Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32877
Docket No. MW-32202
98-3-94-3-636

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Chicago and North Western Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly suspended work for five and one-half (5.5) hours on the regularly assigned machine operator's positions, assigned to the RC 733 Interdivisional Surfacing Gang, on June 7, 1993 (System File 4PG-3571T/81-93-132).

(2) As a consequence of the violation referred to in Part (1) above, Machine Operators M. A. Crawford, R. A. Randolph, R. J. Salisbury and W. D. Christensen shall each be compensated for the five and one-half (5.5) hours' pay lost, at the appropriate 902 or 903 Machine Operator's straight time rate, on June 7, 1993."

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.

At the time in issue, Claimants were regularly assigned as Machine Operators on Interdivisional Surfacing Gang RC 733 with a work week of Monday through Thursday, 7:30 A.M. to 6:30 P.M. On June 7, 1993 Claimants reported to work at 7:00 A.M., performed daily machine maintenance, but did not receive track time until about 11:00 A.M., when they moved their equipment on Mainline Track 1 about 1/8 mile and proceeded to the crossover to Track 2 where their work assignment was to be performed. At that time they were called back by their Roadmaster and told to tie up for the day and that their services were not needed. Claimants left the property around 11:30 A.M. and were paid 4.5 hours that day, rather than their entire ten hour shift, giving rise to the instant claim.

The on-property handling reveals that the Organization relied upon the following language of Rule 27 in asserting that Claimants were entitled to the additional 5.5 hours of pay:

"Rule 27 - HOURS PAID FOR

(a) Except as provided in Rule 23(m) and Rule 30 regularly established daily working hours will not be reduced below eight hours per day, five days per week, to avoid making force reductions except that this number of days may be reduced in a week in which holidays occur by the number of such holidays.

(b) When less than eight hours are worked for the convenience of the employes, only actual hours worked or held on duty will be paid for."

Initially, Carrier responded that Claimants were released because they were unable to get track time, but later changed its defense to indicate that the reason was inclement weather. Carrier claimed that Rule 36 was the pertinent provision which allowed it to pay only for time actually worked on this occasion. Rule 36 states:

"Except as provided in Rule 12(c), hourly rated employees required to report at the usual scheduled time and place for the day's work, and when conditions prevent such work being performed, will be allowed a

minimum of four (4) hours; if held on duty over four (4) hours, actual time so held will be paid for."

The correspondence establishes that the Organization took the position that Claimants were on duty and working at the time they were called back, making Rule 36 inapplicable, and that the decision to release Claimants was not made for their convenience nor was it necessary, since Machine Operators are expected to perform work during inclement weather as evidenced by the fact that their machines are equipped with weather tight cabs and they receive a monthly foul weather allowance.

Carrier replied that moving their machinery was not performing service as contemplated by the Rules. After conference was held, and some 15 months after the claim was initiated, Carrier also stated that lightning was involved, for the first time raising a safety issue.

The Organization contends that Rule 36 governs employees reporting but not working, which is not the case herein, since Claimants were actually performing their duties at the time Carrier arbitrarily determined to release them and only pay them for 4.5 hours, relying on Third Division Award 25183 and Public Law Board No. 4768, Award 49. It also notes that Carrier has changed its defense throughout when realizing the deficiency of its position.

Carrier argues that the Organization has failed to allege any Rule violation, since Rule 27 only applies to a situation where a workday is reduced to avoid making force reductions, rather than due to operating conditions or inclement weather. It contends that the work of Claimants contemplated by the Rules is operating their equipment for its intended purpose of performing surfacing work, not just moving the equipment for a short distance down the track. Carrier asserts that Claimants performed no work on June 7, 1993, and that they were properly compensated under Rule 36 for the time they were actually held. It relies upon Third Division Awards 22997 and 17193 in support of its argument that Carrier is entitled to terminate operations due to inclement weather.

The issue in this case appears to be which Rule is applicable. While Rule 27(a), by its terms, applies to shortening regularly established working hours to avoid making force reductions, a situation which does not exist in this case, the language of Rule 27(b) establishes one circumstance when Carrier can pay actual hours worked instead of the

entire shift - when less than eight hours are worked for the convenience of the employees. There is no dispute in this case as there was in Third Division Award 25183, that Claimants' hours were reduced by a decision of the Roadmaster, and not "or the convenience of the employes."

More relevant to this dispute is the question of whether Rule 36 is applicable and was properly relied upon by Carrier in affording Claimants' pay only for the actual hours they were at work on June 7, 1993. In order for Carrier to rely upon this provision, as it does, it must be established that Claimants were required to report to work and conditions prevented such work from being performed. The parties do not appear to dispute the fact that for Rule 36 to apply, Claimants must have performed no work. They differ as to whether the facts in this case establish that work was performed by Claimants, as intended by the Rule.

A careful review of the record convinces the Board that we need not decide whether the actions of Claimants in performing daily machine maintenance, remaining in call for track time, and actually moving the equipment toward its work location constitutes "work" as contemplated by Rule 36. This is so because we find that Carrier has failed to establish in this case that "conditions prevented such work from being performed."

During the processing of this claim on the property and in conference, the parties understood that the Roadmaster relied upon inclement weather to call the crew in. Carrier did not raise or offer proof of its safety defense (lightning) throughout this time, or rebut the Organization's evidence that Claimants were expected to, and actually, performed work during inclement weather and were provided equipment and pay for such circumstance. While Carrier is clearly entitled to call in its employees where an issue of safety arises, and is expected to do so, it failed to prove that such was the circumstance on June 7, 1993. Thus, the Board is unable to conclude from this record that conditions prevented Claimants' from performing their work on June 7, 1993.

In making this finding, the Board is sensitive to the fact that it would be improper for us to undermine a managerial decision to stop work due to inclement weather in the absence of bad faith. As noted in Third Division Award 17193, "a work stoppage due to inclement weather is as much, if not more, in the interest of employes as it is in the interest of management." However, under the circumstances here involved, we are less taking issue with the Roadmaster's decision on June 7, 1993 than with Carrier's

asserted justification for shortening Claimants' work hours and its failure to support a belated safety defense. Where the Organization raises the fact that Claimants are expected to work during inclement weather, and are provided protected cabs and a foul weather allowance toward this end, Carrier has a higher burden to justify why this inclement weather situation necessitated a cessation of operations. Unlike the situation in Third Division Award 22997 relied upon by Carrier where safety was undisputed as the reason for Claimant's inability to work, Carrier failed to meet the requisite burden in this case.

Accordingly, we sustain the claim.

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 21st day of October 1998.