assigned to those positions on Gang M4950 at the Adams Maintenance of Way Base shall each be compensated the difference in their respective overtime rates and straight time rates of pay for all hours worked on days that should have been assigned rest days but the Carrier improperly assigned as regular work days.

FACTUAL BACKGROUND

The factual predicate for the instant claim is the Carrier's action in combining the work of Gangs M4950 and M052, both of which are housed at bases within Zone 5 of the Northeast Corridor and historically have been separately comprised of five-day positions with Monday through Friday workweeks, and reestablishing those two separate gangs as so-called "mirror gangs" functioning as two parts of a single seven-day operation, with established workweeks of, respectively, Tuesday through Saturday and Sunday through Thursday. Specifically at issue in this proceeding is the question whether the Carrier is within its rights under the Agreement in reestablishing Gang M4950 as part of such a seven-day operation so as to justify the Carrier's action in switching that Gang's workweek from Monday through Friday, to Tuesday through Saturday. This proceeding does not address the Carrier's actions with respect to Gang M052.

Before restating the several work rules contained in the parties' current Agreement that have relevance to this dispute, some historical background is necessary. The industry's and the parties' forty-hour workweek rules proceed from a March 19, 1949, Agreement, which itself arises from certain recommendations contained within a 1948 Report to The President by an Emergency Board. Greatly distilled as appears from the record before this Board, the 1949 Agreement encapsulates the Organization's successful effort to bring to the railroad industry the shorter 40-hour workweek which by then had become the benchmark of American industry as a whole. A number of issues swirled around that larger issue, including issues of premium pay, consecutive off-days, staggered workweeks, and overtime.

In adopting the 40-hour benchmark, the Emergency Board did not grant a complete victory to the Organizations, specifically declining to adopt a rule whereby employees would be entitled to time-and-one-half for all Saturday hours worked and double-time for all Sunday and holiday hours worked. Rather, the Board intended "to apply the 40-hour principle in the manner which will be the least disturbing and costly to the industry," consistent with its finding that:

It is perfectly clear that it is completely unrealistic to suggest that the railroads operate only Mondays through Fridays. Work must be done on every day of the year, and the imposition of penalty rates on certain days will not alter this fact. Similar situations have been faced in other continuous process industries and the general practice is to provide in such instances that Saturdays and Sundays be treated as ordinary working days for pay purposes and to permit management to schedule work assignments on a staggered 5-day workweek basis. Frequently, the staggered week is accompanied by a rotating of weekly work schedules in order to distribute the desirable days off as equally as possible. Work beyond 5 days or over 40 hours in any week is paid for at time and a half. These practices should be adopted by this industry as well, because apparently they are workable and desirable. *Consistent with their operational requirements, the Carriers should allow the employees two consecutive days off in seven and so far as practicable these days should be Saturdays and Sundays.*" (Emphasis added.)

Subsequently, in clarification of its Report, the Emergency Board stated:

A workweek of 40 hours, consisting of 5 days of 8 hours each, with 2 consecutive days off in 7 was recommended....

*** * ***

... That program has a combination of elements: five 8-hour days, 40 hours per week, two consecutive days off each week,

Saturdays and Sundays as the rest days, staggered workweeks and relief assignments.

When an operational problem is met it does not automatically follow that the solution is to make the days off non-consecutive. Other possible solutions may be found by hiring additional relief or extra men who may be used to relieve on combinations of 6 day and 7 day positions. Days other than Saturday and Sunday may be assigned as rest days, or weekly rest days may be accumulated and longer consecutive rest time substituted periodically. Some of the relief or extra men may have non-consecutive rest days, and some employees may be kept on duty for overtime work. Other suitable or practical plans may suggest themselves to one of the parties and meet with the approval of the other. The least desirable solution, to be used only as a last resort, in keeping with the main purpose of the Board, would be to work some regular employees on the 6th or 7th days at overtime rates and thus withhold work from additional relief men. The solution of splitting the rest days of regular employees, in the Board's judgment, should be employed only if every possibility except working men overtime fails to meet the problem.

The Board meant that the typical workweek is to be one with 2 consecutive days off, and it is the Carriers' obligation to grant this. It follows that in any instance in which it is not granted the Carrier must bear the burden of proving that its normal operations will be impaired thereby, which means that other practical arrangements in keeping with the Board's intent cannot be made to meet the problem.

The next question relates to the staggering of the workweek and Saturdays and Sundays as the days of rest. Obviously, if the workweek is staggered some employees cannot have the specific days off. That the Board expected deviations from this pattern is made abundantly clear [T]he Board intended to permit the Carriers to stagger workweeks. *In contrast with the obligation of the Carriers to sustain the burden of proof in the matter of non-consecutive rest days, it is for the employees here to show that some particular operational requirements of the Carrier are not better met by having the workweeks staggered.* (Emphasis added.)

Ultimately, the foregoing principles found their way into work rules set forth in the 1949 Agreement negotiated between certain participating Carriers and Organizations, including the Agreement between these parties.

