Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33266
Docket No. MW-33880
99-3-97-3-392

The Third Division consisted of the regular members and in addition Referee William E. Fredenberger, Jr. when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed to permit Messrs. D. Graner, T. Ternes, G. Bata, W. Lampson, M. Mehl, S. Hunt, B. Adams, K. Drabus, A. Periera, R. Keto, E. Stenerson, J. Northagan, G. Bell, R. Dusterhoft, T. W. Johnson, D. Melhouse, D. Benson, D. Faught, M. St. Cyr, A. Kuntz, R. Dalby and W. Benson, assigned to Rail Gang R-2, to perform their assigned duties on April 1, 1996 and thereafter failed and refused to compensate them for the lost wages (System File R1.074/8-00277).

(2) As a consequence of the aforesaid violation, the Claimants shall each be compensated '... for the equivalent of 10 (ten) hours pay at their respective assigned rate of pay, less any pay that they may have received for the day in dispute, and have all overtime, vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation.'"

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.

On April 1, 1996, Claimants were assigned to Rail Gang R-2 working on the Carrier's Noyes and Detroit Lakes Subdivisions. Claimants were monthly rated employees regularly assigned to a compressed workweek consisting of four consecutive ten hour days. It was raining when Claimants reported for work. After Claimants had worked three hours they were sent home by supervision and compensated only for the three hours they had worked. The claim in this case is for a full ten hours of compensation.

The Carrier denied the claim. The Organization appealed the denial to the highest officer designated to handle such disputes. However, the dispute remains unresolved, and it is before the Board for final and binding determination.

The Organization bases the claim upon Rule 26 (Forty Hour Work Week) and Rule 32 (Reporting and Not Used) of the schedule Agreement, Appendix M to that Agreement and the parties' Memorandum Agreement of September 23, 1991. The Organization argues that the Carrier's action was in derogation of these applicable Agreement provisions and thus violative of them. The Organization maintains that the claim in this case is governed by Third Division Award 25183 which involved the same Organization and many of the same Agreement provisions involved in this case and sustained a claim the Organization characterizes as quite similar to the one in this case.

The Carrier maintains that the Organization has not met its burden of proof with respect to the claim. Additionally, the Carrier defends its actions on the basis of Rule 25(d) of the applicable schedule Agreement providing in pertinent part that ". . . when, due to inclement weather, interruptions occur to regular established work period preventing 8 hours' work, only actual hours worked or held on duty will be paid for. . . ." Claimants, the Carrier argues, were treated and compensated in accordance with this Rule.

At the outset, the Organization raises the procedural objection that the Carrier's entire Submission in this case is a statement of arguments and issues not raised on the property and for that reason should be precluded from consideration by the Board. We cannot agree. Our review of the correspondence and other on-property documents

pertaining to the claim in this case reveals that the Carrier's argument in its Submission and its oral argument before the Board is nothing more than an extrapolation of issues and arguments addressed on the property. Accordingly, the Organization's argument has no merit.

The Carrier's general attack upon the sufficiency of the Organization's proof is matched by assertions from the Organization that the burden of proof, or at least the burden of going forth with the evidence, had shifted to the Carrier at various points in time during the processing of the claim on the property and that the Carrier failed to meet such burden. Rather than address the general question of whether either the Organization or the Carrier has sustained its burden, the Board will make that inquiry only with respect to those matters it deems decisionally significant to the claim.

The Board believes the crucial question in this case is whether Rule 25(d) supports the Carrier's action.

The Organization maintains that Rule 25(d) is inapplicable to the facts of this case because the Rule applies to hourly rated and not monthly rated employees. However, nothing in the language of Rule 25 specifically confines its application to hourly rated employees. In fact there is no mention made in the Rule of such employees. By contrast Rule 32 of the applicable schedule agreement specifically pertains to hourly rated employees. It was a Rule worded much like that of Rule 32 which was before the Third Division in Award 25183 relied upon by the Organization. Accordingly, we do not find that Award persuasive with respect to the question before us. In the final analysis we believe that Rule 25(d) does apply to monthly rated employees and thus to Claimants in this case.

The Organization also attacks the Carrier's reliance upon Rule 25(d) on the ground that the Carrier has not proven that the inclement weather on the claim date created an unsafe situation with respect to Claimants' performance of their work. We cannot agree. It must be borne in mind that Claimants' principle duty on the claim date was to lay rail. The fact that rain was falling supports the inference that for Claimants to perform such work would have constituted an unsafe condition.

The Organization further attacks the Carrier's reliance upon Rule 25(d) on the ground that there was additional work Claimants could have performed on the claim date. However, the Carrier counters with the allegation that such work had been completed by others by the time the Carrier decided to send Claimants home. As

further evidence, the Carrier emphasizes that there was no overtime on the claim date to any employee for the performance of such work. The record contains no evidence refuting these contentions by the Carrier.

Finally, with respect to Rule 25(d) the Organization points out that other employees, including members of Claimants crew, were retained in service for their entire scheduled tour of duty while Claimants were sent home after three hours. However, there is no evidence or allegation that such employees laid rail after Claimants were sent home. Moreover, as noted above, all duties other than laying rail which Claimants could have performed were completed by the time they were sent home. At least there is no evidence to the contrary.

Nevertheless, the Organization argues that the Carrier was obligated to find work for Claimants in order that they could complete their ten-hour tour of duty on the claim date. We do not believe this argument has any merit in view of the clear terms of Rule 25(d).

In the final analysis we must conclude that the claim in this case is without agreement support.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of May 1999.