

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40894
Docket No. MW-41021
11-3-NRAB-00003-090353

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 improperly reduced the work day for employes on Consolidated System Gang 8514 on February 3, 2008 (System File C-0827U-151/1499084).
- (2) As a consequence of the violation referred to in Part (1) above, the employes of Gang 8514 who were not allowed to work their full day on February 3, 2008 shall now each be compensated for five and one-half (5.5) hours at their respective straight time rates of pay.”

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 issue raised by this claim is whether the Carrier was justified in requiring all but six employees of Gang 8514 to suspend work on February 3, 2008, because their work train was not at the job site due to inclement weather. The relevant Agreement provisions appear below.

“RULE 27 - BASIC WORK DAY

- (d) When less than eight (8) hours are worked for convenience of employees, or when regularly assigned for service of less than eight (8) hours on rest days and holidays, or when, due to inclement weather, interruptions occur to regularly established work period preventing eight (8) hours work, only actual hours worked or held on duty will be paid for except as provided in Section (e) of this rule.
- (e) When hourly rated employees are required to report at usual starting time and place for the days work, and conditions prevent work being performed, they will be allowed a minimum of four (4) hours at the pro rata rate. If held on duty over four (4) hours, actual time so held will be paid for. This will not apply to employees notified in advance of usual starting time.”

At the relevant time, Gang 8514 was a production gang working compressed halves in the vicinity of Ogden, Utah, with a scheduled 11-hour workday on February 3, 2008. There is no dispute that all gang members reported to work at the designated assembly point on that date, and all but six were released due to inclement weather allegedly causing the work train not to arrive at the work location. The gang members released were paid five and one-half hours (in line with the Carrier’s practice to pay for half of the scheduled day under Rule 27 (e)); the Welders and Boom Truck Driver performed other duties throughout their full shift on that day. The only statement contained in the record on the property indicates that an additional 14 inches of snow fell that night, yet the gang was allowed to work the following day, was bused to the equipment, and was assigned other duties when it was discovered that there was no power to the train.

The Organization argues that it established that the reason that the Claimants were sent home was because the work train did not arrive, and not because of inclement weather as alleged. It notes that this is not one of the stated exceptions to the 40 hour workweek in Rule 27(d) and is not a permissible reason for suspending the workday. The Organization maintains that the Carrier failed to introduce any evidence of inclement weather, pointing to its employee statement that the weather was far worse the following day, but that the gang was transported by bus to the work train and permitted to work, despite the fact that there was no power to the train. It asserts that the Claimants should have been permitted to perform other necessary functions on the claim date, as were the six gang members who worked, and that the Carrier failed to refute these statements or sustain its affirmative defense, citing Third Division Awards 17051 and 32089.

The Carrier contends that it has the contractual right to work employees less than eight hours per day due to inclement weather, and that it did so in this case and complied with the provisions of the Agreement with respect to pay. It argues that it is not obliged to find other work for employees who are subject to having work suspended due to conditions of service even if some employees continue working, relying on Third Division Award 30443, and that it has the right to suspend work in a situation directly attributable to inclement weather, citing Third Division Awards 22997, 26778, 32789, 33625, 35958, 36724 and 40296 and Public Law Board No. 7156, Award 8. The Carrier referenced the position of the Track Superintendent in its denial, but did not attach an email statement from him until it filed its Submission with the Board. It relies upon such statement in arguing that there is, at best, an irreconcilable dispute of fact as to whether the employees were given the option of working or returning home, contending that the Claimants opted to return to the motel and that the reduction in hours was for their convenience under Rule 27(d) requiring dismissal of the claim citing Third Division Awards 29105, 29762, 31527 and 31800.

A careful review of the record convinces the Board that the Organization met its burden of establishing a prima facie violation of the established working hours in Rules 27 and 28 by the Carrier not providing a full shift of work to all members of Gang 8514 on the claim date. While it was not disputed that there was poor weather, there is nothing in the record indicating the extent of the inclement weather underlying the decision to release all but six gang members that day. In fact, the Carrier repeatedly stated that it was the fact that the work train did not arrive at the work location that was the reason why the Claimants could not

perform their regular duties. While the Organization has the burden of proof in a contract case, it is incumbent upon the Carrier, when asserting the affirmative defense of “inclement weather” to explain the reduction in hours, to establish that the action in sending the Claimants home was directly attributable, or causally connected, to the weather. See Third Division Award 40296. No such evidence was presented herein. This fact distinguishes this case from those relied upon by the Carrier where evidence of a weather emergency was proven. See, e.g. Third Division Awards 22997, 26778, 30443 and 32798. The only statement submitted on the property indicates that the weather was worse the following day, employees were transported by bus to the train (which apparently still could not get to the location) and were permitted to work a full shift despite the fact that there was no power to the train. The Carrier offered no explanation, and the email furnished to the Board confirms that some of the employees were given a “4 and go” because “weather contributed and the work train did not show.” The Carrier did not produce any evidence that employees were given an option to work or not on February 3, 2008, and that the Claimants chose to go home under Rule 27(d) so we are unable to accept its contention that this case presents an irreconcilable dispute of fact. Because the Carrier failed to rebut the Organization’s prima facie case, the claim must be sustained.

AWARD

Claim sustained.

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 10th day of March 2011.