SPECIAL ADJUSTMENT BOARD NO. 1107

AWARD NO. 1
CASE NOS. 1 AND 2
UNION CASE NOS. B-TC-1699 & B-TC-1756
COMPANY CASE NOS. 12(96-1499) & 12 (97-0063)

PARTIES TO THE DISPUTE

CSX TRANSPORTATION, INC.
- and -
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

STATEMENT OF ISSUES

The "Attachment A" to the Agreement establishing this Board simply lists the file numbers of the two claims, with this common description: "Position bulletined with other than Saturday and Sunday as rest days". The Parties advised the Chairman that they both wanted a final resolution of the underlying dispute but they were unable to stipulate to a common framing of the issues to be decided in this case. For its part, CSXT suggested that the issue before the Board be framed simply, as follows: "Did the Carrier violate the Agreement when it established seven-day positions with rest days of other than Saturday and Sunday?" BMWE countered that tactical formulation by suggesting a "Statement of Claim" more to its own liking, as follows:

> 1. The Agreement was violated when the Carrier changed the five (5) day positions of two (2) man Gang 5DC6 from a Monday through Friday with Saturdays and Sundays designated as rest ' days to f five (5) day positions Wednesday through Sunday with Mondays and Tuesdays designated as rest days and when the Carrier failed to properly compensate Foreman R. J. Nedeff and Trackman D. B. Bohrer, the two (2) employes assigned to Gang 5DC6, for work they performed on their former rest days beginning June 1, 1996 and continuing and for the work they were entitled to perform on Mondays and Tuesdays beginning June 3 and 4, 1996 and continuing (System Files B-TC-1699/12(96-1499) and B-TC-1756/12(970063) BOR].
>
> 2. As a consequence of the above-referenced violations, Foreman R. J. Nedeff and Trackman D. B. Bohrer shall each be allowed: (a) half their respective straight time rates for the eight (8) hours they worked on each Saturday and Sunday beginning June 1, 1996 and thereafter until the violation is corrected; and (b) eight (8) hours' pay at their respective straight time rates for the hours they were not allowed to work on each Monday and Tuesday beginning June 3, 1996 and thereafter until the violation is corrected.

Careful review of the factual record and the positions of the Parties causes the Chairman to reject the loaded issues suggested by the respective Parties and objectively frame the following questions, which are properly presented for determination in this matter:

1) Did Carrier violate Rule 17 of the Agreement when, effective April 1, 1996, it changed the work weeks/rest days of two (2) man Gang 5DC6 from Monday through Friday with Saturdays and Sundays designated as rest days to Wednesday through Sunday with Mondays and Tuesdays designated as rest days, as claimed in System Files B-TC-1699/12(96-1499) and B-TC-1756/12(970063) BOR?

2) If so, what is the appropriate remedy to properly compensate the Claimants [Foreman R. J. Nedeff and Trackman D. B. Bohrer, the two (2) employes assigned to Gang 5DC6 before and after the change] for the period June 1, 1996 through August 6, 1996, [as claimed in System Files B-TC-1699/12(96-1499)] and for the period August 10, 1996 through September 23, 1996, as claimed in System Files [B-TC-1756/12(970063) BOR], for the work which they performed on their former Saturday/Sunday rest days because of the new changed schedule, and for the work which, but for the new changed schedule, they would have performed on Mondays/Tuesdays?

PERTINENT CONTRACT PROVISIONS

Rule 17

Note: The expressions "position" and "work" used in this Rule 17 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.

(a) There is hereby established for all employees covered by this agreement, subject to the exceptions contained hereafter in this rule and Rule 60(b-2), a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the Management's operational requirements, so far as practicable the days off shall be Saturday and Sunday. The foregoing is subject to the provisions of this rule which follows:

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

****

(d) 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.

(e-l) All possible regular relief assignments with five day of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven-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 under this agreement.

(e-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.

****

RULE 18
SERVICE ON REST DAYS AND HOLIDAYS

(a) Except as otherwise provided in this rule, employees who are required to work on their designated rest days and the following holidays, namely, New Year's Day, Washington's Birthday, Good Friday, Memorial Day, Fourth of July, Labor Day, Veteran's Day, Thanksgiving Day, Christmas Eve (the day before Christmas is observed) , and Christmas (provided that when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation, shall be considered the holiday) shall be compensated therefor at the rate of time and one-half, with a minimum of two (2) hours and forty (40) minutes as per Rule 27.11

****

RULE 24
OVERTIME

(b) Work in excess of 40 straight time hours in any work week shall be paid for at one and one-half times the basic straight time rate except where such work is performed by an employee due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under paragraph (g) of Rule 17.11

