Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30443
Docket No. MW-28245
94-3-87-3-821

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

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

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

(1) The Carrier violated the Agreement when it required the employes assigned to Eastern District Tie Gangs 5850, 5860 and the support gangs working with the Eastern District Tie Gangs to suspend work after working only three (3) hours each day on July 31 and August 1, 1986 (Carrier's File 860035).

(2) The Agreement was further violated when the Carrier failed and refused to allow each of the employes assigned to the above-mentioned gangs expense allowance of twenty-one dollars and seventy-five cents ($21.75) per day on July 31 and August 1, 1986.

(3) As a consequence of the violation referred to in Part (1) above, each of the employes assigned to the gangs referred to in Part (1) shall be allowed a total of ten (10) hours pay at their respective straight time rates.

(4) As a consequence of the violation referred to in Part (2) above, each of the employes assigned to the gangs referred to in Part (1) above shall be allowed forty-three dollars and fifty cents ($43.50)."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

On July 31, 1986, and August 1, 1986, and after an employee suffered a heat stroke resulting in injuries, the Carrier did not permit the Eastern Tie Gangs and their support Gangs working in the vicinity of Conway, Arkansas, to work full days on the grounds that extreme heat conditions were present thereby causing a safety concern for the Gangs. The record is in conflict over whether the employees actually worked part of the days or if they just reported and were released. Because the affected employees were paid three rather than eight hours and further because per diem expense allowances of $21.75 (lodging and meals) also were not paid, this claim was filed.

The emergency force reduction provisions of Rule 3(c)(2) state:

> "Article VI – Emergency Force Reduction Rule
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> * * *
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> (2) Except as provided in paragraph (a) hereof, rules, agreements or practices, however established that require advance notice to employes before temporarily abolishing positions or making temporary force reductions are hereby modified to eliminate any requirement for such notice under emergency conditions, such as flood, snow storm, hurricane, tornado, earthquake, fire, or a labor dispute other than as defined in paragraph (a) hereof, provided that such conditions result in suspension of a carrier's operations in whole or in part. ...."

With respect to the issue of reduction of hours paid on the claim dates from eight to three, the emergency conditions allowing for the temporary abolishing of positions or temporary force reductions are listed by example. The Rule provides for "emergency conditions, such as flood, snow storm, hurricane, tornado, earthquake, fire, or a labor dispute ..." [emphasis added]. While extreme heat is not specifically provided for in the Rule, because the Rule only lists examples, we find that given the appropriate circumstances, extreme heat could constitute an emergency to invoke operation of the Rule. See Fourth Division Award 2823 ("The words, 'such as,' in the provision quoted above are merely descriptive and do not preclude consideration of other situations ...."); Third Division Award 19755 (where the phrase "such as" was found in the relevant Rule causing the Board to state that "[i]t intends to apply not only to emergencies listed, but also to others of similar nature."); Second Division Award 8119 ("the words 'such as' are words of description and not necessarily words of preclusion.").

The question then becomes whether the evidence in this record supports a conclusion that extreme heat existed on the dates at issue so as to constitute an emergency. We find that the record supports the Carrier's position that an emergency existed. Although the on-property handling does not specifically show how hot it was on the relevant dates (the Carrier represents in its Submission that temperatures on the dates in question were in excess of 100 degrees and reaching as high as 105 degrees, which information was further supplemented by the Carrier with data from the National Clinic Data Center showing that temperatures at Conway, Arkansas, reached record highs of 112 degrees on July 31, 1986 and 110 degrees on August 1, 1986), the record is sufficient to establish that the conditions were quite hot and extreme. The on-property handling shows that the decision was made by the Carrier after conditions were such that an employee suffered a heat stroke "which resulted in massive and permanent injuries". Under the "such as" language in the Rule, the burden is on the Carrier to sufficiently justify conditions not specifically listed in the Rule. But, given the specific extreme conditions described in this record and the effect those conditions had on a member of one of the Gangs, we believe that burden has been met. Under the facts of this particular case, we find an emergency existed. Therefore, the Carrier did not violate the Agreement when it only paid the employees on the claim dates for three rather than eight hours.

The fact that other gangs working in Arkansas were not treated in a similar fashion does not change the result. The record discloses that the work involved in the District Tie Gang operation was a much more intense operation than that of other division employees who were working in and around the area because those other employees were not subjected to the high-production environment experienced by the District Tie Gang.

That portion of the claim seeking ten hours pay for each of the affected employees shall therefore be denied.

With respect to the claim for lodging and meal expenses of $21.75 per day for the affected employees, there are no jurisdictional impediments raised to this Board's consideration over this part of the claim. Under Rule 26(a), Award of Arbitration Board No. 298, employees are to receive up to $12.75 per day for lodging and $9.00 per day for meals for a total of $21.75 per day. Section I(B)(4) further provides:

> "The foregoing per diem meal allowance shall be paid for each day of the calendar week, including rest days and holidays, except that it shall not be payable for work days on which the employe is voluntary absent from service, and it shall not be payable for rest days or holidays if the employe is voluntarily absent from service when work was available to him on the work day preceding or the work day following said rest days or holidays."

Because the employees were not voluntarily absent on the dates at issue, under this language, payment of the allowances is required. The record also reveals a letter from the Carrier's predecessor with respect to meal allowances under the provisions of Arbitration Board No. 298 consistent with our conclusion requiring payment stating that "no payment for meal allowance was allowed days for which no payment for wages was made, except in those cases where the men were laid off by reason of inclement weather the meal allowance was paid." [emphasis added]

Given that the Carrier has taken the position that the extreme heat involved in this case was an emergency and further given that in the past the Carrier has allowed payment of similar per diem requests as those made in this case (which is consistent with the language of Section I(B)(4) quoted above), we find that the Organization has carried its burden and demonstrated that the affected employees' per diem requests should be allowed for the dates in the claim.

That portion of the claim seeking lodging and meal allowances shall therefore be sustained.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of September 1994.