

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40440
Docket No. MW-40130
10-3-NRAB-00003-070399
(07-3-399)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employes 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 the employes assigned to System Gangs 9063 and 9065 for their overtime service on May 3, 2006 (System File UPRM-9742T/1453319).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants S. Ingraham, C. Botello, P. Arollo, Jr., A. Coria, W. Thomas, R. Robles, W. Burt, H. Woody, E. Betselie, S. Morehouse, J. Hepler, J. Rangel, D. Dacko, J. Vazquez, S. Sandoval, N. Barker, S. Vancleve, A. Spencer, B. Maestas, W. Charley, H. Largo, L. Woody, T. Dehiya, J. Bigman, L. Arevalo, R. Antonio, L. Augustine, S. Yazzie, G. Sam, C. Chosa, R. Clark, G. Alcantar, S. Vossberg, I. Gararzia, W. Horgan, W. Hofer, J. Jared, A. C. Vigil, J. Vigil, J. Armstrong, G. Valenciano, L. Bekay, E. Largo, R. Bekay, B. Herrera, M. Eggers, B. Bombeck, T. Tom, Jr., F. Martinez, Sr., J. Woody, A. Keesie, W. Sam, P. Tsosie, T. Tsosie, A. Benally, M. Begay, E. Becenti, E. Domingo, W. Glenn, B. Bigman, T. Sandoval, A.P. Vigil, J. Frakes, J. Green, A. Hasselbring, G. Jackson, O. Chevarillo, K. Brown and M. Bahenata shall now ‘. . . be compensated at double their respective, applicable overtime rates of pay for the three hours as**

cited, 17:30 to 20:30 hours, and compensated 30 minutes for their meal period at the overtime rate.”

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 Organization filed the instant claim on the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it failed and refused to properly compensate the Claimants for overtime service on May 3, 2006.

The Organization initially contends that on the claim date, the Claimants worked continuously from 6:00 A.M. to 8:30 P.M., without being allowed to observe their regularly scheduled 30-minute meal period and without being provided another meal period within six hours of their regularly scheduled meal period or at any time. The Organization asserts that Rule 32 is clear and not subject to misinterpretation. Rule 32 provides for a regularly scheduled meal period, and it further specifies that if this is not observed, then the meal period will be paid at the pro rata rate and a 20-minute paid meal period will be afforded at the first opportunity. If this 20-minute meal period is not provided, then Rule 32 provides that the meal period will be paid for at the overtime rate.

The Organization emphasizes that it is undisputed that no meal period was provided. The Organization therefore argues that it is clear that the Claimants were entitled to be compensated for their regularly scheduled 30-minute meal period at the overtime rate.

The Organization maintains that the Claimants began continuous overtime service at 4:30 P.M., and this lasted until 8:30 P.M. The Claimants then were released from duty with no additional meal period provided to them. Under Rule 32, a meal period should have provided to the Claimants within six hours from the end of their regularly scheduled meal period. Because no such meal period was provided to the Claimants on the claim date, then in accordance with the clear and unambiguous language of Rule 32, the Claimants were entitled to be compensated at double their existing rate of pay beginning at 5:30 P.M. and continuing until they were afforded a meal period. The Organization submits that because the Claimants were not provided a meal period, they were entitled to compensation at double their existing time and one-half rate of pay for the period from 5:30 P.M. until they were released from work at 8:30 P.M.

The Organization submits that the fact that the Carrier released the Claimants from work, instead of providing them with a meal period, cannot serve as a means of depriving the Claimants of compensation at double their existing rates to which they were entitled at the time they were released from work. The Organization emphasizes that there is no provision in the Agreement that allows the Carrier to work the Claimants as it did without providing a meal period or proper compensation therefore.

The Organization then argues that there is no evidence that any employees were instructed to observe meal periods whenever necessary to avoid violating the Agreement. The Organization contends that Rule 32(a) does not empower employees to take a meal period whenever they want. The evidentiary record also contains no evidence whatsoever that the Claimants were allowed their regular meal period or the subsequent meal period. The Organization asserts that the fact that the Claimants were "fed later . . . while they were roading the machines," as Track Supervisor Richins stated, is not proof of a second meal period. The Organization insists that feeding the Claimants while they continued traveling their machines is not according them a meal period.

