

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40389
Docket No. MW-38405
10-3-NRAB-00003-040320
(04-3-320)

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to properly compensate System Gang 8574 employees J. Beach, P. Finn, H. Garcia, L. Flores and D. Carey for their overtime service on April 19, 20 and 21, 2003 (System File D-0332-01/1368277).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants J. Beach, P. Finn, H. Garcia, L. Flores and D. Carey shall now be compensated for “*** an additional two (2) hours and thirty (30) minutes of overtime for April 19, 2003 and one (1) hour and fifteen (15) minutes for April 20, 2004 (sic).’ and “*** Further, these employees must be compensated for this violation of the Agreement in an amount equal to double the existing rate of pay from 6:30 p.m. until the time that these employees were releases (sic) from duty on April 19, 20 and 21, 2003 or an additional six (6) hours and fifteen minutes (15”) at their respective overtime rates of pay as penalty payment as provided in Rule 32 of our Collective Bargaining Agreement.”**

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.

The Claimants hold seniority in the Track Sub-department. On the dates in question, Gang 8574 worked a compressed half established in compliance with Rule 40 (12-hour work days paid at straight time). The Claimants' work records establish that on April 19, 2003, neither Claimant Finn nor Claimant Carey performed any overtime work. Garcia and Flores each worked one hour of overtime for a total of 13 hours worked on the April 19. Beach worked two hours of overtime for a total of 14 hours worked on the April 19. On April 20, Beach worked two hours of overtime for a total of 14 hours worked. The balance of the Claimants worked one hour of overtime for a total of 13 hours worked on April 20. On April 21, Beach worked two hours of overtime for a total work day of 14 hours. The rest of the Claimants worked 12 hours at straight time; they worked no overtime on April 21.

On all three days, the Claimants ate lunch between the third and the sixth hour after their start time. The Organization maintains that the Carrier should have afforded the Claimants a second meal period. Because it failed to do so, the Carrier should pay the Claimants the penalty provided in Rule 32 (e)(6). The Carrier asserts that because the Claimants were released within three-hours of their quitting time, it had no contractual obligation to afford the Claimants a second meal period. Because it was not obligated to provide a second meal period, it is not obligated to pay a penalty for its failure to do so.

The Carrier summarized the issue as follows:

“Are Claimants entitled to penalty payment for not receiving a second meal period, when they were released from duty within 3-hours of their assigned quitting time?”

The Carrier argues that Carey and Finn are no longer employed by the Carrier. It asserts that the Board loses jurisdiction over their claims. The Board addressed this defense in Third Division Awards 10100 and 10500. The Board concluded in Award 10100, but particularly in Award 10500, that an employee’s employment and exposure to an alleged contractual violation is sufficient to establish the Board’s jurisdiction over the claim. Claimants Carey and Finn were in the employ of the Carrier at the time of the alleged violation.

Before the Board, the Carrier presented Awards issued on the very same issue presented here and between these very same parties. Public Law Board No. 6867, Awards 9 and 11, held, in pertinent part, as follows:

“This claim raises a second meal period for a System Gang working a compressed half that is required to work overtime continuous with their regularly scheduled hours.”

The Board considered the parties’ arguments, even though they are well addressed in Public Law Board No. 6867, Awards 9 and 11. Awards 9 and 11 resolve the issue by interpreting the very Rule at issue in the instant case involving the five Claimants, i.e., Rule 32 - Meal Periods. The language of the Rule pertinent hereto states:

“(e) When employees are required for overtime service, they will be accorded subsequent meal periods as specified hereinafter:

(1) Employees required to work overtime following and continuous with their regularly assigned hours will be accorded a meal period during said overtime service within six (6) hours from the end of the regularly scheduled meal period. No meal period need be allowed when employees are released from work and returned to their home station,

headquarters location, or outfit cars within three (3) hours after their assigned quitting time. . . .

