Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32549
Docket No. MW-30730
98-3-92-3-529

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
((Western Lines)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, without proper advance notification, the regularly assigned starting time for Tucson Division Extra Gang XG-12 was changed on January 31, February 1, 4, 5 and 6, 1991 to absorb overtime and avoid the payment of doubletime (Carrier's File MofW 163-63 SPW).

(2) As a consequence of the violation referred to in Part (1) above, Forman XG-12 M. A. Cota and Laborers XG-12 D. O. Olivas and S. R. Perez shall each be allowed forty-one and one-half (41 1/2) hours' pay at their respective doubletime 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 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 were given due notice of hearing thereon.

Claimants held Extra Gang positions covered by the Agreement on the dates set forth above with assigned work schedules of 7:00 A. M. to 3:30 P. M., Monday through Friday. On each of those days except February 6, when they clocked in at 10:00 A.M., they were directed to delay their reporting and remain at home until 1:00 P. M. in order to work with a rail grinding crew in the evening hours while rail traffic was light. For their hours at home, and again from 1:00 P.M. to 3:30 P. M. they received straight time pay. From 3:30 P. M until their release at 3:30 A. M. on each of the days following the above dates they were paid twelve hours at their applicable time and one-half rates.

The Organization contends that Carrier's rescheduling of the Claimants to start work later than normal while paying them to stay at home in order to avoid double time rates later in the day violated the Agreement, including principally the following provisions:

"RULE 22 - STARTING TIME

Notice of Change. - (b) The starting time of the regular work period for regularly assigned service will be designated by supervisory officer and will not be changed without first giving the employes affected five working days' advance written notice.

Shifts. - (c) (4) When regular operations requiring working periods varying from those set forth above, hours of assignment will be designated by agreement between Management and General Chairman or his representative to meet service requirements."

"RULE 28 - OVERTIME

Computing. - (b) Time worked preceding or following and continuous with a regularly assigned eight (8) hour work period shall be computed on actual minute basis and paid for at time an one-half rate, the regularly assigned eight (8) hour work period to be paid at straight time rate.

Time worked after sixteen (16) hours of continuous service shall be computed on the actual minute basis and paid for at the double time rate

until employe is released for eight (8) consecutive hours time off duty. For purposes of computing sixteen (16) hours of continuous service, as referred to herein, actual time worked shall be counted from time on duty until relieved for eight (8) consecutive hours time off duty.

It is understood that nothing in this rule requires that the Carrier retain an employe on duty at punitive rate of pay.

* * *

Absorbing Overtime. - (g) Employes shall not be required to suspend work during any assigned work period for purpose of absorbing overtime or to avoid holiday pay, and the Management shall not apply the assignment or displacement rules in such a manner as to deprive the employe of holiday pay."

Citing the above Rules, the Organization argues that if Carrier desired to change the starting time for this gang to hours outside of Rule 22, it was required to confer with the General Chairman, which it failed to do. Accordingly, Claimants were entitled to work their regular hours, and would have earned double time pursuant to Rule 28 (b) if they had been allowed to do so.

The Carrier denies violating Rules 22, 28 or any other Rule. It maintains that it complied with the literal language of Rule 28 (b), which provides that "for purposes of computing sixteen (16) hours of continuous service . . ., actual time worked shall be counted. . . ." On each of the claim dates, Carrier contends, none of the Claimants had actually *worked* 16 hours, although they had been *paid* for hours in excess of 16 by virtue of receiving pay while at home. Carrier urges that because rail grinding was scheduled for the period between 2:00 P. M. and 2:00 A. M., there was no work for this crew to do prior to early afternoon. Thus, the necessary suspension of work was for legitimate reasons other than for the purpose of avoiding overtime. Carrier points to Third Division Award 31595 as supporting its interpretation of Rule 28.

Award 31595 addressed a situation where the Claimants had worked 23 hours continuously and, prior to their next early morning start time, were released rather than being permitted to work 32 hours without rest. The Board in that case concluded that the Carrier should be entitled to use reasonable managerial discretion when manifest

health and safety implications are presented. Thus, in such circumstances a prima facie case of stopping work to avoid overtime may be rebutted by a showing that Carrier's decision was driven by safety concerns, and not merely an intention to avoid overtime. The Board's judgment in Award 31595 was premised on its expressed unwillingness to speculate on Carrier's possible "mercenary ulterior motive."

Award 31595 represents a sensible outcome on its facts. For this Board, however, when that particular clock is wound, its bells strike in dull tones. First, we are presented not with a gang of employees who had worked 23 hours around dangerous heavy equipment and wanted to work another eight, but with Claimants who were asked to sit home all morning and then work 14 hours. We find no "manifest health and safety" implications on this record. Rather, Carrier's argument is simply that Rule 22 allows it to bench people at will and reschedule them in a fashion that eliminates double time pay so long as it pays them for sitting out. That premise further fails to give any account to the terms of Rule 28 (b), which measures "actual time worked" as commencing with the start of "time on duty," and does not engage the issue of whether Claimants were arguably on duty from 7:00 A. M. on the days in question.

Secondly, Award 31595 announces a standard meant to eliminate "second-guessing and speculating on a mercenary ulterior motive for Carrier's decisions." Said another way, that decision affords the Carrier a favorable presumption on the motivation issue if it demonstrates that work is suspended for health and safety reasons. This Board is wary of such a test when, as here, there are no such concerns. Indeed, to entertain Carrier's argument that it was merely concerned with avoiding a gang standing idle would require us to ignore the basis of the rationale in Award 31595 and invite the same dissection of Carrier's motivation which that Award finds so disturbing. In short, if there are no safety issues embedded in the dispute, there is no logical reason for indulging Carrier in a favorable inference, and without it this Board is left with the impossible task of scrutinizing a cold, dead record for possible ulterior motives on Carrier's part in requiring employees to stop work.

Carrier argues creatively and forcefully that there is nothing in Rule 28 (g) which covers the situation here, where Claimants were asked to stay home not to absorb overtime but because there was nothing for them to do until the rail grinding operation began. After careful evaluation of those arguments, we conclude that because there may always be economic defense along the lines posited here to justify suspension of work, this filament is entirely too fine for such a weighty fish. The Board is poorly equipped

to assess whether Carrier's argument is truth or poetry, and unwilling to engage in conjecture about it. In our judgment, if these Claimants may be asked to adjust their regular starting times without the notice required by the Rules in circumstances such as presented here, the only thing left of the Rules in question - which seem to clearly outlaw precisely such activity - would be the very little pieces.

The claim must be sustained. Claimants shall be made whole for the loss of work opportunities on the dates covered by the claim, offset in part by such overtime pay as already received for those hours subject to double time penalty.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 29th day of April 1998.