BACKGROUND

The Brotherhood of Maintenance of Way Employes ("BMWE" or "Organization") and CSX Transportation, Inc. ("CSXT" or Carrier") created this Special Board of Arbitration ("Board") to hear and decide a dispute over CSXT's unilateral change in the work week/rest days of a two (2) man Gang [5DC6]: from Monday through Friday, with Saturdays and Sundays designated as rest days, to Wednesday through Sunday, with Monday and Tuesday as designated rest days. Prior to the date of this change, Gang 5DC6 had been regularly assigned to five (5) day work weeks, Monday through Friday with Saturdays and Sundays designated as rest days since 1951. Carrier effectuated a post-award bulletin process whereby, effective April 1, 1996, the two positions on the gang were

abolished and then immediately re-bulletined, with the two positions now having the Wednesday-Sunday workweek. Claimants, who were the long-time incumbents of the two positions on Gang 5DC6, immediately applied for and were awarded their old positions with the only change being the new workweek and rest days. They worked under the new schedule but initiated the instant claims, which were filed on their behalf by the Organization on August 5, 1996 (Case No. 1) and September 20, 1996 (Case No. 2).

The questions at issue in this case were filed and progressed as two (2) separate claims on the property, *i.e.*, one claim [System Files B-TC-1699/12(96-1499)] seeking recission of the April 1, 1996 change and compensatory damages for work weeks/rest days beginning June 1, 1996 through August 6, 1996 and a separate claim [B-TC-1756/12(970063) BOR] for recission of the April 1, 1996 change and compensatory damages for work weeks/rest days beginning August 10, 1996 through September 23, 1996. Inasmuch as the Claimants and issues were the same in each of the claims, the Parties agreed to consolidate them in arbitration before the Board. After filing and exchanging written prehearing submissions and rebuttal, in accordance with the Agreement establishing the Board, each of the Parties was afforded full opportunity to present oral argument and additional arbitration awards in support of their positions at a hearing before the Board in Chicago, Illinois on October 20, 1998. The record was closed with oral summation and the Board thereafter rendered its decision in this matter.

POSITIONS OF THE PARTIES

The following statements of position have been extrapolated and edited from the respective briefs filed by the Parties (Emphasis in original):

The Organization

Rule 17 of the controlling Agreement, taken virtually verbatim from the March 19, 1949 National Forty Hour Work Week Agreement, specifically sets forth the manner in which bulletined work weeks may be instituted. The fundamental question for the arbitrator is whether CSXT violated Rule 17 when it rebulletined the work week of Gang 5DC6 from Monday through Friday with Saturday and Sunday designated as rest days (which had been the work week of Gang 5DC6 since 1951), to a work week of Wednesday through Sunday with Monday and Tuesday designated as rest days. The Carrier's actions violated the Agreement because Rule 17 is clear and also because viewing the dispute in the context of the Agreement as a whole supports the instant claim.

The plain language of Rule 17, particularly Paragraph (b) , as explained in the prefatory NOTE to this rule, specifically stipulates that Saturdays and Sundays will be the rest days in five (5) day service. Because precedential NMB Case No. 212 interpreted the language of Rule 17 and held that Sunday could not be a regularly assigned workday for staggered five (5) day assignments, the Carrier's position necessarily hinges on the premise that the subject positions were seven (7) day positions. However, we have shown that the duties of the subject positions have reasonably been met in five (5) days for nearly fifty (50) years and that **no relief positions** have ever been assigned on the Claimants' rest days. Hence, the Carrier has failed to show that the duties of the subject positions could not have reasonably been met in five (5) days. Although the Carrier's train operations are conducted twenty-four (24) hours per day, seven (7) days per week, this is nothing new and **no change** was shown to establish seven (7) day positions. Moreover, the work performed by two (2) man Gang 5DC6 on their former rest days following the subject change of rest days was, with the exception of two (2) dates in a nearly two (2) year period, **routine maintenance,** *i.e.*, **not absolutely necessary** to the Carrier's train operations. Hence, there was no operational requirement to severely disrupt the Claimants' work/family life by changing their work weeks and designated rest days and the Carrier has not shown otherwise. Although the Carrier's failure in this regard obviates examination of the Carrier' s alleged "operational requirement" to **reduce overtime,** the Carrier's stated "reason" for changing the Claimants' rest days is not a bona fide operational requirement. Because basic force Maintenance of Way work is not customarily performed seven (7) days per week or even six (6) days per week, it is **five (5) day service** and the Carrier's decision to change the Claimants' rest days from Saturday and Sunday to other than Saturday and Sunday clearly violated the Agreement.

