Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38209
Docket No. MW-38686
07-3-05-3-80

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 Division –
(IBT Rail Conference
(
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when, beginning in 2004, the Carrier unilaterally placed Rules 89 and 90A Gangs Y701(101?), Y102, Y112, Y142, Y802, Y400, Y402, G012, Rule 89 Gangs Y-812, Y-842, Y-852, and Rule 89 Gang Y-162, under the provisions of Rule 52 (System Files NEC-BMWE-SD-4410, SD-4411, SD-4412 and SD-4413 AMT).

(2) As a consequence of the above-stated violation:

'1. That the Rule 52 designation be immediately removed from the gang and that a notice be distributed to the affected employees that the gang is no longer deemed by management to be covered by Rule 52.

2. In the event that Rule 52 is used to only pay employees half a day that the employees affected shall be compensated for the time that their pay was docked as a result of implementation of Rule 52.

3. That this claim shall be considered a continuing claim in accordance with Rule 64 from the date of receipt of this claim until such time as it is resolved.'"

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.

Rule 52 provides:

"RULE 52 WHEN WEATHER CONDITIONS PREVENT WORK BEING PERFORMED

(a) When the foreman and supervisor in charge agree in writing that weather conditions prevent work being performed, employees in the below listed gangs of twelve (12) or more reporting at their regular starting time and place for the day's work will be allowed a minimum of four (4) hours [five (5) hours for four (4) day gangs]; if held on duty beyond four (4) hours [five (5) hours for four (4) day gangs], they will be paid on a minute basis.

1. **Track Welding (Aluminothermic)**
2. **Mechanical Surfacing**
3. **Gangs where the nature of the work being performed is such that adverse weather conditions would present an extraordinary safety concern.**

a. Applicable gangs under 3, above shall be by agreement between the appropriate General Chairman and appropriate Assistant Chief Engineer. Concurrence will not be unreasonably withheld nor delayed."

The Carrier desired to bring certain gangs under the four (and five) hour pay provisions of Rule 52. By certified letter dated February 20, 2003, the Superintendent Engineering Production notified the General Chairman of the Carrier's desire to ". . . discuss and reach agreement concerning those [listed] gangs which will be subject to the conditions of Rule 52."

By certified letter dated March 17, 2003, the General Chairman responded, in relevant part, as follows:

> "Rule 52 was negotiated between the parties in 1987 and has remained in the agreement since 1987. For the last fifteen years the parties have not had a need to add additional gangs to be covered by the provisions of Rule 52. Your request to add an additional 11 gangs to the rule's coverage comes as a surprise since there has been no need to add them in the past.
>
> The Union is aware of no change that would require that we add these gangs to this rule and reverse fifteen years of practice and we respectfully decline the request to add these gangs to the rule now."

By certified letter dated April 21, 2003, the Superintendent Engineering Production listed reasons for the Carrier's desire to bring the gangs under Rule 52 and further stated:

> ". . . It is also our belief that the Organization's desire not to meet to discuss our request and withhold its concurrence to this request is unreasonable. I believe that we should further discuss this matter in conference as soon as possible as we are now in the beginning of the FY 2003 production season and will be advertising Gangs which incorporate the provisions of Rule 52. I will represent the Assistant Chief Engineer at this meeting and you may contact me at. . . ."

By certified letter dated April 24, 2003, the General Chairman replied stating that ". . . [t]he Union never said either verbally, or in writing, that we would not meet with you about this issue." Further, in that letter, the General Chairman stated:

> "We are available to meet with you on May 9, 2003. Please call me and confirm a mutually agreeable time."

Prior to the filing of the claims, no meetings were held or further correspondence passed between the parties concerning the Carrier's desire to bring the additional gangs under the provisions of Rule 52.

Beginning in 2004, the Carrier placed the gangs specified in the claim under the provisions of Rule 52 without first receiving the Organization's concurrence. The consolidated claims followed.

As the matter was progressed on the property, the Carrier stated that the General Chairman ". . . did not respond to the April 21, 2003-letter" thereby taking the position that "[t]he Rule [52(a)(3)(a)] clearly mandates and requires that 'concurrence on the part of the Organization will not be unreasonably withheld nor delayed.'" In response, the Organization produced the signed return receipt of its April 24, 2003 certified letter showing that on April 25, 2003, the Carrier, in fact received the Organization's letter in which the General Chairman stated that ". . . [t]he Union never said either verbally, or in writing, that we would not meet with you about this issue" and further stated "[w]e are available to meet with you on May 9, 2003." The Carrier then took the position that it could find no record of the Organization's April 24, 2003 correspondence being received by it.

In a letter dated August 23, 2004, however, the Director-Labor Relations stated:

> "While the matter at hand may have been avoided had both parties endeavored to actually communicate on this issue, the Carrier does not view that void as a basis on which to remove the gangs from the purview of Rule 52, nor to summarily reject the Organization's grievance.

* * *

> However, in discussing this issue with Superintendent Engineering Production, Tom Denio, he has expressed a willingness to meet with the Organization to discuss any other concerns in connection with the issue and attempt to reach a mutually satisfactory understanding. If you have additional concerns or objections, please contact Mr. Denio . . . to arrange a mutually agreeable date to discuss those issues."