* * *

(6) In the event a meal period is not afforded at the designated time, the employees will be compensated at double their existing rate of pay from that time until such time as they are accorded a meal period; there will, however, be no compounding of the penalty payments provided herein.

(7) No employee will be requested, required or permitted to deviate from the provisions of this rule.”

The factual circumstances underlying Award 9 occurred on April 4, 6 and 22, 2004. The Claimants in Award 9 worked 11 hours at straight time rates during their compressed half. Award 9 contains an extensive elucidation of the factual record developed on the property in that case. The factual predicate in that case does not give rise to any basis for distinguishing that case from this one.

Award 9 begins its analysis by noting that both the UP and the BMW E agreed that the Rule must be interpreted and enforced as written, citing cases cited here by these very same parties, i.e., Third Division Awards 20276, 20956 and 31082.

PLB 6867 continues its analysis by noting that the parties introduced Rule 32 – Meal Periods into the Agreement well before introducing Rule 40, which permits compressed half work periods, into the Agreement in 1990. PLB 6867 observes:

“With the adoption of Rule 40 in 1990, the regularly scheduled work day of an employee could now be between 10 and 12 hours. An employee working a compressed half would work longer straight time hours before commencing overtime. Any entitlement to a subsequent meal period under Rule 32 (e) (1) applies specifically to employees in overtime service. The parties knew this at the time they adopted Rule 40, and, as noted by Carrier did not change the language of Rule 32 (e) (1) with respect to when a subsequent meal period need not be allowed-3 hours from ‘their assigned quitting time.’ Without any proffered evidence of specific negotiations concerning the application of this

provision to employees working compressed halves, the Board is unable to accept the Organization's assertion noted in [General Chairman] Tanner's statement that the 3 hours is intended to be measured from the original 8 hour posting rather than the 10-12 hour assignment typical of working a compressed half. Such approach would lead to an argument of entitlement to a subsequent meal period after 11 hours of service, even if it was part of an employee's straight time shift, when Rule 32 (e), by its clear terms, applies only to overtime service. (Award 9)

PLB 6867 concludes:

On this record the Board concludes that Rule 32 (e) (1), as written, and consistent with its past application, provides an exception to the general requirement that Carrier must furnish meal periods every 6 hours for employees working in continuous overtime service who are released from work within 3 hours of their assigned quitting time. We do not accept the Organization's argument that Rule 32 (e) (6) is a separate monetary obligation that arises independently if Carrier chooses not to provide a meal period during that 3 hour overtime service under Rule 32 (e) (1). . . . The entitlement to a meal period at a specific time must exist prior to the payment of penalty pay for its denial. The second sentence of Rule 32 (e) (1) negates such entitlement for employees working overtime who are released within 3 hours of their assigned quitting time. While this interpretation may permit the passage of long periods of time without meal periods for employees working compressed halves, it is not within the province of the Board to protect against harsh results by modifying the agreed upon contract language. It is up to the parties to negotiate any revision to Rule 32 (e) (1) to deal with such consequences." (Award 9)

PLB 6867 denied the claim of those employees who worked three or fewer hours before they were released. Awards 9 and 11 are well reasoned. Those decisions constitute for these parties the precedential analysis of Rule 32 (e)(1) and (6).

Thus, the Board concludes, as did Public Law Board No. 6867, in Awards 9 and 11, that the instant claim for penalty pay is not supported by the language of Rule 32

(e)(1) and (6). The Claimants worked three or fewer overtime hours on the three days in question before being released. Their release occurred within three hours of their quitting time. Pursuant the clear language of Rule 32 (e)(1) the Carrier is not obligated to afford employees released within three hours of their assigned quitting time a second meal. Absent that obligation to provide a second meal, the Rule 32 (e)(6) penalty does not come into play. The Carrier had no contractual obligation to provide the second meal. Accordingly, the Board denies the instant claim.

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 25th day of March 2010.