

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35006
Docket No. MW-31586
00-3-93-3-584**

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company (former St. Louis-
(San Francisco Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier changed the work week of Gang 386 from ten (10) hours per day, four (4) days per week (Monday through Thursday) to eight (8) hours per day, five (5) days per week (Monday through Friday) without serving a seven (7) day advance notice beginning July 13, 1992 (System File B-1301-2/MWC 92-11-06A SLF).**
- (2) The Agreement was further violated when the Carrier improperly required each employe assigned to Gang 386 to report for service at the work site rather than an assembly point as contemplated by Rule 48 beginning on July 13, 1992 and continuing.**
- (3) The Agreement was further violated on July 16, 1992 when the Carrier improperly released the members of Gang 386 on July 16, 1992 instead of allowing them to complete their assigned workday.**
- (4) As a consequence of the violation referred to in Part (1) above, each employe assigned to Gang 386 on July 13, 1992 and continuing shall be allowed two (2) hours' pay, at their respective straight time rates, for the two (2) hours they were not allowed to work on Monday through Thursday and eight (8) hours' pay, at their respective time and one-half rates, for each Friday they worked beginning on July 13, 1992 and continuing.**

- (5) As a consequence of the violation referred to in Part (2) above, each employee assigned to Gang 386 on July 13, 1992 shall be allowed thirty (30) minutes' pay, at their respective rates, plus mileage [thirty (30) miles] for time and travel to and from the work site beginning on July 13, 1992 and continuing until the violation ceases.
- (6) As a consequence of the violation referred to in Part (3) above, each employee assigned to Gang 386 on July 16, 1992 shall be allowed ten (10) hours' pay, at their respective rates, minus the 2.7 hours paid to them."

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.

This case involves three claims by the Organization:

- (1) That the Carrier violated Rule 52 when it failed to give a full seven calendar days notice of the cancellation of the make up schedule under which members of Gang 386 worked four workdays, Monday through Thursday, at ten hours per day; and
- (2) that the Carrier violated Rule 48 by requiring members of Gang 386 to report for service at the work site rather than the closest station on the Carrier where meals and lodging are available; and

- (3) that the Carrier violated Rule 49 when it released members of Gang 386 from duty on July 16, 1992, with only two hours and 40 minutes of compensation, due to allegedly inclement weather, while permitting other gangs working at the same location to work a full day.

It is undisputed that prior to the week of July 13, 1992, the Claimants were assigned to a make up time schedule under which members of Gang 386 worked ten hours on each of their four workdays, Monday through Thursday, with Fridays, Saturdays and Sundays designated as assigned rest days. It is further undisputed that on Thursday, July 9, 1992 the Claimants received instructions from Roadmaster M. J. Brown that effective Monday, July 13, 1992, they were required to begin working a five-day workweek of eight hours per day, Monday through Friday. The Claimants each worked eight hours on July 13, 14 and 15, 1992. On Thursday, July 16, 1992, the Claimants were advised, upon reporting for duty, that due to inclement weather they were not needed. Accordingly, they were released from duty for the day. On Friday, July 17, 1992, the Claimants worked a regular eight hour tour.

According to the Organization, Rule 52 was violated when the Carrier canceled Gang 386's make up schedule with less than seven calendar days notice. Under the express terms of Rule 52, make up time schedules may be canceled, effective at the end of any work period, upon seven calendar days written instructions from the Division Engineer to the General Chairman. The Organization asserts that because the notice was defective, the Claimants' schedule for the workweek commencing July 13, 1992 should have been four ten hour days, Monday through Thursday, with Friday off. The Organization argues that each Claimant properly should have been assigned ten hours of work on July 13 through 16, and seeks payment for each Gang member of the difference between pay received on each of those days and pay for ten hours of work at straight time rates. Further, the Organization asserts that the Claimants were entitled to pay at the time and one-half rate for all hours worked on Friday, July 17, 1992, which it alleges was an assigned rest day.