So far as this record shows, the next watershed moment in the parties' history of working with a 40-hour workweek came in connection with the Report of Presidential Emergency Board 222, dated May 28, 1992, which generally involved maintenance of way work. In the underlying dispute, the Carrier recognized that the then-present work week consisted of five eight-hour days ("5x8 workweek") from Monday through Friday, with Saturday and Sunday rest days, and proposed instead to be able to schedule any two or three consecutive days as rest days so that maintenance of way work could be scheduled on days when work could be performed most efficiently, *i.e.*, on weekends. The Organization, by contrast, focused its presentation on concerns over safety and disruptions to such work in light of relatively short headways between trains, and the Carrier's resulting reliance on what it believed to be excessive overtime, which created safety and personal problems for employees. The Emergency Board ultimately recommended modification of the parties' then-current 40-hour workweek provision, to augment the basic 5x8 provision with one for four ten-hour days ("4x10 workweek"), with three consecutive rest days, provided that one such rest day fall on a Saturday or Sunday. Thereafter, on June 27, 1992, the parties negotiated just such a change to their work rules, with the additional provision for a \$1/hour incentive allowance for the 4x10 workweek.

The parties' current Agreement reflects the foregoing history, as follows:

RULE 32 FORTY HOURS WORK WEEK

Except as otherwise provided in this Agreement, AMTRAK will establish for all employees a work week of 40 hours, consisting of five (5) days of eight (8) hours each, with two (2) consecutive days off in each seven (7). The work week may be staggered in accordance with AMTRAK'S operational requirements. So far as practicable, the days off shall be Saturday and Sunday.

Work weeks consisting of four (4) days of ten (10) hours work per day, with three consecutive rest days, are permissible provided that there is one Saturday or Sunday rest day per week. When such a gang is established with Saturday or Sunday as a work day, employees filling positions in such gangs shall be paid an incentive allowance of \$1.00 per hour for all hours, or portion of hours, worked....

Where a four (4) day, ten (10) hours work per day gang is established with starting times in accordance with Rule 42(c), the incentive allowance in Rule 42(d) shall be applicable in addition to the incentive allowance provided above.

* * *

RULE 33 DEFINITION OF EXPRESSIONS 'POSITIONS' AND 'WORK'

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

RULE 34 FIVE DAY POSITIONS

Except as otherwise provided in this Agreement, on positions the duties of which can reasonably be met in five (5) days, the days off will be Saturday and Sunday.

RULE 35 SIX DAY POSITIONS

Except as otherwise provided in this Agreement, where the nature of the work is such that employees will be needed six days each week, the rest days will be either Saturday and Sunday or Sunday and Monday.

RULE 36 SEVEN DAY POSITIONS

On positions which are filled seven days per week,¹ any two consecutive days may be the rest days, with the presumption in favor of Saturday and Sunday.

Against that backdrop, the specific facts underlying this claim are as follows: Historically—from their inception until the advent of the instant dispute—Gangs M4950 and M052 separately have been comprised of positions established and operated as five-day positions with Monday through Friday workweeks, working eight-hour overnight shifts. Gang M4950 was housed at the Adams Maintenance of Way Base, and Gang M052 was housed elsewhere in Zone 5 of the Northeast Corridor operation.

Pursuant to advertisements dated December 5 and 19, 2011, the Carrier advertised and then filled Gang M4950, comprised of 1 Foreman, 2 Truck Drivers, 6 Trackmen, 1 Burro Crane Operator, 1 Machine Operator, and 1 M/W Repairman, with an established workweek of Tuesday through Saturday, from 10 p.m. to 6:30 a.m., with a \$1/hour night-work incentive payable under Rule 42(d) of

¹ On a date and for reasons not reflected in this record, the parties altered the language of this provision to refer in its current form to “positions which *are* filled,” rather than to “positions which *have been* filled,” which was the verbiage used in the provision in the 1949 Agreement. (Emphases added). Also on a date uncertain, the parties agreed to remove from this provision the precatory phrase, “Except as otherwise provided in this Agreement.”

the Agreement.² Separately, the Carrier advertised and filled what it terms a “mirror gang,” Gang M052, to work the same territory, duties, and hours, albeit with a Sunday through Thursday workweek. According to the Carrier, the two gangs were established, together, under the Seven Day Positions provision of Rule 36, to provide the Carrier with “complete 7-day coverage.”

THE PARTIES’ POSITIONS

The following summary of the parties’ positions is gleaned from the parties’ several exchanges of statements of position as they developed through the processing of the original claim to presentation at arbitration, as further elucidated at hearing, where both parties were provided the opportunity to present evidence and argument before finally submitting the matter to the Board for resolution.

In its initial January 25, 2012, claim, the Organization took the basic position that establishment of Gang 4950 with Sunday and Monday rest days and a \$1/hour incentive allowance for all hours worked could only be accomplished under the 4x10 provision of Rule 32, as reinforced by Rule 34. In its March 20 denial, the Carrier answered that the 4x10 provision of Rule 32 indeed was one available option, but it chose instead to establish Gang M4950 as a mirror of Gang M052, with the two gangs functioning as a single seven-day operation under Rule 36.

