Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION

Award No. 26818
Docket No. MW-26589
88-3-85-3-330

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

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

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

(1) The Carrier violated the Agreement when it failed and refused to compensate Machine Operators L. R. Gillis, J. A. Curtiss, D. C. Peterson, V. F. Zimmerman, M. K. Kraninger, G. Thompson, S. R. Maes, L. V. Schermerhorn, R. L. Treanor, T. D. Benedict and E. Bert for the overtime service they performed from 4:00 P.M. to 8:30 P.M. on April 18, 1984 (System File M-20/013-210-36).

(2) Because of the aforesaid violation, each of the claimants shall be allowed four and one-half (4 1/2) hours of pay at their respective time and one-half rates."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The circumstances giving rise to this claim are not in serious dispute. The Claimants are regularly assigned to System Tie Gang 812 headquartered in outfit cars, with regularly assigned hours from 7:30 a.m. to 4 p.m. The Gang was instructed to relocate on April 18, 1984, from Perry, Utah to Downey, Idaho.

While the Claimants arrived in Downey prior to 4 p.m., their outfit cars did not arrive at Downey until 8:30 p.m. In dispute is whether or not applicable Rules provide for pay for the hours from 4 p.m. to 8:30 p.m., although the Carrier argues that the dispute was improperly processed through the claims handling procedure, regardless of the merits of the matter.

The original claim (May 17, 1984) argued that the Carrier had violated "the Agreement, specifically, but not restricted to Rules 1, 33, 35, 36 and 38" when it failed to compensate the Claimants for "four and one-half (4 1/2) hours overtime service."

The Carrier denied the claim on the basis that the "movement of the me" and machinery was completed during normal working hours" and thus there was no overtime.

The appeal by the Organization first referred to Rule 35(a), which calls for pay at time and one-half for "time worked" following the regular eight-hour assignment. However, based on information developed at the earlier steps (i.e., that the Claimants were not "working" beyond 4 p.m. but were awaiting the outfit cars), the Organization then referred to Rule "36(a)." Rule 36 is entitled "Travel Service" and includes Sections 1, 2, and 3, so that reference to "36(a)" is somewhat imprecise. Nevertheless, Sections 2 and 3 concern details of compensation of "employees assigned with outfits as headquarters" and "Employees assigned to outfit cars."

It should be noted that both Rule 35 and Rule 36 are referenced in the initial claim by the Organization.

Following conference on the property concerning the claim, the Organization then wrote further to the Carrier citing, for the first time, the application of Rule 30(b).

Pertinent portions of the three Rules are as follows:

"RULE 30, DESIGNATED ASSEMBLY POINT

(a) The starting place for section forces will be the section tool house. The starting place for bridge and building forces, steel erection forces and others assigned with fixed headquarters in terminals, will be the designated tool house or shop. The starting place for employees assigned with headquarters outfits will be the designated outfit's tool or supply car, provided, however, that when the outfit car is located at a point away from the assigned tool or supply car to meet the requirements of the service, the starting time will commence at the outfit car. When the assigned outfit cars are located at a point away from the tool or supply car for the convenience and request of the employes, the starting time will continue as commencing at the location of the tool or supply car.

(b) Employes time will start and end at the designated assembly point as provided by Section (a) with the following exceptions:

(c) The assembly point for regular forces assigned with fixed headquarters shall be subject to change to conform with prevailing conditions, but shall not be changed more than once in any ninety (90) day calendar period."

"RULE 35. OVERTIME SERVICE

(a) COMPUTATION. Time worked preceding or following and continuous with the regular eight (8) hour assignment shall be computed on an actual minute basis and paid for at time and one-half rate with double time applying after sixteen hours of continuous service, until relieved from service and afforded an opportunity for eight (8) or more hours off duty."

"RULE 36. TRAVEL SERVICE

. . .

Section 2 - Change of Work Location - Outfit Service :

(a) Employes assigned with outfits as headquarters, except as provided in Section 1, 3, 4, and 5, shall be paid for time spent traveling when moves are made from one work point to another during the hours of the employe's regular assignment, including waiting time enroute, the same as for time worked.

(b) In lieu of pay for time spent traveling when moves are made from one work point to another outside of regularly assigned hours, or on a rest day or holiday, including waiting time enroute, employes will be paid travel time at their pro rata rate computed on the basis of forty (40) miles per hour for normal traveled road miles between the work location from which the move commenced and the new work location.

In computing time under this rule, fraction of less than one-half hour shall be dropped and one-half or more shall be counted as an hour.

Section 3 - Extra Gang Assignment - Traveling In or With Outfit Cars:

(a) Employes assigned to outfit cars which are considered their headquarters will be compensated as follows when their outfit cars are moved on or off their assigned seniority district whether they ride the outfit cars or use other means of transportation to the location where outfit cars are being moved.

