

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37368
Docket No. MW-36566
05-3-01-3-38

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(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 allow the Claimants assigned to System Gang 9013 to observe their assigned meal in accordance with Rule 32 beginning October 3, 1999 and continuing (System File UPSGRM-9114T/1216633).
- (2) As a consequence of the violations referred to in Part (1) above, the Claimants listed below* and any employee assigned to or who exercises seniority on the gang after October 3, 1999 shall be allowed thirty (30) minutes' pay at their respective straight time rates for each day they are not allowed to observe their assigned meal period until the violation ceases.

*J. L. Lueders
B. L. Eschen
R. L. Upah
D. J. Bonner
P. C. Peterson
R. D. Dillingham
L. R. Trnka
W. D. Belt
R. D. Richardson

A. L. Tinderholt
J. L. Jacobi
T. W. Ray
J. D. Stott
R. D. Angel
D. W. Spilman
M. D. Bonham
G. D. Vileta
W. J. Thatcher

M. S. Grommet
D. C. Peterson
H. D. Harris
L. R. Oline
R. D. Graff
M. L. Kuker
L. L. Soren
B. G. Givens
M. E. Kleven

C. I. Whitesell
R. F. Boswell
R. M. Craun

D. L. Farland
K. G. Hart
T. J. Richeson

G. W. Thomas
M. H. Templeton
R. L. Crandon"

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.

According to the Organization, the Claimants were assigned to various positions within System Curve Rail Gang 9013. That gang was one of several consolidated system gangs established pursuant to a January 1, 1998 Implementing Agreement negotiated by the parties pursuant to the New York Dock Conditions imposed by the U. S. Surface Transportation Board in Finance Docket No. 32760 approving the Carrier's merger with the Southern Pacific Railroad and its subsidiaries.

In its Submission before the Board, the Organization cited certain portions of the Implementing Agreement, also known as the Consolidated System Gang Agreement, deemed relevant to the current dispute. For example, it pointed out that Section 1 essentially provided that as of the January 1, 1998 effective date, all of the Carrier's system gang operations on the Carrier's newly acquired territories would be subject to the Agreement between the UPRR and BMW. The Organization further emphasized that the System Curve Gang 9013 to which the Claimants were assigned was a type of system gang operation specifically listed in Side Letter No. 1 and thus covered by both the Implementing Agreement and the UP/BMW Agreement.

According to the record, on January 14, 1999, all of the positions associated with System Gang 9013 were initially bulletined as working Monday through Friday from 7:30 A.M. to 4:00 P.M. According to a copy of a bulletin for the position of System Bus Driver, which the parties agree was representative of all of the bulletined positions for the gang, the position advertisement contained the following information as regards a meal period: "LUNCH NORMALLY 1130-12."

The instant claim alleges that the Carrier failed and refused to allow the Claimants to observe their meal period, as bulletined, in accordance with Rule 32 of the UP/BMWE Agreement. Specifically, the December 2, 1999 claim as initially submitted to the Manager of Engineering Resources stated that until October 3, 1999, the Claimants were allowed a meal period from 11:30 A.M. to 12:00 P.M., as advertised in the bulletin. The Organization pointed out that prior to the claim date, the 30-minute meal period occurred at the end of the Claimants' fourth hour after their 7:30 A.M. starting time.

The claim specifically contends that starting on October 3, 1999, the Claimants were not afforded their 30-minute meal until 2:30 P.M. According to the Organization, the new meal period coincided with the Carrier's change in Gang 9013's reporting time from 7:30 A.M. to 9:30 A.M. The above changes in starting time and meal period remained in effect until October 31, 1999 when, as will be discussed below, the Carrier made a subsequent change in the gang's starting time and meal period. The Organization objects to this change because, where previously the meal period occurred at the end of the fourth hour after starting work, the new change delayed the meal period to the end of the fifth hour after starting work.

On October 31, 1999, the Carrier notified the Claimants that the starting time would be changed to 8:30 A.M. as a result of the change from Daylight Savings Time to Central Standard Time. The meal period was then altered to 2:00 P.M., five hours and 30 minutes after starting work. Although the crux of the instant claim is the Organization's objection to the change in the interval of the meal periods from the changed starting times, the Organization does not dispute that the Carrier did provide proper advance notice under Rule 31(a) to change the starting times.