By letter dated September 13, 2004, the Organization responded:

> "While we appreciate the willingness of Superintendent Engineering Production Tom Denio to meet with us on these issues the collective bargaining agreement has been violated and this needs to be corrected. Should Superintendent Engineering Production Tom Denio desire to place gangs under Rule 52 he should write to the Union and we shall give proper consideration to each request and, if requested, meet with him about the issue. . . . His willingness to meet now does not correct the fact that the contract was violated in the Spring of 2003 and continues to this day until it is settled."

Before the Carrier can bring gangs under the inclement weather provisions of Rule 52 with its less than full day's pay allowances, Rule 52(a)(3)(a) requires ". . . agreement between the appropriate General Chairman and appropriate Assistant Chief Engineer" with the further requirement that "[c]oncurrence [by the Organization] will not be unreasonably withheld nor delayed." By letter dated February 20, 2003, the Carrier started the process to attempt to bring certain gangs under Rule 52's provisions, which was initially rejected by the Organization by its letter of March 17, 2003 (". . . we respectfully decline the request to add these gangs to the rule now."). In its April 21, 2003 letter, the Carrier persisted and requested a meeting. In its April 24, 2003 letter, the Organization agreed to meet ("[w]e are available to meet with you on May 9, 2003."). The problem arose in 2004 when the Carrier acted under the assumption that the Organization never responded to its April 21, 2003 letter requesting a meeting; the Carrier concluded that the Organization's refusal to meet was an "unreasonable" action under Rule 52(a)(3)(a); and the Carrier further concluded that the Organization's refusal to meet allowed the Carrier to make the change designating the gangs as falling under

Rule 52. However, because the Organization demonstrated that it sent its April 24, 2003 letter by certified mail expressing a willingness to meet and produced the signed return receipt showing that the Carrier, in fact, received that letter, we find that the Carrier acted on the wrong assumptions and unilaterally designated the gangs as falling under Rule 52 without concurrence from the Organization and without a demonstration of unreasonable action by the Organization. Because the Carrier acted unilaterally in the face of the Organization's stated willingness to meet, we are unable to find that the Organization's "[c]oncurence . . . [was] unreasonably withheld nor delayed" under Rule 52(a)(3)(a) so as to permit such unilateral action by the Carrier in 2004. The Organization has therefore demonstrated that the Carrier violated Rule 52 by unilaterally designating the gangs listed in the claim as falling under Rule 52.

The function of a remedy is to restore the status quo ante so as to put the parties back to where they were before the demonstrated breach of the Agreement and to make adversely affected employees whole. Therefore, in order to accomplish that end, the Carrier's designation of the gangs listed in the claim as falling under Rule 52 shall be rescinded. By rescinding the Carrier's unilateral designation of the gangs as Rule 52 gangs, the parties will be on equal footing for future discussions, if any, concerning whether those gangs should be designated as Rule 52 gangs. Further, as requested by the Organization, the Carrier shall advise the affected employees on the respective gangs of the removal of the Rule 52 designation.

With respect to the make whole aspect of the remedy, in the event employees in the gangs listed in the claim were not permitted to work on certain days and were compensated as limited by the provisions in Rule 52, those employees shall be made whole for lost wages. However, the Board has discretion with respect to the formulation of remedies. We cannot ignore the fact that after the Organization demonstrated to the Carrier that the Carrier had, in fact received the Organization's certified letter dated April 24, 2003, the Carrier in its letter of August 23, 2004 offered to meet with the Organization concerning the Rule 52 designations, but, by its letter of September 13, 2004, the Organization rejected that offer and advised the Carrier to write another letter requesting a meeting and the Organization would then consider the Carrier's request. There was no reason for the Organization to take that position. After the Organization pointed out that the Carrier had received the Organization's earlier willingness to meet, the Carrier then expressed a willingness to meet and discuss the Rule 52 designations with the Organization, but the Organization rejected that offer. Backpay should not accrue

after the Organization rejected the Carrier's 2004 offer to meet. We shall therefore toll the Carrier's backpay liability under this Award as of September 13, 2004 when the Organization refused to meet with the Carrier to discuss the designation of the gangs as Rule 52 gangs and told the Carrier to write another letter for the Organization to consider. In terms of monetary relief, employees on the gangs listed in the claim not permitted to work as a result of inclement weather and paid under Rule 52 shall be made whole, but only until September 13, 2004.

Because we have rescinded the Carrier's Rule 52 designation of the specified gangs and made the adversely affected employees whole as limited above, no further relief is warranted. Should the Carrier still desire to designate the gangs as Rule 52 gangs, the Carrier (and the Organization) will now have to follow the procedures set forth in Rule 52. We express no opinion on the merits of the Carrier's reasons concerning making gangs Rule 52 gangs. Nor do we express an opinion on the Organization's reasons for opposing that designation.

Based on the above, the Organization carried its burden of proof to demonstrate a violation of the Agreement. With the limitation on the remedy discussed, the claim will therefore be sustained.

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 25th day of June 2007.