The Organization suggests that although there might have been ample time for the Claimants' regular meal period, it was not allowed. Moreover, the Claimants were not afforded a second meal period pursuant to Rule 32(e) even if they were "fed." The Organization argues that there can be no doubt that the Carrier violated the Agreement.

The Organization submits that the language of Rule 32 is clear, unambiguous, and not subject to misinterpretation. Rule 32 provides for the exact remedy requested in the claim. The Organization emphasizes that the Board consistently has held that agreements must be applied as written.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the meal periods on the claim date were granted and observed in accordance with Rule 32. The Carrier asserts that the Organization failed to provide any documentation to support its assertion that the meal periods were not allowed. The Carrier argues that the instant claim therefore can be considered the ramblings of Organization representatives. In such circumstances, where there is such a direct conflict of evidence, the Carrier submits that the Board is without power to decide who is correct.

The Carrier contends that this matter can be considered a classic case of a "dispute in fact." The Carrier emphasizes that in such situations, the Board has dismissed the claim without reaching the merits. Citing a number of prior Awards, the Carrier submits that this is the correct outcome and should be applied in this case.

The Carrier goes on to contend that it did not violate Rule 32. The Carrier emphasizes that, according to the statement of Supervisor Richins, Gangs 9063 and 9065 were provided with ample time for their meal period beginning at 10:00 A.M., their fourth hour, which is within the timeframe set forth in Rule 32. Moreover, the Carrier asserts that employees as a whole have been notified that they have permission and authority to take their meal period when practicable. As for the Organization's position that the assignment bulletin confined employees to certain specified times from which they could not deviate, the Carrier insists that system gang employees are flexible and take their meals as the opportunity arises within the hours set forth in the Agreement. The employees do not all take their lunch at the same time. Citing a prior Third Division Award, the Carrier submits that the time period referenced in the bulletins for "normal" meal periods is not a fixed time.

The Carrier emphasizes that there is no doubt that it complied with Rule 32 and the request for overtime pay during the lunch hour should be denied.

Addressing the Organization's position regarding the second meal period, the Carrier argues that the Organization is wrong in asserting that this meal period was not provided to the Claimants on the claim date. The Carrier suggests that the Organization conceded this point in that it referenced that the Claimants ate pizza and drank soda. The Carrier emphasizes that the Organization never refuted that this constitutes a legitimate meal. The Carrier argues that the record shows that there was no violation of the Agreement.

The Carrier submits that the Organization has not met its burden of proving that a bona fide violation of the Agreement occurred. The Carrier asserts that Boards consistently have held that the party alleging a violation must show proof of the claim and proof of a definite violation of the Agreement. Citing prior Awards, the Carrier argues that the claim should be denied because the Organization failed to show how the Agreement has been violated.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record evidence and concludes that the Organization met its burden of proof that the Carrier violated the Agreement when it failed to properly allow the Claimants to take a second meal period on May 3, 2006, when they worked four hours of overtime. Therefore, the claim must be sustained.

The record reveals that the Claimants worked from 6:00 A.M. to 8:30 P.M. on May 3, 2006. Although the Claimants were afforded their first meal period between 11:00 A.M. and 11:30 A.M. that morning, they were never given a second meal period during their overtime period in the late afternoon. That failure on the part of the Carrier to afford the Claimants the second meal period violated the Agreement.

Rule 32, Section E, states the following:

"When employees are required for overtime services, they will be accorded subsequent meal periods as specified hereafter:

- (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 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. Subsequent meal periods will be granted at six (6) hour intervals, with it being understood that the six (6) hour interval period will begin to toll at the end of the last meal period allowed.

* * *

- (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.”

Because the Claimants had their first meal period between 11:00 A.M. and 11:30 A.M., the Agreement prescribed that they be provided another meal period by 5:30 P.M. The record reveals that that meal period was not provided. Consequently, the Claimants are entitled to the penalty payment set forth in the Rule.

For all of the above reasons, the claim must be sustained.

AWARD

Claim sustained.

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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 14th day of May 2010.