The Carrier's positions before PEB 211, PEB 219 and in negotiations which led to the Agreement for its SPGs show, beyond a doubt, that the Carrier recognized it did not have the unfettered right to unilaterally change the work week of basic Maintenance of Way Gang 5DC6 from five (5) days, Monday through Friday with Saturdays and Sundays designated as rest days to five (5) days, Wednesday through Sunday with Mondays and Tuesdays designated as rest days, under the clear terms of Rule 17. For all the foregoing reasons, the Claimants are entitled to the remedy requested not as a penalty, but to compensate them for their clear losses

resulting from the Carrier's violations of the Agreement and to ensure the integrity of the Agreement. Award 35 of SBA No. 488, involving similar circumstances and rule 17 on this property, is not palpably erroneous and should lead to a fully sustaining award. BMWE respectfully submits that the claim should be allowed as presented.

The plain fact remains that the positions discussed therein were five (5) day positions in 1949 through May of 1996 and remain to this day five (5) day positions. The Carrier has not presented any evidence of a change in operations which would dictate a change therefrom. The salient points to remember here are: 1). The Carrier has not shown that a seven (7) day position existed in the area where it unilaterally made the change; 2). The Organization evidenced that basic Maintenance of Way forces have met the Carrier's Maintenance of Way requirements on five (5) day positions with Saturdays and Sundays as rest days for at least fifty (50) years under Rule 17; 3). The Carrier has not set forth any basic Maintenance of Way work which cannot be accomplished in five (5) day service with Saturdays and Sundays as rest days; 4) The Carrier is attempting to obtain through the guise of an interpretation of Rule 17 that which it could not obtain in national negotiations; 5) The Carrier's action plan clearly sets the stage for what it wanted accomplished, *i.e.*, reduce overtime. The Carrier has not shown that an operational requirement existed to change the rest days from Saturday and Sunday, nor has it presented any arbitral support which follows the fact pattern of these two (2) cases to justify the change.

The Carrier

Rule 17 in the controlling Agreement, adopted pursuant to the Forty Hour Week Agreement of September 1949, provides for five day work week assignments with two rest days, consecutive if possible, for all employees, and grants the Carrier the right to stagger the five day work week assignments of individual employees to provide manpower for work which must be performed more than five days a week. The language contained within the NOTES and Rule 17 is clear and unambiguous: "Positions" refers to the Carrier's operational requirements;"Seven-day positions" are involved when operations are necessary seven days a week; and, the 5-day work week assignments of individual employees may be staggered with other than Saturday/Sunday rest days.

As was made clear to the Organization during the on property handling of the instant dispute, the Carrier has an operational need for track inspection and track maintenance seven days per week. It runs trains 24 hours a day, 7 days a week. Traffic and train density make it imperative that the track structure is in top notch condition 7 days a week and not just on week days. Safety of train crews and the traveling public also mandate this coverage. Additionally, the Carrier has the right and responsibility to schedule and stagger its employees in the most efficient manner possible to meet these needs. Based on the Agreement language cited above, assigning Maintenance of Way gangs to work seven days per week is a managerial prerogative.

The Carrier' s capacity to operate trains is limited by the track structure and its related physical plant (bridges, tunnels, etc). In order to meet increased customer demand, and an upturn in business (increased carloads) , the Carrier sought to operate more trains, more frequently, on the existing track structure. In order to accommodate the customers' needs, the railroad's maintenance functions, performed by the Engineering Department, had to be re-structured concomitantly. This necessitated conducting maintenance functions on days other than the traditional Monday through Friday. To elaborate further on the necessity for the change, in response to customer demands for improved service and increased frequency of service, in 1995, CSX began a two year project to change its entire Transportation/Operations Center in Jacksonville, Florida as well as to change its corresponding field operations from a "Divisional Structure" into a customer-responsive "Service

Lane". This internal re-engineering impacted all aspects of the company and necessitated the re-organization of the Carrier's manpower in all department operations.

An almost identical case involving CSX was reviewed by the National Railroad Adjustment Board and an Award was rendered during 1996. In that case, the Organization contended its Agreement was violated when the Carrier abolished gang 6CO6, which was off on Saturday and Sunday, and re-established the same gang with rest days of Monday and Tuesday. *See* Third Division Award No. 31300 (Wesman). The facts are the same in the instant case; therefore, there is no basis for the Organization's claim. Carrier operates seven days a week and the Claimants were aware of the rest days when they bid on the assignments. As in the case cited above, there is no merit to the instant claim. This issue has also been thoroughly dealt with on other properties and many other on-point factually similar Awards support this Carrier's decision to stagger the work weeks of its Maintenance of Way forces. *See* PLB No. 2166, Award No. 1, (Eischen); PLB 5317, Award No. 1 (Scheinman); NRAB Third Division, Award No. 31136 (Fletcher); NRAB Third Division, Award No. 30011 (Marx); NRAB Third Division, Award No. 31295 (Mason); *Cf.*, PLB 4104, Awards Nos. 9,10,11 (Scheinman).