In its first appeal, dated May 2, the Organization posited that the Carrier failed to demonstrate any operational change necessitating the wholesale

² Nine of the 12 positions were advertised on December 5, 2011, and awarded on December 27, 2011. The remaining three positions were advertised on December 19, 2011, and awarded on January 10, 2012.

abolishment of the five-day positions of Gang M4950 and reestablishment of the same positions, performing the very same work, as seven-day positions. The Organization stated that such position of the Carrier was "directly contrary to what Amtrak argued before Presidential Emergency Board ["PEB"] 222 which heard this issue between Amtrak and the BMWED and issued its findings on May 28, 1992," emphasized that Gang M4950 "is the exact type of maintenance gang that Amtrak argued in 1992 before the Presidential Emergency Board that they did not have the ability to work as a regularly assigned work day on a Saturday or Sunday under the current rules," stated its understanding that the 1992 revision to Rule 32, recognizing the Carrier's right to establish 4x10 work schedules, was the direct result of Emergency Board 222's Recommendation, and concluded by arguing that the Carrier had not made any requisite showing of such an operational change as would be required to justify abolishing positions that historically had been established as five-day positions and reestablishing them as seven-day positions.

In its June 12 denial, the Carrier explained that the establishment of Gang M4950 as part of a seven-day operations was precipitated by changes in congressional funding—a reference to the overtime cap contained in The Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), the law reauthorizing Amtrak and tasking the Carrier with improving service, operations, and facilities, and also to bring the Northeast Corridor into a state of good repair—and specifically was designed to reduce weekend overtime costs while simultaneously improving response times during emergencies. The Carrier further contended that PEB 222 was distinguishable from the instant matter, as the Carrier was not at the time of that proceeding establishing seven-day positions, whereas current operational needs necessitate such action under the authority of Rules 32

and 36, which permit establishment of staggered 5x8 workweeks with non-Saturday and Sunday rest days for seven-day positions.

The Organization advanced its appeal on July 30, as more particularly described in a letter dated August 10. In this second appeal, the Organization detailed its position that the Carrier failed to demonstrate any operational need to change Gang M4950 from five to seven-day positions, emphasizing that Gang M4950 historically met its duties with a Monday through Friday workweek despite the fact that the railroad always has operated 24 hours per day, seven days per week ("24/7 operation"). The Organization also argued that it is well-settled that a Carrier's desire to reduce overtime costs is insufficient to support invocation of Rule 36, and that the Carrier made no showing of any actual inability to secure appropriate response to weekend emergencies.

The Carrier again denied the claim on November 27, arguing that increased ridership—describing 2011 as setting its eighth ridership record in nine years—and its toll on maintenance needs, together with congressional mandates to limit overtime expenditures even while bringing the Northeast Corridor to a state of good repair, and certain asserted advantages of a seven-day approach over the use of a 4x10 workweek, warrant its decision to establish Gang M4950 as part of a seven-day operation so as to facilitate more efficient maintenance scheduling. The Carrier further recognized that it had not opted in the past to establish seven-day positions, but that such inactivity in the past did not compromise its existing rights under Rule 36 to establish Gang M4950 as part of a seven-day operation with a Tuesday through Saturday workweek.

By response dated March 15, 2013, the Organization stated that Gang M4950 is not part of a *bona fide* seven-day operation, as its mirror gang, Gang

M052, does not share Gang M4950's headquarters, which alone defeats the Carrier's action. In any case, the Organization posited that the clear weight of precedent, as discussed in Special Board of Adjustment No. 1107, Award No. 1 (Eischen 1999), demonstrates that the Carrier cannot carry its heavy burden of rebutting, through clear and convincing evidence of material change to operational requirements, the presumption that the workweek of existing five-day operations with Saturday and Sunday rest days should not unilaterally be changed. Specifically regarding the Carrier's reference to PRIIA's overtime cap, the Organization took the position that PRIIA does not override the lack of an overtime cap in the Agreement; that the Carrier's President and Chief Executive Officer in any case is empowered to waive the cap; that avoidance of overtime is not a *bona fide* operational change as established through precedential decisions; that there is no showing by the Carrier that the historic five-day operation is a significant cause of overtime; and, finally, that there is no showing that any incumbent of Gang M4950 will reach PRIIA's overtime cap. As for the Carrier's expressed preference for establishing a seven-day operation under Rule 36 over the use of 4x10 scheduling under Rule 32, the Organization argued that the use of 4x10 workweeks is the parties' agreed-to provision for addressing the alleged need underlying this dispute, yet the Carrier has not demonstrated any reason for eschewing it; moreover, the Organization points out that either approach would address weekend coverage, meaning that the real motive is not to avoid weekend overtime, leaving the Carrier with only the claim that it needs weekday overlap, which undermines the Carrier's principal claim that essential maintenance cannot be performed during the week with the historic five-day positions.