Thus, the Organization essentially contends that the change in Gang 9013's meal period to the end of the fifth working hour, from October 3 through 30, 1999, and then to five hours and 30 minutes after the starting time as of October 31, 1999, and continuing, deprived the Claimants of a properly assigned meal period under Rule 32 (d) of the Agreement. The relevant provisions of Rule 32 are 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 shall 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 shall be paid for at the pro rata rate and twenty (20) minutes with pay in which to eat shall be afforded at the first opportunity.

* * *

(d) When the starting time of employees is changed in accordance with the provisions of Rule 31 a corresponding change will be made in the regular assigned meal period."

In light of the facts set forth above, the Organization argues that the Carrier violated Rule 32(d) when it changed Gang 9013's starting time but "failed to make a corresponding change in the assigned gang lunch period." According to the Organization, the four-hour window between the starting time and the meal period should have been preserved with each change in starting time, instead of getting progressively larger. Thus, it asserts, a violation of Rule 32(d) occurred on each date that the Carrier failed to allow the meal period at the end of the fourth hour of work. As a result, contends the Organization, the Claimants are entitled to a penalty payment of 30 minutes at their respective straight time rates of pay.

The Carrier first contended that, procedurally, the claim is defective because it was initially submitted by the wrong General Chairman, who was not a

recognized representative of the Claimants. The Organization disagreed citing an August 1, 1998 Agreement which it argued essentially mooted the Carrier's argument. Before addressing the Carrier's substantive arguments in this matter, at this juncture the Board notes that after reviewing the record in light of the Carrier's procedural challenge, the claim was properly submitted, and we agree with the Organization that the August 1, 1998 Agreement mooted the Carrier's contentions otherwise. Thus, there is no basis for the Board's outright dismissal of the claim based on the claimed procedural defect. Third Division Award 32432 is not relevant to the procedural argument here, we also find.

Substantively, the Carrier emphasized that the record amply demonstrates that on each date encompassed by this continuing claim, the Claimants were allowed a meal period in accordance with Rule 32(a). As the record makes clear, from October 3 through October 30, 1999, the meal period occurred at the end of the fifth hour and concluded at five hours and 30 minutes of starting work. Similarly, on October 31, 1999, when the starting time was changed to 8:30 A.M., the meal period started five hours and 30 minutes after starting work and concluded at the beginning of the sixth hour.

Rule 32(a) clearly states that when a meal period is allowed it will occur between the ending of the third hour and the beginning of the sixth hour after starting work. The bulletin information with regard to the 11:30 A.M. meal period was merely a guideline, and not a guarantee that the meal period would be allowed every day at that precise time. Rule 32 of the Agreement superceded the information contained in the bulletin, as many Third Division Awards have held, the Carrier asserted.

The Carrier further stated that Third Division Award 32627, involving these parties, is of limited relevancy here. Award 32627 merely established the Carrier's obligation to include a "normal meal period" on the bulletins of system gang vacancies, and that issue is not presently before the Board. Here, there is no allegation that the January 14, 1999 bulletins for the vacancies on System Curve Gang 9013 omitted any reference to a "normal meal period." However, in response to the Organization's contention, the inclusion of such information as regards the meal period did not contractually obligate the Carrier to rigidly allow meal periods at the four-hour interval advocated by the Organization on each date worked by the

gang. The Carrier's sole obligation was to comply with Rule 32 of the Agreement, which it did, as the record in this case established, the Carrier stressed.

Thus, the Carrier emphasized that, on each claim date, the meal periods that were allowed fully complied with Rule 32(a) inasmuch as they occurred within the "window" of six hours. The Carrier reminded the Board that the contractual language contained within Rule 32 exists to preserve the Carrier's need for flexibility during operations involving large production gangs and to address manpower needs. According to the Carrier, the bulletin information as regards the meal period was designed to convey a "normal period," contingent upon the operational circumstances of each day. This is precisely why the wording "lunch normally" appeared in the bulletin, and why the parties negotiated the window specified in Rule 32(a) the Carrier insists.

The Board carefully considered the respective positions of the parties, and the precedent Awards cited in support of their positions. In response to the specific question at issue, we find that, given the facts of record, the Organization's contention that the Claimants were not allowed to observe their assigned meal pursuant to Rule 32 is not supported by the record. As discussed extensively above, the parties do not dispute that as of October 3, 1999, the Claimants were allowed a meal period at the end of the fifth hour after their 9:30 A.M. starting time, until October 31, 1999, when the meal period was changed to start five hours and 30 minutes after their 8:30 A.M. starting time.