Regarding the 'history' of forces working Monday through Friday with 'weekends off'; CSX Transportation operates the Railroad twenty-four hours per day, seven days per week and 52 weeks per year. Recent customer demands for better service and more reliable service require the Carrier to change its operations so that repairs and maintenance activities can be done during times of less traffic volume. This accounts for the necessity to change work schedules and to re-bulletin the positions. It is the position of CSX Transportation that there is Maintenance of Way work that needs to be done seven (7) days per week, and that the Carrier has the right and responsibility to schedule and stagger its operations.

A study of the train traffic on CSXT showed that the company could improve train operations and increase the frequency of operations, by expanding its Maintenance of Way functions from the traditional Monday through Friday (five-day week) to a Sunday through Saturday (seven-day week) operation. There would be fewer train interruptions and increased productivity by scheduling track maintenance functions on those two previously underutilized days. These changes in the Carrier's operations are not temporary, or seasonal-they are permanent, and the increase in both business volume and frequency of trains has continued to grow. This is a bona fide operational change in the fundamental way that the company does business. The Carrier has shown an operational need for 7-day assignments to perform needed track inspection and maintenance. The applicable Agreements and precedent Awards fully support Carrier's decision to so assign its Maintenance of Way forces.

OPINION OF THE CHAIRMAN

Arbitrators usually follow the principle that words used by the Parties should be given their ordinary and popular meaning in the absence of an indication that they were intended mutually to convey some special meaning. *See* D. Nolan, Arbitration Law and Practice (1979), N.8 at 168; Walter Jaeger, Williston on Contracts, § 618 at 705 (4th Ed. 1961). The Restatement (Second) of Contracts is in accord: "In the absence of some contrary indication, therefore, English words are read as having the meaning given them by general usage, if there is one. This rule is a rule of interpretation in the absence of contrary evidence, not a rule excluding contrary evidence." (Restatement, N.13 at § 202, comment e). Relying on this "plain meaning rule", each of the Parties to this dispute argues that plain and unambiguous language in Rule 17, derived *verbatim* from the March 19, 1949 National Forty Hour Work Week Agreement, supports its position.

However, no less prominent a commentator than Justice Oliver Wendell Holmes made the following observation about the so-called plain meaning rule: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 US 418, 425 (1918). It is also noted that the strict plain meaning rule was rejected in the Restatement (Second) of Contracts. (Section 212, comment b (1979)).

It must be established as a starting point that the language of Rule 17 is not so crystal clear that the position of either party in the present case is plainly vindicated or that the other can be dismissed out of hand solely by reading the words of Rule 17 standing alone. Almost since its

inception in March 1949, the artfully drafted compromise language of the negotiated National Forty Hour Work Week Agreement has been a fertile source for controversy which has required frequent arbitral intervention. Like the present case, almost all of those disputes have involved reconciliation of the inherent tension in the language appearing in the following phrase from Rule 17 (a): ....*the work weeks may be staggered in accordance with the Management's operational requirements, so far as practicable the days off shall be Saturday and Sunday. The foregoing is subject to the provisions of this rule which follows....* Nor is reconciliation of that language easily accomplished simply by reading the specific provisions of Rule 17 (b): *On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.* [cited by the Organization] and/or Rule 17 (d): *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.* [cited by the Carrier].

When conflicting interpretations of a contract provision are thus plausibly demonstrated, the language in dispute must be considered to be ambiguous and neither Party can find comfort in the "plain meaning rule". Alternatively, each Party also invokes so-called "past practice", bargaining history and a plethora of prior arbitration decisions interpreting the disputed language. Since the language of the collective bargaining agreement is ambiguous, the arbitrator may rightly consider such parole evidence of mutual intent to resolve a dispute as to the meaning of the unclear contract language. Several sources of evidence may be utilized in order to determine the intent of the parties when entering into ambiguous contract language, including bargaining history, "past practice" and arbitral interpretations. In this case, the correct answer is found in the arbitral gloss to the above-

cited language of Rule 17, which has been laid down in a line of authoritative precedent decisions over the last fifty years.

