

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41046
Docket No. MW-40885
11-3-NRAB-00003-090196**

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud 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 Mr. F. Tsosie, III for his service on September 5, 6, 7, 8, 10, 11, 12, 13 and 14, 2007 (Carrier’s File 1490593).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant F. Tsosie, III shall now ‘. . . be compensated twenty-three (23) hours at double the existing straight time rate of pay and twenty-two (22) hours at double the existing overtime time rate of pay for the denied meal periods as provided for in Rule 32 of the Collective Bargaining Agreement. An additional four (4) hours of overtime will be paid to the Claimant, for the violation of Rule 31(g). ***”

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.

There are a number of parts to this claim. In considering each of the segments, the Board notes that as the moving party, the Organization bears the burden of proof, and must establish through probative evidence each part of its claim. See Third Division Award 27851.

The major portion of this claim is based on the Organization's interpretation of Rule 32. In pertinent part, it reads, as follows:

"RULE 32- MEAL PERIODS

- (a) Where a meal period is allowed it will be between the ending of the third hour and the beginning of the sixth hour after starting work. The regular meal period will not be less than thirty (30) minutes or more than one (1) hour.
- (b) If the meal period is not afforded within the time limit specified in Section (a) and is worked, the meal period will be paid for at the pro rata rate and twenty (20) minutes with pay in which to eat will be afforded at the first opportunity.
- (c) If the twenty (20) minute meal period as specified in Section (b) is not afforded within the regular hours of assignment, the meal period will be paid for at the overtime rate.

* * *

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

* * *

- (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 the rule.”

The Organization maintains that the Claimant was not afforded a meal period under Rule 32(a) on the nine claim dates. Consequently, the Organization argues that the penalties provided under Paragraphs (e) (6) and (7) should be paid to the Claimant. The Carrier contends that the penalty for violating Paragraph (a) is set forth in Paragraphs (b) and (c)- not in Paragraphs (e) (6) and (7).

The Board reaches the issue over the interpretation of the Rule based on the following factual finding. The Board carefully reviewed the Form B Clearance Records the Organization submitted into evidence during the on-property processing of this claim. The Organization placed in evidence forms for six of the nine claim dates, namely, September 5, 6, 11, 12, 13, and 14 (the form dated September 6 may be read as September 4, a date not subject to this claim. Similarly, the date on the form for September 13 is crossed out and 14 was inserted.) The Board's review of the Form B Clearance Records establishes that September 13 is the only date that the Claimant would not have had an opportunity to take a meal period during the three- hour window established by Rule 32 (a) from the third hour to the beginning of the sixth hour after the start of work.

The record contains no evidence concerning September 7 and 8. Based on this evidentiary record, the Board concludes that the Organization failed to meet its burden to prove that the Claimant did not have an opportunity to take a meal

period in conformance with Rule 32 (a) on September 5, 6, 7, 8, 11, 12 and 14. The Board addresses September 10 separately, below.

The Claimant, served as the Employee in Charge (EIC) on the claim dates. The Organization does not allege that the Claimant requested, but the Carrier denied those meal period requests. Rather, except for September 10, there is no evidence that the Claimant alerted his Supervisor that he did not have sufficient time to take his meal period. Public Law Board No. 6867, Award 10 (Referee Newman) references Rule 32 (e) (4) (b) and notes that the Foreman should alert the Supervisor if employees may miss their meal period. This provision of the Rule makes such notification a prerequisite before going into penalty time. The Carrier, in the instant case, argues that the Claimant should have alerted his Supervisor about his need for a meal period, but he did not do so. It is not clear from the record the extent to which Rule 32 (e) (4) (b) was discussed on the property as a bar to penalty pay for the claimed dates. Consequently, the Board does not dismiss the claim on this basis.

The Board turns to address the claim for penalty pay for September 13 based on the Organization's interpretation of Rule 32. The Organization maintains that if the Carrier fails to afford a meal period that conforms with 32 (a) then the penalty is calculated on the basis of Paragraphs (e) (6) and (7). The Carrier contends that the penalty for its failure to afford the first meal period is set out in Paragraphs (b) and (c) of the Rule. The Board concurs with the Carrier's interpretation of the Rule. By clear language, Paragraphs (b) and (c) set forth the penalty for the Carrier's failure to meet the meal period requirement set forth in Paragraph (a) of the Rule.

The Carrier correctly notes that the Organization did not claim a pro rata payment under Paragraph (b) or an overtime payment under Paragraph (c) of the Rule. According to the Carrier, the Board therefore lacks jurisdiction to consider whether these subsections of the Rule were violated. The Board concurs and does not consider this portion of the claim any further.

The Board turns to consider that portion of the claim which focuses on September 10. The Organization claims that the Carrier changed the starting time without adequate notice. In the Claimant's written statement that is part of the on-

property record, he states that on September 8, Foreman Moore notified him of a change in the starting time to 3:00 A.M. There is insufficient evidence for the Board to conclude that this notice was less than 36 hours, or that the change in starting time exceeded four hours and required 48 hours' notice. The Board concludes that the Organization failed to prove that the Carrier violated Rule 31 (g).

With regard to September 10, the Claimant admits that he received the appropriate, straight, overtime and double time pay for the hours worked on September 10. The Claimant submits that he was not afforded the meals to which he was entitled under Rule 32. Again, the Form B Clearance records were not placed in evidence. The Organization failed to meet its burden to prove this portion of its claim.

In view of the foregoing, the Organization failed to meet its burden of proof with regard to any segment of this 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 23rd day of August 2011.