On May 23, the Carrier responded, arguing that Gang M4950 in fact is being scheduled as part of a legitimate seven-day operation, and that it is immaterial that it does not share a headquarters with its mirror gang as they do share the same territory, functions, and tour of duty. The Carrier further argues that material changes to the language of Rule 36 over the years renders inapposite the precedent on which the Organization principally relies, and permits the Carrier to establish Gang M4950 as part of a seven-day operation. As such, the Carrier argues that PEB 222 also is inapposite, as this case, unlike that earlier case, involves a seven-day operation. Additionally, the Carrier details the provisions of PRIIA and changing operational limitations and needs that require a finding that operational necessity undergirds its action in establishing Gang M4950 as part of a seven-day operation, including its need to rely on planned 55-hour preventive maintenance outages over the weekends as well as an overall increase in the infrastructure burdens relating to increased ridership. By way of further support, the Carrier points to Engineering reviews it conducted in the wake of PRIIA, which confirm that due to increased traffic loads over the typically long operating schedule in the New York Division, a lengthened a tour of duty provided by a 4x10 workweek would be of negligible value. Essentially, the Carrier maintains, unplanned outages and resulting passenger delays are becoming more frequent and serve to underscore the need for an increased focus on preventative maintenance over the weekends. Since the change to a seven-day operation, the Carrier states, there has been a significant decrease in the number of delay minutes as a result of weekend maintenance coverage. As the Carrier puts it, "This improvement is attributed to the presence of these gangs on site during weekend shifts, on a regular basis, to perform routine maintenance and provide more effective and efficient

response to unplanned incidents.” In further demonstration of the need for regular weekend coverage, the Carrier points out that in fiscal year 2011, prior to the disputed change, the New York Division performed maintenance work on an overtime basis on 92% of Saturdays and 74% of Sundays. And, the Carrier emphasizes, the changed schedule effectively reduces overtime obligations for employees, consistent with the Organization’s own statements that overtime is not desirable and should be eliminated.

In its submission to this Board, the Organization principally contends that Rule 36 does not create any standalone authority to establish new seven-day positions, and that the Carrier cannot meet the heavy burden of the established test for converting historic five-day positions with weekend rest days to seven-day positions that work one of the weekend days, citing Special Board of Adjustment No. 1107, Award No. 1; Third Division Award No. 35564; and Third Division Award No. 36722. The Organization further rejects the relevance and materiality of the overtime cap provisions of PRIIA, arguing that the cap is contractually irrelevant, subject to waiver, and not shown to be implicated by the changes in question. As for the Carrier’s contention that weekend coverage is operationally necessary, the Organization points out that the Carrier remains free, pursuant to amended Rule 32, to establish staggered 4x10 workweeks for mirror gangs to provide regular weekend coverage. The Organization adds that the Carrier’s right to establish such weekend coverage defeats any claim of operational necessity for reestablishing Gang M4950 as part of a seven-day operation.

Relying on the history of the 1949 Agreement and particularly the current iteration of Rule 36 as contained in the parties’ Agreement, the Carrier argues that the Organization cannot meet its burden of demonstrating that the

Carrier's operational needs are not better met by staggering the workweek and assigning Gang M4950 to a Tuesday through Saturday workweek as part of a seven-day operation, as a result of which the Carrier contends that this claim must be denied. Specifically relating to the history of the 1949 Agreement, the Carrier emphasizes that the Emergency Board expressly recognized that the railroad industry is a 24/7 operation and that certain employees could expect to work weekends so long as their workweek consisted of five eight-hour days with two consecutive rest days. In this regard, the Carrier emphasizes that the issues of split rest days and weekend rest days must not be conflated; whereas the Carrier has a heavy burden of justifying split rest days, the Organization bears the burden of opposing staggered workweeks that provide consecutive rest days.

Although the Carrier denies any obligation to establish operational necessity for its decision to establish Gang M4950 as part of a seven-day operation with a workweek that includes Saturdays, arguing that Rule 36 provides all the authority it requires, the Carrier nevertheless argues that there indeed has been a significant change in the operating environment due to the advent of PRIIA and increasing ridership and related maintenance needs. The Carrier stresses that its most heavily trafficked segments in the relevant area are essentially inaccessible during the workweek due to heavy ridership and long operating hours, as a result of which the Carrier finds it necessary to schedule planned 55-hour weekend outages, among other measures, to meet customer demands for good service. The Carrier argues, too, that its New York Division in fiscal year 2011 worked 92% of Saturdays and 74% of Sundays, demonstrating its regular need for weekend overtime, which it seeks to reduce or eliminate consistent with both the PRIIA overtime cap and the Organization's own recognition that overtime is not desirable

and should be eliminated. The Carrier acknowledges that use of 4x10 scheduling would provide weekend coverage, but argues that its staggered 5x8 workweeks provide more overlap during the week, permitting it to accomplish larger projects with the entire workforce.

As for the Organization's reliance on Special Board of Adjustment No. 1107, Award No. 1, the Carrier argues that such Award should not be followed here due to changes to the language of Rule 36 from its advent in the 1949 Agreement. The Carrier argues that, whatever the earlier cases provide, Rule 36 properly is construed as authorizing the establishment of seven-day positions with staggered workweeks and rest days of other than Saturday and Sunday. With regard to PEB 222, the Carrier points out that its position in that case referred to five-day, not seven-day, positions, and therefore has no bearing on this case.

Finally, the Carrier argues that the fact that it previously has not exercised its rights under Rule 36 does not preclude it now from exercising those rights, especially considering the operational necessity of providing regular seven-day maintenance coverage even while minimizing overtime. In this regard, the Carrier notes that the Organization did not challenge the establishment of Gang M052 and others as part of a seven-day operation.