In addition, the Organization claims that Carrier's decision to release members of Gang 386 from duty on July 16, 1992 with only two hours and 40 minutes of compensation was arbitrary and an abuse of the Carrier's discretion. According to the Organization, other gangs at the same location as the Claimant's gang worked their full tours of duty that day. It argues, therefore, that the weather on July 16, 1992 did

not provide justification for the Claimants' release from duty and that the Carrier's actions constituted a violation of the basic day provisions of the Agreement and a misapplication of Rule 49, which reads:

"Rule 49

- (a) When less than eight hours are worked for the convenience of employees only actual hours worked or held on duty will be paid for.**
- (b) Hourly paid employees required to report at the usual time and place for the day's work and when weather or other conditions prevent work being performed, will be allowed a minimum of three hours; if held on duty over three hours, actual time will be paid for."**

The Organization further argued during the on-property handling of this claim that beginning on July 13, 1992, and continuing, the Carrier violated Rule 48 by requiring members of Gang 386 to report for service at the work site rather than the closest station on the Carrier where meals and lodging are available. Rule 48, paragraph (3) states:

"(3) The assembling point for mobile gang employees designated in Rule 17 who are not furnished outfit cars or highway trailers shall be the station on the Carrier closest to the work location where meals and lodging are available within a reasonable proximity; however, where the majority of the members of the gang and the supervisor agree, any point may be designated as the assembly point."

Because the meal and lodging accommodations were not located at the designated assembly point, the Maintenance of Way Tool House on President's Island in Memphis, Tennessee, the Claimants elected to drive to and from the work site from their respective homes approximately 15 miles away. The Organization asserts that the Claimants are entitled to 30 minutes pay and mileage reimbursement for the time and travel between their homes and the work site.

The Carrier, on the other hand, argues that its failure to provide seven days advance notice before changing the workweek of Gang 386 was an unintentional

oversight, and the violation of Rule 52 does not warrant an award of damages. The Carrier argues that the Claimants suffered no loss earnings.

With respect to the alleged violation of Rule 48, the Carrier asserts that lodging and meals were available in Memphis at the Riverview Motel, a mere five minutes from the Tool House where the Gang was instructed to report. These accommodations, the Carrier argues, fully satisfied the requirements of Rule 48. According to the Carrier, each member of the Gang made his own decision to return home each day instead of staying in Memphis on the per diem allowance. The Carrier maintains that the allegation that the Claimants were forced to drive their own personal vehicles to and from the work site without being paid for time or mileage is false.

With respect to the claimed violation of Rule 49 when Gang 386 was released from duty on July 16, 1992 with only two hours and 40 minutes (2.7 hours) of compensation, the Carrier asserts that its decision that inclement weather prevented performance of the Gang's work was a proper exercise of managerial discretion. The Carrier acknowledges that the Claimants properly should have received three hours of pay under Rule 49(b), and made arrangements to pay eligible members of Gang 386 the additional three tenths (0.3) of an hour to bring the amount paid in line with the Agreement.

After reviewing the record evidence, we have determined that the claim should be sustained in part and denied in part. We sustain the Organization's claim that Rule 52 was violated when the Carrier provided less than seven calendar days' notice before canceling Gang 386's make up schedule. Under Rule 52, the Carrier's July 9, 1992 notice was not effective until the end of the work period in effect seven days after notice was given. The appropriate remedy was determined by the Board in Third Division Award 29542:

"For each Claimant, a determination shall be made of the daily earnings the Claimant would be entitled to receive on the basis of ten hours per day, four days per week. For each fifth day worked during the workweek, Claimant would be entitled to pay at the time and one-half rate. From such entitlement, Carrier can deduct the actual earnings received by Claimant on that day. The Carrier also may reduce its liability with respect to any Claimant that Carrier can demonstrate was not available for work on one or more of the claim dates."

Accordingly, the Claimants shall receive two hours pay at straight time rates for July 13, 14 and 15, 1992, provided they were working on Gang 386 on those days. Gang members who worked on July 17, 1992, the Gang's assigned rest day, shall receive the difference between eight hours pay at the time and one-half rate and actual earnings for work performed on that day. As discussed below, the Claimants were properly released from service on July 16, 1992, and therefore are not entitled to any remedy for that day.

The Organization's claim under Rule 49 thus is sustained in part and denied in part. The record evidence does not support a finding that the Carrier abused its discretion under Rule 49(b) to determine that inclement weather prevented work from being performed. However, as the Carrier acknowledges, the proper compensation was three hours, not 2.7 hours, of pay. Accordingly, unless the Carrier has already done so, all employees in Gang 386 who reported for work on July 16, 1992 and who were paid only 2.7 hours, shall be paid an additional 0.3 hours' pay at the applicable straight time rate.

The claim by the Organization that the Carrier violated Rule 48 is denied. The designated assembling point at the Maintenance of Way Tool House was in close proximity to a location where meals and lodging were available. There is no record evidence supporting a finding that any members of Gang 386 were required to drive 30 miles or 30 minutes per day, or that the accommodations were so unreasonable as to justify their decision to commute from their homes.

AWARD

Claim sustained in accordance with the Findings.

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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 20th day of September, 2000.