The judicial doctrines of *stare decisis* and *res judicata* do not apply strictly in labor-management arbitration. Although prior arbitration awards are not binding in exactly the same way that judicial decisions are, they do have considerable authoritative force. In that connection, one well recognized commentator on the arbitration process make the following important distinction:

> Giving authoritative force to prior awards when the same issue subsequently arises (stare decisis) is to be distinguished from refusing to permit the merits of the same event or incident to be relitigated (res judicata). Where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration but it may be controlled by the prior award.

See Elkouri & Elkouri, How Arbitration Works, 421-22, 4th ed., 1985), *see also* Timkin Roller Bearing Company, 32 LA 595, 597-599 (Boehm, 1958).

Absent a contractual mandate to do so, the Board Chairman is not bound in any legal or technical sense to follow the decisions of predecessors, even on the same issue. As a practical matter, however, where a prior decision covers the same parties, issues, facts and contract language, many arbitrators consider the interpretation laid down in the earlier award a binding part of the agreement, unless and until the parties change the underlying language. Even those who refuse to hold prior awards contractually binding give them serious and weighty consideration when called upon to interpret the same language. One eminent pioneer labor-management arbitrator stated the prevailing view as follows:

> Where a prior decision involves the interpretation of the identical contact provision, between the same company and union, every principle of common sense, policy and labor relations demands that it stand until the parties annul it by a newly worded contract provision.

Pan American Refining Corp., 2 ALAA ¶ 67,937, ¶ 69,464 (McCoy, 1948).

A wealth of reported decisions by respected arbitrators have reaffirmed the notion that a responsible arbitrator with proper regard for the arbitration process and for stability in collective bargaining, even though technically not bound, should accept an interpretation in a prior arbitration as binding, if it is on point, based in the same agreement and not plainly wrong. O & S Bearing Company, 12 LA 132, 125 (R. Smith, 1949); Brewers Board of Trade, Inc., 38 LA 679, 680 (Turkus, 1962). It is not necessary that the subsequent arbitrator endorse all of the reasoning expressed in the earlier opinion. What is important is that the earlier award be final, definitive and set forth a holding which is not palpably erroneous. Lehigh Portland Cement Co., 46 LA 133, 137 (Duff, 1965). In such circumstances, arbitrators generally conclude that it would be a disservice to the parties to subject them to the unsettling effects of conflicting and inconsistent interpretations of the same contract language in the same set of circumstances.

All of these factors lead me to conclude that proper disposition of the present case is achieved by application of the guiding principles laid down with authoritative force in precedent-setting decisions more than forty years ago and followed since by most Railway Labor Act arbitration tribunals which have addressed the confronting issues under the language of the Forty Hour Work Week. Close attention to these precedents demonstrates a remarkable consistency of analysis regarding the presumptions and burdens of proof to be applied in interpreting the Forty Hour Work Week Agreement language which appears in Rule 17. *See*, NRAB Third Division Awards 6502 and 6695 (Leiserson), 7370 (Carter), 17593 (Gladden), 23461 (Scheinman), 28307 (Lieberman), 32795

(Wesman); NRAB Second Division Award 8289 (Kasher); Board of Arbitration NMB Case No. 212 (Cole); Special Board of Adjustment 488 B&O/BMWE, Award 35 (Lynch); Special Board of Arbitration UP/BLE (Van Wart); PLB 4104 Awards 2,3,9, 10, 11 (Scheinman); PLB 2166, Award 1 (Eischen), PLB 5565, Award 8 (Eischen). This consistency of analysis is broken only by sporadic outliers in which a few arbitrators were persuaded, for one reason or another, to depart from the authoritative line of precedent emanating from NRAB Third Division Awards 6502 and 6695 (Leiserson). *Cf.*, NRAB Third Division Awards 6856 (Carter) [subsequently modified by Arbitrator Carter in Award 7370, *supra,* after his own analysis was rejected by the Board of Arbitration in NMB Case No. 212]; 10171 (McMahon); 30011 (Marx) and 31300 (Wesman).

The overwhelming weight of authority in the better-reasoned majority line of cases follows the reasoning first laid down by Arbitrator William Leiserson 45 years ago in NRAB Awards 3-6502 and 3-6695. The Leiserson analysis was later adopted in its entirety by the Board of Arbitration in NMB Case No. 212 and by Arbitrator Edward Carter in NRAB Award 7370, *supra*. In the Majority Opinion of the Board of Arbitration in NMB Case No. 212 , dated June 4, 1956, Arbitrator David L. Cole (Chairman of the Emergency Board which had recommended the Forty Hour Week Agreement) expressly declined to follow Arbitrator Carter's decision in NRAB Award 3-6865, endorsed with approval Arbitrator Leiserson's decision in NRAB Award 3-6695 and applied the Leiserson analysis:

> Referee Carter who wrote the Adjustment Board's opinion in Award 6856 (the Erie case) also participated in several other awards on this general subject of Sunday work. One of these was Award 1644 in which he summed up the view for which the Carrier is now contending in these words:

The agreement does not prohibit the assignment of a type of work on Sunday after September 1, 1949, even though it was not so assigned prior to that date, if such work is necessary to be performed on Sunday.

