

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40780
Docket No. MW-40404
10-3-NRAB-00003-080210**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to compensate the members of RP-03 for an entire days pay on December 7, 2005. [System File C-06-P018-3/10-06-0116 (MW) BNR].**
- (2) As a consequence of the violations referred to in Part (1) above, RP-03 members M. Sailors, T. Green, S. Cummings, S. Barton, K. Frahm, S. Wall, L. Miller, S. Thomas, J. Beal, R. Ayer and J. Jones shall each be compensated five (5) hours each at their respective straight time rates of pay for December 7, 2005.”**

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.

This case relates to the Carrier's interpretation of Rule 25, Paragraphs C, D and E. On December 6, 2005, Rail Relay Gang RP-03, a mobile gang working in the Denver, Colorado, area worked the entire day in temperatures that dipped below the zero degree Fahrenheit mark. That evening, two of the gang members were assigned the task of keeping the gang machines running overnight, so that they would not be difficult to start the next morning. At 8:30 A.M. the next day, December 7, 2005, the gang members assembled at the designated assembly point at the 13th Street crossing in Denver, to start the workday. During the normal briefing, the Claimants were told by the Roadmaster that due to the inclement weather, the entire gang would receive three hours' show-up time and be sent home; in accordance with Rule 25 E the Claimants returned to their designated lodging facility. However, certain employees of Gang RP-03 continued to work for the remainder of the day. Said employees, who were not selected on the basis of seniority, each received a full eight hours' pay that day. Upon becoming aware of the occurrence, the Claimants contacted the Organization, which initiated a claim on their behalf on January 6, 2006, requesting five hours' straight time pay for each Claimant.

Rule 25, Paragraphs D and E provide:

- “D. When less than eight (8) hours are worked for the convenience of employes, 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 inclement weather conditions prevent employes from performing work on a regular scheduled workday, they will be allowed a minimum of three (3) hours at pro rata rate. If held on duty over three (3) hours, actual time so held will be paid

for. Except in an emergency and hen required to patrol track during heavy rains, employes reporting will not be required to work in the rain for the sole purpose of receiving payment under this Section.”

The Organization contends that this is a simple violation of the parties' Agreement, and the Claimants should be paid their remaining five hours' straight time pay for the day that they should have been permitted to work. The Carrier contends that the Claimants were all given the opportunity to work but took the option to go home instead of working, so that they have been paid all the compensation they are entitled to, the three hours' "show-up" pay under Rule 25 E. The Organization counters that the Claimants were not given the option of working or going home, and that they were specifically advised that they would be paid show-up pay and that they were to return to the designated lodging facility for the remainder of the work day. Junior employees were retained to continue working, in violation of Rule 2 A of the Agreement. The Organization does not dispute the Carrier's right to send employees home with a minimum of three hours' pay when inclement weather prevents work from being performed. What the Carrier may not do is send senior employees home while keeping junior employees on the job.

According to the Carrier, in this case the local Supervisor determined that the weather was too inclement for the rail gang to perform its regularly assigned duties. Specifically, the Supervisor was concerned that the gang's machines would not run properly because of the cold. He offered the gang the alternative of collecting inclement weather pay without working, or the opportunity to perform other work that could be done without using the machines. The Claimants elected to go home, so they are not entitled to any additional pay for the day beyond the inclement weather pay they were already paid in accordance with the Agreement. At best, the Organization failed to meet its burden of proof; it has not established how any provisions of the Agreement were violated on December 7, 2005. The Carrier retains the discretion to decide whether to keep employees on duty or send them home on inclement weather days, and numerous prior Awards of the Board have recognized management's right to exercise its discretion in determining that inclement weather exists. There is no indication that the Roadmaster's decision to give employees the alternative of working or going home was in any way arbitrary or inappropriate. Deference should be paid to the Supervisor's decisions in such matters, as part of

management's prerogative to determine whether to release employees due to inclement weather. There is no showing of any bad faith on the part of the Carrier

The record includes evidence from the NOAA National Climatic Data Center that the temperature on December 7, 2005, was an average -5 degrees, with fog and blowing snow. The temperature was, according to the NOAA data, 36 degrees below normal and the lowest average daily temperature for the entire month. The preceding day, December 6, 2005, the average temperature was 14 degrees (which was still 18 degrees below normal).

The record includes an e-mail from the Roadmaster, dated January 24, 2006, stating: ". . . Gang RP-03 did start the day at the crossing at 13th Avenue in Denver. The weather was very inclement that day. The gang was given the option to leave after three hours or work the whole day by doing quality work, the majority of the gang went in after the three hours." The Roadmaster subsequently expanded on his original statement in an e-mail dated February 12, 2006:

"In Denver CO rail gang RP 03 were to work on curve OA relaying rail. The temperature on this day was -10 degrees snowing and the wind was blowing about 20 mph. The reason I chose for them not to work was that we could not keep the machines running properly or safely because of the cold. I myself gave the employees the option to go in after 3 hours or stay and work for the rest of the day and receive a full days [sic] pay. There was work to be done that did not require the use of machines and this work could have been done safely. This was communicated to the crew members through the crew Forman [sic]."

The record also includes individual statements from three of the Claimants that the Roadmaster did not give them the option to work, as well as a group statement signed by the Claimants to the same effect. The Claimants' statements suggested that the employees who were permitted to continue to work were favorites of the Supervisors who received special treatment.

There really is no dispute that the Carrier has the discretion to determine whether inclement weather exists for purposes of invoking Rule 25 E. There also is no dispute that weather was cold and snowy on December 7, 2005, the date in question.

Had management simply invoked Rule 25 E, the Organization would not have filed a complaint.

The crux of this claim is whether the Claimants were told to go home under Rule 25 E, or whether they were given the option of going home or continuing to work, doing work that did not involve the machines that management was concerned about operating because of the cold. As to those facts, there is an irreconcilable dispute between the parties: evidence from the Roadmaster is that gang members were given the option; the Claimants deny having been given any option. Whether the Claimants were given an option is the critical fact in this case. Where there is an irreconcilable dispute between the parties on such critical facts, the Board has no option but to dismiss the claim.

AWARD

Claim dismissed.

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 15th day of December 2010.