DISCUSSION

Divorced from the temporal and contextual history of the parties' 40-hour workweek rules, a case can be made that the planned and unplanned maintenance requirements in the Northeast Corridor, and especially in its Zone 5, presently require a 24/7 operation in order to meet the Carrier's service needs as it

sees them and understands the congressional mandate of PRIIA, its authorizing congressional legislation. There are many hundreds of miles of aging track in need of maintenance and repair, there has been considerable growth in the Carrier's share of passenger traffic between Washington, D.C., New York City, and Boston, and the fact is that short headways in the most trafficked areas with the longest operating hours practically require maintenance operations in the Northeast Corridor to be performed on nights and weekends. As the Carrier argues, the language of Rules 32, 33, and 36 provides support for the establishment of mirrored gangs working staggered 40-hour workweeks that span nights and weekends in order to meet service and quality demands.

Context, however, is key to resolution of this dispute, which does not arise in a vacuum, but instead arises against a historical backdrop now in its seventh decade. Whatever the extent of the Carrier's authority in the wake of the 1948 Report and subsequent adoption of work rules in the 1949 Agreement permitting establishment of maintenance gangs as part of a five-, six-, or seven-day operation, the fact is that Gang M4950 was established and continuously operated from its inception until the action giving rise to this claim as a five-day, not seven-day, operation with Saturday and Sunday rest days. The Carrier pursued this course despite the fact that it was understood in 1949, and at all times since, that railroad operations are 24/7 and maintenance needs arise outside of the normal Monday through Friday daylight workweek not only due to unplanned events, but also because the challenges attendant to weekday maintenance, including relatively short headways and long operating hours, always have supported the scheduling of planned maintenance at times when there is less traffic on the track and therefore less disruption and safety risk.

From the inception of the 40-hour workweek, and notwithstanding the clarity of the Carrier's general right under Rule 32 to establish staggered 5x8 workweeks requiring employees regularly to work either or both of the weekend days where practicability supports such a schedule, there has been considerable dispute over the specific nature and extent of the Carrier's right regularly to assign employees to work weekends. Some of that dispute involved these same two parties in relation to PEB 222, which the parties agree resulted in the 1992 amendment of Rule 32 to permit the regular scheduling of 4x10 workweeks, provided that employees working such schedules would be assigned to three consecutive rest days, at least one of which was to be either Saturday or Sunday, and provided further that "employees filling positions in such gangs shall be paid an incentive allowance of \$1.00 per hour for all hours, or portion of hours, worked."

To be sure, as the Carrier emphasizes, that 1992 agreement arose out of a dispute over five-day maintenance operations, not seven-day operations. The fact remains, however, that the issue before PEB 222 involved maintenance of way work, and rather than to invoke what it now claims to be its rights under Rule 36 to establish its maintenance operations as a seven-day operation with any two consecutive rest days—a right nominally extant under the Agreement at the time—the Carrier instead sought in PEB 222 relief from what it understood to be a flat requirement that it "give employees Saturday and Sunday off when employed in an operation that works five days a week."

Now, the Carrier attempts to distance itself from that earlier statement of position by arguing that it was not then addressing seven-day positions, but critically that effort is not supported by any demonstration as to how the work of Gang M4950 differs from the type of maintenance of way work at issue before

PEB 222. The Carrier's present effort to distinguish its position in PEB 222, so as to render it inapplicable here, thus begs the question as to why the Carrier chanced the proceeding before the Emergency Board in 1992 and then negotiated with the Organization for the resultant 4x10 amendment to Rule 32, rather than to adopt the seemingly simpler approach of abolishing the historic five-day positions performing its maintenance of way work and reestablishing them under Rule 36 so that they could be assigned regularly to work on one or both of the weekend days. Ultimately, the Board is persuaded by the Organization's argument that the Carrier pursued relief from the Emergency Board in 1992 rather than to pursue the readier course of obtaining that relief by invoking an extant work rule because the Carrier understood in 1992 that Rule 36—whatever it was meant to establish—did not support the specific course of action then pursued by the Carrier, which this Board cannot distinguish from the factual scenario underlying the instant dispute.

At some point during the decades-long history of the 40-hour workweek—again, this record does not reflect when—the verbiage of Rule 36 in fact changed in two respects. It was separated from the prefatory phrase, "Except as otherwise provided in this Agreement," and instead of referring to positions that "have been" filled seven days per week, was changed to refer instead to positions that "are" filled seven days per week. The Carrier argues that such changes must be understood as transforming Rule 36 into a standalone authorization for abolishing M4950 and other maintenance gangs from their historic status as five-day operations and reestablishing them as seven-day operations. This Board is not so persuaded.

To the extent it is helpful to parse the linguistic difference between replacement of the phrase, "have been filled," with the phrase, "are filled," the fact

is that at the time the parties negotiated the current language of Rule 36, neither party then viewed Gang M4950 as part of a seven-day operation. At that time, regardless of any express tie-in to other provisions of the 40-hour workweek rules, the positions of Gang M4950 did not constitute positions that "are," *i.e.*, presently at that time, filled seven days per week. At the time the change to the language was negotiated, the positions of Gang 4950 were not filled seven days per week. Thus, the Board is not persuaded that the change to "are filled" was meant to allow the Carrier, unilaterally, to bring long-extant five-day positions within the ambit of Rule 36, essentially reversing the gains won by the Organizations in 1949, by the simple device of announcing unilaterally and at any time that, henceforth, such positions newly would be considered to be part of a seven-day operation.