With respect to the applicability of Third Division Award 32627, we agree that the issue before us does not concern whether the bulletins at issue here complied with the holdings of that particular Award. Obviously, the current claim seeks a ruling on the meal period information, quoted above, vis à vis Rule 32; the claim does not assert that information regarding meal periods was not specified in the System Curve Gang 9013 bulletined vacancies.

Upon our complete review of the record, we agree with the Carrier that the phrase "lunch normally" did not confer upon the Claimants an absolute right to an "assigned meal period of 30 minutes at the end of the fourth hour after starting work" for the duration of Gang 9013's existence, as the Organization would have it. The meal period information contained in the bulletin, although it did furnish a

time, was only a guideline based on service requirements, as the Carrier essentially has contended, not to be superceded by the specific contractual language of Rule 32(a). Furthermore, we disagree that the above language contained in Rule 32(d) forced the Carrier to continue to allow the meal period after the fourth hour of work simply because it had changed the starting times under Rule 31. The intent of Rule 32(d) we hold, is to emphasize that the meal period window specified in Rule 32(a) will change, or "slide," accordingly, when changes in starting times are made.

Based on the above, we conclude that "lunch normally" did not create a hard and fast time for the meal period, and did not trump the specific negotiated language of Rule 32(a) that accorded the Carrier flexibility in scheduling meal periods. Again, we stress that nothing in Rule 32(d) required the Carrier to maintain the same interval between starting time and meal period when the starting times were twice changed with "proper advance notice" pursuant to Rule 31. As previous Third Division Awards have held, job bulletins such as those at issue here, are informational in nature and do not carry the same weight as the negotiated Agreement provisions they may address. Third Division Awards 28226, 24492, 14636, 14065 and 13195, which stand for that principle, are sound precedent which the Board is constrained to follow.

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 24th day of February 2005.

CARRIER MEMBERS'
CONCURRENCE AND DISSENT
TO
THIRD DIVISION AWARD 37368 (DOCKET MW-36566)
(REFEREE GOLDSTEIN)

While we concur with the decision of the Majority on the merits, there is one aspect of the Award to which we dissent. Thus, on Page 4 of the Award, the Majority stated:

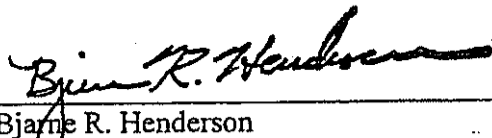
"The Carrier first contended that, procedurally, the claim is defective because it was initially submitted by the wrong General Chairman, who was not a recognized representative of the Claimants. The Organization disagreed citing an August 1, 1998 Agreement which it argued essentially mooted the Carrier's argument. Before addressing the Carrier's substantive arguments in this matter, at this juncture the Board notes that after reviewing the record in light of the Carrier's procedural challenge, the claim was properly submitted, and we agree with the Organization that the August 1, 1998 Agreement mooted the Carrier's contentions otherwise. Thus, there is no basis for the Board's outright dismissal of the claim based on the claimed procedural defect. Third Division Award 32432 is not relevant to the procedural argument here, we also find."

We submit that the Majority erred and has, in essence, written language that would change the Agreement to which the BMW Representative advancing this claim to the Board is not signatory. As countless Awards have held, the Board is not empowered to rewrite collective bargaining agreement language. That is a function of the parties. The August 1, 1998 Agreement did not confer upon the General Chairman advancing the claim the right to interpret the Union Pacific collective bargaining agreement. The August 1, 1998 Agreement also did not encompass Rule 32 of the Agreement, which was the basis of the dispute in this case.

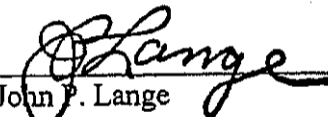
For these reasons, we believe that this portion of the Award is incorrect and will not establish precedent.



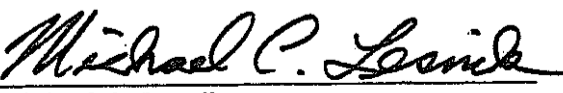
Martin W. Fingerhut



Bjarne R. Henderson



John P. Lange



Michael C. Lesnik

March 24, 2005