In Award 6856 he cited a number of awards as supporting this view, although the facts in several indicated that the type of work in question had been performed on Sundays prior to September 1, 1949. This fact-he called merely strong evidence, or a 'presumption' that it continued to be necessary.

The position of the Organization, on the other hand, is summarized and supported by the following statement by Referee Leiserson in Award 6695:

'This claim can only be upheld if the contractual provisions of its 40-Hour Agreement with the Clerks permit it. Examining Rule 35 (d) which governs 7-day service, we find that the rule states that any two consecutive days may be the rest days on positions which have been filled 7 days per week. (Emphasis in original). Admittedly, the positions at Utica have not been filled seven days a week either before or after September 1, 1949, except by special arrangements during World War II. Accordingly we cannot hold that this rule authorizes the proposed change from the present 5-day service to a 7-day operation.

We subscribe basically to the interpretation of Referee Leiserson. We do so, in brief, **because we find that the parties in agreeing upon Sections 1 (a), 1 (b), 1 (c), 1 (d) and 1 (j) made it clear that seven-day operations stand on different grounds from six-day and five-day operations, by using guarded and carefully drawn language distinguishing the three kinds of work weeks. We find that the seven-day operation, unlike the other two, is closely tied to the Sunday Work Rule, which rule did away with the long-established practice of premium pay for Sunday as such, but assured the employes that seven-day types of work previously dispensed with by the Carrier would not be reinstated now that it may be done at straight time and that types of work which have not been needed on Sundays will not hereafter be assigned on Sunday.** To avoid misunderstanding or misquotation, however, it must be pointed out that neither Section 1 (d) nor Section 1 (j) stipulates that the prior Sunday work must have been paid for either at the rate of time and one-half or straight time. **Read with the test stipulated in Section 1 (d) that speaks of seven-day positions as those which have been filled seven days per week, this makes the intent of the parties quite plain....The reference to staggered work weeks in accordance with operational requirements applies to six-day operations, as distinguished from five-day, and also to seven day operations which may properly be carried on by one or more of the many classes or crafts of employes who are parties to the agreement, and in any event is definitely and explicitly qualified by the more specific sections which follow Section 1 (a).** (Emphasis added).

Just three weeks later, on June 28, 1956, Arbitrator Carter rendered NRAB Award 3-7370, in which he synthesized the Leiserson analysis with his own views regarding presumptions and burdens of proof under the controlling language, as follows:

> **Where there has been no additional need brought about by some change in circumstances that creates a need for seven day service, the rules of the Forty-hour Week Agreement do not permit the institution of seven day service where it did not exist before.**
>
> **Construing the rules as a whole, they simply mean that Sunday assignments will remain as they were before the forty hour week except where there has been such a change in operating conditions due to a change in the nature or amount of business, or other changed conditions which makes Sunday work necessary. The presumption is that work is not required to be performed on Sunday when it was not required to be so performed before the Forty Hour Week Agreement. The Carrier is required to overcome this presumption by evidence that changed circumstances necessitated the institution of seven day service.** There is no evidence in the present case of any changed conditions which warranted any seven day assignment. Before as well as after the seven day assignments here made the work was performed without any regularly assigned Sunday work. There would appear to be no better proof that Sunday work was not required than the fact that it was so performed before and after the Sunday assignments of which complaint is here made. We do not think these Sunday assignments were justified at the Butte freight house and that they were in violation of the Agreement. This result is sustained by the principles announced in Awards 1566, 1644, Second Division; 5247, 6232, 6502, 6695, 6856, Third Division.