Although reasonable minds can differ over whether the plain language of Rule 36 as presently constituted supports the Carrier's interpretation, the historic backdrop of the interpretation and application of the workweek rules persuades the Board that the mere evidence that Rule 36 was changed, without any evidence as to when or why the rule was changed and/or how the changes were intended by the parties, if at all, to relate to the particular dispute at issue, provides inadequate support for the Carrier's reading of the provision. There simply is not any basis in this record for concluding that the parties designed or intended the changes to the language of Rule 36 to be so significant as essentially to reverse the decades-long history of the workweek provisions, so as to establish Rule 36 as a broad standalone authorization for the Carrier, unilaterally and without negotiation, to side-step the strong preference for weekend rest days in any and all operations that through accretion of duties, responsibilities, and/or workload arguably require weekend attention. Absent compelling evidence of such intent, this Board finds

the Carrier's interpretation of Rule 36 to depart too greatly from the undisputed history of the workweek rules with regard to providing weekend rest days to the extent "practicable." In its ordinary sense, "practicable" means achievable or doable; the Carrier's evidence of an increased maintenance load well may justify increased work hours and/or hiring additional employees, but it does not, without more, demonstrate that Gang M4950 cannot continue to be fully employed with maintenance tasks during its customary and historic workweek schedule.³

Contrary to the Carrier's position, Special Adjustment Board No. 1107, Award No. 1 (Eischen 1999), persuades this Board that Rule 36 is not properly interpreted at this point in history as authorizing the Carrier unilaterally to abolish historic five-day positions and to reestablish them as seven-day positions so as to avoid the strictures of the normal weekend rest-day preference applicable to five-day positions pursuant to Rules 32 and 34. Notably, the referenced Eischen Award involves the same version of amended Rule 36 as is at issue in this proceeding, *i.e.*, the version of the rule relating to positions which "are" filled seven days per week, as compared to the previous version that related to positions that "have been" filled seven days per week.⁴ Whatever the amendments to Rule 36 were designed to address, the Board is persuaded that the Organization is correct in contending that the amendments were not intended to separate Rule 36 from its shared place in the history of the 40-hour workweek provisions, or to

³ Even if the Board were to conclude that the Carrier's maintenance needs fall under the language of Rule 36, that rule still includes a presumption in favor of Saturday and Sunday rest days, and the Carrier still would be left with an insufficient answer to the question why it is operationally necessary to meet those needs with the particular change wrought to the workweek of Gang M4950, under circumstances where the gang's historic workload, if anything, has increased and not simply shifted to the weekends.

⁴ As recorded in Award No. 1 of SBA No. 1107, Rule 17(d) provided that, "On positions which are filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday." Award No. 1, slip op. at 2, 9.

divorce it from the evident limitations of its historic meaning as evidenced by the understanding expressed by the Carrier in its conduct over the years and in its position before PEB 222.

Consistent with the foregoing, and specifically the Board's conclusion that Rule 36 is not properly interpreted at this time in history as supporting the Carrier's position, the Carrier finds no help in its reliance on management rights, rhetorical confusion over the Organization's objection to its reliance on existing contractual flexibility, and/or the Organization's prior recognition of the Carrier's right regularly to assign seven-day positions to weekend work. The work of Gang M4950 is not properly categorized as that of a seven-day operation within the meaning of Rule 36 as it developed over the years, and Rule 36 therefore does not support the Carrier's position in this matter. Likewise, the Board is mindful of but not persuaded by the Carrier's citation to cases based on Rule 33, of which Third Division Award No. 31295 (Mason 1996) is the principal example. The fact that the word "positions," as used in Rule 36, refers to maintenance operations rather than to the individual incumbents of positions within Gang M4950 does not overcome what the Board finds to be a history of shared understanding that Rule 36, whatever else it might be taken to mean, is not properly interpreted as authorizing the Carrier's unilateral action in this case.

The record evidence of the parties' history under the 40-hour workweek and the sound logic underlying Award No. 1 of SBA 1107 and the earlier decisions summarized therein persuades this Board that the Organization, in the verbiage of the 1949 Report, met its initial burden of demonstrating that the Carrier's maintenance of way work requirements are not better met by staggering workweeks, and that it remains practicable for their rest days to be Saturday and

Sunday. Again, maintenance of way work, whether planned or unplanned, always has been a legitimate 24/7 concern, but that work heretofore has been met by the parties through application of five-day positions working 5x8 schedules with weekend rest days, under circumstances where, for decades, the Carrier might have, but undeniably did not, take the position that Rule 36 invites a relaxed approach to the problem. By meeting that initial burden, this Board finds that the Organization effectively shifts to the Carrier the heavy burden of rebutting the presumption that existing five-day operations staffed by positions with a Monday through Friday workweek should not unilaterally be changed to seven-day operations with other than Saturday/Sunday rest days, which burden requires clear and convincing evidence of necessity due to a material change of operational requirements.

The Carrier attempts that showing in this case principally by reference to (1) congressional mandates requiring the Northeast Corridor to be brought to a state of good repair even while capping individual overtime at \$35,000 per year, and (2) record ridership levels which, combined with short headways and long operating hours on weekdays, raise serious safety and productivity concerns that, in the Carrier's judgment, practically require weekend scheduling that for financial, safety, and other reasons are better met through regularly scheduled staggered workweeks than through overtime.