(b) When a move occurs on a regular work day, employes involved will be allowed straight time for any portion of the move which occurs during their regular assigned hours.

(c) When a move occurs on a rest day, employes involved, who performed compensated service on the work days, immediately preceding and following such rest day, will be allowed straight time on the basis of one hour for each 40 miles or fraction thereof for any portion of the move which occurs during hours established for work periods on other days. The maximum time allowance under this Section (c) shall be 8 hours per day.

(d) As pertains to employes using other means of transportation to the location where outfit cars are being moved, in case outfits are diverted, or work performed enroute, no allowance will be made for any time lost.

(e) In computing time under this rule, fraction of less than one-half hour shall be dropped and one-half hour or more shall be counted as an hour."

It is the Carrier's position that the claim is defective and must be dismissed, because the Organization, as outlined above, appeared to change the basis for its position as the claim progressed. Further, the reference to Rule 30 came only after final conference, by which time accepted procedure would have required all arguments and evidence to have been set forth.

There is no question that there is some confusion in the presentation of the claim as it progressed. It remains the fact, however, that the claim concerned whether or not the Claimants should be paid between the hours of 4 p.m. to 8:30 p.m. on the date in question. There can be no doubt that both parties were aware that this was the question at issue. The Organization

cited Rule 35 and Rule 36 at the outset, thus alerting the Carrier to the basis (or bases) for the claim. As to the obviously belated reference to Rule 30, the Board perceives that this Rule is not, by itself, a basis for payment in any circumstance. It does, however, provide definition for "starting place" and "assembly point" which are necessary for a reading of Rules 35 and 36.

As a result, the Board finds that the claim is sufficiently consistent to warrant review on the merits.

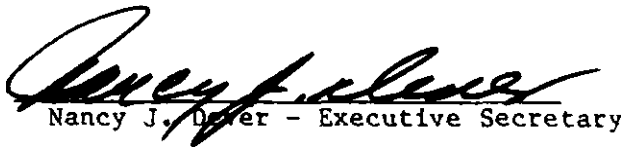
The Board finds, as contended by the Carrier, that Rule 35(a) is not applicable since the period involved was not "time worked." However, Rule 36, Section 2(b) provides for compensation for "time spent traveling when moves are made from one work point to another outside of regularly assigned hours, . . . including waiting time enroute. . ." Rule 30 helps to define the use of "work point," stating that "Employes time will . . . end at the designated assembly point" (i.e., the outfit car). Rule 36, Section 2 provides for payment at the "pro rata rate."

The Board must conclude that these interrelated Rules were intended to provide compensation in the circumstances, as here, where the employees were unable to return to their outfit cars until 4 1/2 hours after the completion of their regular eight-hour day. The appropriate rate of pay (as, at one point, proposed by the Organization) is, however, the pro rata rate. Pay at time and one-half is reserved, in Rule 35, for time actually worked.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of February 1988.

DISSENT OF CARRIER MEMBERS'
TO
AWARD 26818, DOCKET MW-26589
(Referee Marx)

The Majority in this case has gone to great lengths to rationalize a sustaining Award when, in fact, the result should have been a dismissal or denial Award.

A review of the record clearly shows the Organization was uncertain of the Rules which allegedly supported the Claim, having changed its position and the sought-after relief at every appeal level, and following the conference on the property. The Organization also failed to cite any Rule in the Notice of Intent before this Board in order to clarify its position.

In the initial Claim, the Organization utilized a shotgun approach and cited Rules 1, 33, 35, 36 and 38, although it primarily relied on Rule 35(a) in seeking relief at the time and one-half rate. On appeal, the same Rules were cited, but the relief was changed to the pro rata rate based specifically on Rule 36, Section 1(a). Following the conference, the Organization wrote the Carrier asserting Rule 30(b) applied and that the sought-after relief was again at the time and one-half rate. The Notice of Intent sought relief at the same rate even though the Organization merely sought the pro rata rate during the conference.

The Majority suggests the Organization's reference to Rule 36(a) is somewhat imprecise: however, a cursory review of the Organization's appeal letter reveals it clearly relied on Rule 36, Section 1(a), and not Sections 2 or 3. The Majority also

failed to take note that the Carrier had previously stipulated that Rule 36, Section 3, applied to system gang personnel, as in this case, in lieu of Section 2, and that this had been the application on the property for 16 years. Without any knowledge of the interpretation and practice, the Majority erroneously concluded that the interrelated rules were intended to provide compensation under the prevailing circumstances; however, an Award must be based on proof rather than an erroneous presumption. Rule 36, Section 3, is applicable to system gang personnel in lieu of Rule 36, Section 2, which applies to division employees in outfit service. This application has been supported previously by Award 7 of Public Law Board No. 4219 on this same property.

For the above reasons, we dissent.

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

P. V. VARGA

J. E. YOST