(Emphasis added)

In the only reported decision involving the Parties to the instant dispute, the same issues under Rule 17 of the Agreement were arbitrated and decided in Award 35, by SBA 488 B&O/BMWE (Lynch), dated August 28, 1963, as follows:

> Claimants here were members of Extra Gang No. 12125, on a scheduled Monday through Friday basis; Saturday and Sunday, rest days. They were headquartered at Camden Station, Baltimore. The gang was abolished upon proper notice. Carrier then... issued bulletin No. 37 re-establishing the extra gang on a Thursday through Monday basis, with Tuesday and Wednesday as rest days. The reason assigned by Carrier is that the City of Baltimore ordered it to perform certain work on B&O tracks which operate through the city streets, and the City directed that this work could only be performed on Saturdays and Sundays. The work started October 7, 1961 and was completed on November 5, 1961 when Carrier restored the gang to a Monday through Friday -- Saturday and Sunday, rest days -- basis.
>
> **We have carefully examined the position and argument of the Carrier in justification of its action, and can only conclude that Carrier's action was taken in order to evade the payment of overtime to these claimants on the 5 week-ends required to do the necessary work. We do not agree with Carrier Arguments that prior to October 5 this gang was involved in a five-day operation, and that thereafter it was a seven-day operation. <u>It was a five-day operation before, during and after the period covered by this claim. The positions in this gang were filled on a five-day basis at all times. And under such circumstances Rule 17 (b) says flatly the days off will be Saturday and Sunday.</u>**

> Thus, had Carrier conformed to the requirements of the Agreement, it (a) could have assigned men from the extra list; or (b) could have worked these claimants (as it did) at overtime rates.

(Emphasis added)

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 17 (a) and (b) creates a rebuttable presumption that existing five-day operations staffed by positions with a Monday-Friday work week and Saturday-Sunday rest days should not unilaterally be changed to seven-day operations with other than Saturday-Sunday rest days. A Carrier invoking the language of Rule 17 (a) and (d) to alter this *status quo* and justify implementing such a change from five-day Monday through Friday positions to seven-day positions with other than Saturday-Sunday rest days, bears the 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. Typical of this long line of cases is NRAB Award 3-17593 (Gladden, November 25, 1969), which cites Award 7370 (Carter) in concluding as follows (Emphasis added):

> We believe Rules 7 (a) and 7 (d) authorized the Carrier to establish seven day positions on positions which had, prior to September 1, 1949, been filled seven days per week. 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.**

See also NRAB Award 2-8289 (Kasher, 1980); NRAB Award 3-23461 (Scheinman, 1981); PLB 2166, Award No. 1 (Eischen, 1981); Special Board of Arbitration UP/BLE (Van Wart, 1989); PLB 4104 Awards 2,3,9, 10, 11 (Scheinman, 1989); NRAB Award 3-28307 (Lieberman, 1990); PLB 5565, Award 8 (Eischen, 1996); NRAB Award 3-32795 (Wesman, 1998).

Application of the principles established in this long line of cited precedent to the facts of the present case leads ineluctably to the conclusion that the Carrier failed to rebut the presumption because it did not produce clear and convincing record evidence of the operational necessity of changing 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-Sunday. The primary reasons advanced on the property by Carrier to justify the change were "management rights", efficiency and avoidance of overtime, round-the-clock 24 hour/7 day operations, consistency with a "Service Lane" internal reorganization implemented by a new management team in 1995, "traffic and train density" and "safety of train crews and the traveling public". It is well established that 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*, and railroading, *per se*, has always been a 24/7 operation. *See, e.g.*, Board of Arbitration NMB Case No. 212 (Cole); Special Board of Adjustment 488 B&O/BMWE, Award 35 (Lynch); NRAB Awards 3-6695, 3-7370, 3-14098, 3-17343 and 3-19622; Special Board of Arbitration UP/BLE (Van Wart).

Aside from rhetorical flourishes, there is virtually no evidence in this record to support Carrier's assertions that the challenged work week/rest days change was necessitated by material operational changes involving safety or customer demands and the other asserted reasons simply do not rise to the level of material operational necessity sufficient to rebut the presumption and justify unilateral change of the *status quo*. To the contrary, the available evidence supports the conclusion

that, just as in Award 35 of SBA 488, *supra*, before, during and after the disputed changeover by Carrier, the work performed by Gang 5DC6 remained *de facto* a five-day operation, despite Carrier's unilateral *de jure* declaration that, effective April 1, 1996, it would henceforth be scheduled and compensated as a seven-day operation. In that connection, the record shows that on only two (2) occasions in the two (2) years that they worked under the disputed Wednesday-Sunday workweek schedule did Claimants perform work on a Saturday or Sunday which immediately affected Carrier's operations on those days; otherwise the work they performed on those former Saturday and/or Sunday rest days was routine maintenance work no different than that performed on any other work day. [It is noted that after approximately two (2) years under the disputed schedule, in mid-May 1998, Carrier unilaterally changed the Gang 5DC6 work week to a Sunday-Thursday work week with Friday-Saturday rest days.]