The principal difficulty with the first part of the Carrier's effort is that even if the congressionally-imposed overtime cap were found to be a contractually relevant consideration, and even if that cap proved to be a hard cap rather than subject to waiver at the Carrier's request, there is no actual evidence in this case that the Carrier's establishment of Gang M4950 as part of a seven-day operation has or will reduce its overtime expenditures, much less that it was necessary to

avoid hitting the overtime cap. Presumably, the members of Gang M4950 are working fewer weekend overtime hours post-change, but it does not necessarily follow that they are not working other overtime hours, and in any event there is no basis for knowing how many overtime dollars they in fact were being paid when working the previous Monday through Friday workweek, or how that amount has reduced—if in fact it has—since the change to the workweek, or whether any employee actually is approaching the overtime cap. Presumably, such evidence was available to the Carrier for the period from the inception of the changed workweek to the date of hearing, but it is absent from this record.

Moreover, this Board joins those others that have concluded that a desire to reduce expenses, for example through a reduction in overtime, without more, is not sufficient to meet the Carrier's burden of demonstrating operational necessity. There are all manner of costs associated with fealty to collective bargaining agreements, in terms not only of wages and benefits, but also related to honoring working conditions like crew size and safety requirements. The Carrier is no more free to avoid the costs of the negotiated workweek rules simply to lower its expenses than it is free unilaterally to reduce negotiated wages and benefits. True, the Carrier showed in this case that a significant amount of work regularly was being performed on Saturdays and Sundays on an overtime basis, but even if the Board were to accept the Carrier's invitation to assume that such work came at a significant cost, that does not equate to a showing that the Carrier could not have arranged for the performance of that weekend work through other available measures, *e.g.*, through such measures as were identified by the Emergency Board in 1949, including hiring additional relief or extra men, or otherwise by invoking 4x10 scheduling under Rule 32. Changing the workweek of Gang M4950 may be

one way to achieve the goal of enhanced efficiency, but it is not the only way, and it has not been shown to be operationally necessary; at most, the Carrier has shown that it was financially beneficial.

As for the second part of the Carrier's attempted proof of operational necessity, this Board readily accepts that planned maintenance outages are preferable to unplanned outages, and that it is preferable in numerous respects for planned maintenance to be performed when there are longer headways and fewer attendant safety risks and work disruptions, *i.e.*, on weekends, which is the point the Carrier emphasizes with its reference to 55-hour planned outages from Friday night to Monday mornings. Nothing in this Award should be read as impinging on the Carrier's general right to schedule night and weekend maintenance work. The issue, rather, is whether that right can be transformed into a basis for unilaterally changing the workweek of Gang M4950 from Monday through Friday to Tuesday through Saturday.

In the Board's judgment, there is no showing of "operational necessity," as that phrase has come to be understood and applied in the context of the 40-hour workweek, for the Carrier's change to the workweek of Gang M4950; at best, it appears that the basis for the change is the Carrier's evident desire to avoid the presumably higher cost of having the weekend work performed by employees entitled to overtime, or through 4x10 scheduling of employees with rights to an incentive allowance, or through the hiring of additional employees. There is no showing that Gang M4950 was other than fully employed when working its historic Monday through Friday workweek, or that there was any diminution in the workload of its historic Monday through Friday workweek, and in fact the Carrier goes to lengths to argue that the more weekday overlap between

Gang M4950 and its mirror gang, the better, which suggests that the issue is not one of a lack of weekday work, but too much work. Indeed, so far as this record shows, the chief problem confronting the Carrier's maintenance operation is an accretion of maintenance work due to a combination of an aging infrastructure, a dramatic increase in ridership since 2001, and a heightened interest in improved passenger comfort and service reliability. This case is not accurately understood as relating generally to a management decision respecting days and times of the week when historical levels of maintenance work best are accomplished. More specifically, the Carrier is searching for ways to respond to the burdens of an accretion of maintenance work through unilateral application of work rules never before applied to this situation despite a history dating back to 1949, under circumstances where the available evidence strongly suggests that Rule 36 was not intended to provide the Carrier with such broad unilateral rights.

The conclusion that the Carrier's action in this case is motivated by a desire to reduce costs rather than a true operational necessity is bolstered by consideration of the Carrier's presentation regarding its preference for weekend maintenance of way work scheduling. In its presentation, the Carrier repeatedly focuses specifically on the need to perform that work on weekends, not weekday nights, again by reference to its 55-hour planned outages. The Carrier does at one point assert that greater weeknight overlap would allow it to schedule the entire operation—both Gangs M4950 and M052—to work together on large projects, but it makes no showing that it ever actually schedules the two gangs to work together on single projects during weekday nights, and in fact such scheduling would seem to contradict one of the Carrier's points of emphasis in the run-up to this proceeding: longer weeknight hours provide negligible value to the Carrier. The

point on which the Carrier is most persuasive is that weekend work is a particularly opportune time to perform planned maintenance, but as discussed below, that observation begs another fundamental question.

When the Carrier's various points are considered together, the Board is left to wonder why the Carrier chose the Rule 36 avenue rather than the more straightforward 4x10 route of Rule 32. In either case, whether proceeding under Rule 32 or Rule 36, each gang works one weekend day, without overlap. Under the Rule 36 scenario, each gang works an eight-hour day, whereas under the 4x10 scenario, each gang would work a longer 10-hour day, which would seem better matched to the principal espoused need for weekend coverage, as opposed to providing shorter weekend coverage and greater weeknight overlap under circumstances where it is not even clear that there is any significant scheduling of the mirrored gangs to shared weeknight projects. Thus, the issue ultimately appears to devolve to one of money, as the 4x10 scheduling comes with the promise of the \$1 incentive allowance. Again, however, financial considerations do not demonstrate operational necessity, especially where, as here, the financial consideration of using 4x10 scheduling is due to the application of a negotiated incentive allowance that arose out of an earlier dispute over maintenance of way work scheduling. The point is that 4x10 scheduling would seem to provide a ready answer to the Carrier's legitimate concern over weekend scheduling, and the availability of that negotiated option persuades the Board that there is no operational necessity for the unilateral establishment of Gang M4950 as part of a nominal seven-day operation that by all accounts is performing the very same work, in the very same locations, that it historically performed as part of a five-day operation.

The Board has considered the Carrier's numerous citations, but does not find them to be persuasive here. Briefly stated and by way of example, Public Law Board ("PLB") No. 6596, Award No. 2 (Zusman 2003) does not appear to share the seminal facts of the instant dispute, which include that Rule 36, as interpreted, understood, and applied specifically by these parties, historically does not support a departure from five-day, Monday through Friday scheduling of maintenance of way work; where this Board finds insufficient evidence of material change in operations to warrant a unilateral departure from the parties' shared historic understanding, and specifically that there is no showing of any diminution of Gang M4950's weekday workload, but rather there is an accretion of additional work effectively requiring expanded hours of maintenance operations; and where, by rule, 4x10 scheduling specifically was negotiated by these parties to address the problem of weekend work. So, too, with respect to PLB No. 5317, Case No. 1 (Scheinman 1994); Third Division Award No. 31295 (Mason 1996); PLB No. 2960, Award No. 80 (Vernon 1985); Second Division Award No. 1565 (Wenke 1952), and other cases cited by the Carrier.

In so concluding, the Board is mindful of the Carrier's evident concern over a perceived lack of flexibility in the 40-hour workweek rules that, according to this Award, preclude it from responding in the manner it finds best suited to the current challenges of its operating environment. This Award, of course, is confined to interpreting and applying the relevant provisions of the parties' current Agreement in a manner consistent with historic usage and context. Nothing in this Award should be construed as precluding either party from seeking alteration of those provisions through negotiation; this Award holds that the Carrier cannot, in effect, create such change through unilateral mid-term action.

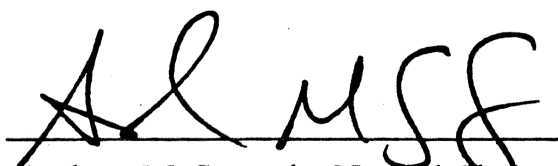
Finally, the Board does not view the lack of a grievance over the establishment of Gang M052 as part of a seven-day operation as determinative of the Organization's rights in this case or a tacit admission of the correctness of the Carrier's interpretation of Rule 36.

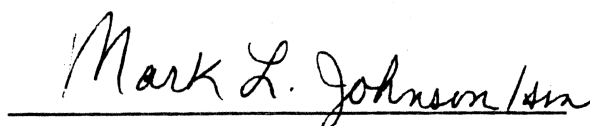
By way of remedy, and consistent with the Organization's request, the positions within Gang M4950 shall be restored to their former status as five-day positions with a Monday through Friday 5x8 workweek, and from the inception of the improperly changed schedule through the date on which the former workweek is reinstated, all affected employees shall be compensated in an amount equal to the difference between the overtime rate and the straight time rate for each hour of work they performed on their former weekend rest days. True, the current incumbents of positions within Gang M4950 bid on those positions, but that fact is not destructive of the Organization's right to challenge the propriety of those job advertisements and to ensure that its members are made whole for violations of their contractual rights.

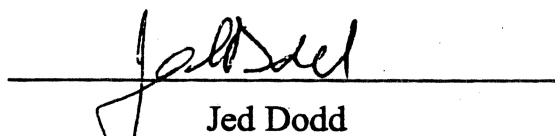
AWARD OF THE BOARD

1. The Carrier violated Rule 32 of the Agreement when in January 2012 it changed the workweek/rest days of Gang M4950 from Monday through Friday with Saturdays and Sundays designated as rest days, to Tuesday through Saturday with Sunday and Monday designated as rest days.

2. In remedy of the violation, the positions within Gang M4950 shall be restored to their former status as five-day positions with a Monday through Friday 5x8 workweek, and from the inception of the improperly changed schedule through the date on which the former workweek is reinstated, all affected employees shall be compensated in an amount equal to the difference between the overtime rate and the straight time rate for each hour of work they performed on their former Saturday rest days.


Andrew M. Strongin, Neutral Chair
Takoma Park, Maryland


Mark L. Johnson
Carrier Member
concur/dissent


Jed Dodd
Organization Member
concur/dissent

Written dissent to follow.