Based upon all of the foregoing, we conclude that Carrier did violate Rule 17 of the Agreement when, effective April 1, 1996, it changed the work weeks/rest days of two (2) man Gang 5DC6 from Monday through Friday with Saturdays and Sundays designated as rest days to Wednesday through Sunday with Mondays and Tuesdays designated as rest days, as claimed in System Files B-TC-1699/12(96-1499) and B-TC-1756/12(970063) BOR. As remedy for that proven violation, Carrier is directed to compensate Claimants, for the periods of time claimed in the claims under consideration, in an amount equal to the difference between what they actually earned under the contractually invalid schedule and what they would have earned but for the violation of Rule 17. Specifically, Carrier shall compensate Foreman R. J. Nedeff and Trackman D. B. Bohrer,

the two (2) employes assigned to Gang 5DC6 before and after the invalid change, an additional half-hours pay for each hour worked on their former Saturday-Sunday rest days because of the new changed schedule during the period June 1, 1996 through August 6, 1996, [as claimed in System Files B-TC-1699/12(96-1499)] and for the period August 10, 1996 through September 23, 1996, [as claimed in System Files [B-TC-1756/12(970063) BOR]. [Contrary to the assertions of the Organization, the two (2) claims which are the foundation for the Board's jurisdiction in this matter were filed for specific dates certain and not as "continuing claims"].

As authority for the overtime "make whole" remedial damages for the Saturdays and Sundays covered by these claims, we rely on NRAB Awards 3-13738 (Dorsey) , 3-19947 (Blackwell), 3-25968 (Marx), 3-30662 (Eischen), 3-30987 (Eischen), 3-31453 (Meyers) , 3-31590 (Eischen) , 3-32107 (Zusman) and PLB No. 2206, Award 52 of (Eischen). In short, the appropriate rate for calculating damages is the rate the injured employee would have earned but for the violation of Rule 17. The Organization's plea for additional straight time damages for the "lost work opportunity" on Mondays and Tuesdays covered by these claims is not persuasive. The majority of reported decisions, including the only on-property precedent between these same Parties involving the same facts, contract language and issues, do not award such damages in addition to the overtime damages. *See* SBA No. 488, Award 35 (Lynch). Finally, the Parties have informed the Board that they wish to use this decision as a basis for possible resolution of a number of related claims. At their joint request, the Board will retain jurisdiction for that purpose, which may be invoked by either Party upon written notice to the Chairman.

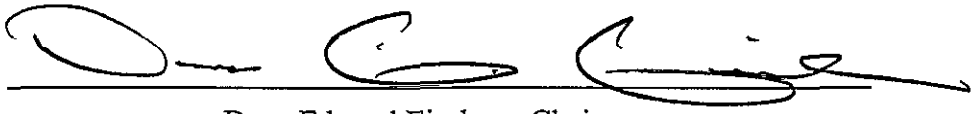
AWARD OF THE BOARD

1) Carrier did violate Rule 17 of the Agreement when, effective April 1, 1996, it changed the work weeks/rest days of two (2) man Gang 5DC6 from Monday through Friday with Saturdays and Sundays designated as rest days to Wednesday through Sunday with Mondays and Tuesdays designated as rest days, as claimed in System Files B-TC-1699/12(96-1499) and B-TC-1756/12(97-0063) BOR.

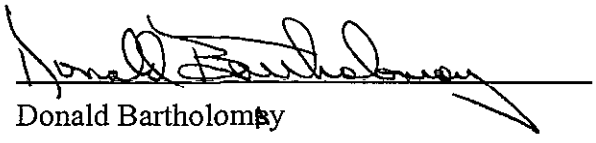
2) As the appropriate remedy for the proven violation, Carrier shall compensate the Claimants [Foreman R. J. Nedeff and Trackman D. B. Bohrer, the two (2) employes assigned to Gang 5DC6 before and after the change] in an amount equal to the difference between the overtime rate and the straight time rate for each hour of work which they performed on their former Saturday/Sunday rest days because of the new changed schedule during the period June 1, 1996 through August 6, 1996, [as claimed in System Files B-TC-1699/12(96-1499)] and the period August 10, 1996 through September 23, 1996, [as claimed in System Files B-TC-1756/12(970063) BOR], .

3) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.

4) At the joint request of the Parties, this Board retains jurisdiction to resolve any disputes which might arise over the interpretation of this Award and/or over its application toward the resolution of other related claims held in abeyance pending rendition of this Award.



Dana Edward Eischen, Chairman
Dated at Spencer, New York on February 26, 1999



Donald Bartholomay
Union Member

James B. Allred
Company Member