

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40783
Docket No. MW-40420
10-3-NRAB-00003-080173**

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 Agreement was violated when the Carrier did not allow C. Wiemann, M. Reget, R. Bowen, M. Lynch, K. Johnson, D. Ashby, D. Jennings, M. Arteaga, C. Martin, D. Horn, S. Woods, S. Kessler, B. Finley and D. Ahlen to work their basic ten (10) hour day on March 21, 2006. [System File C-06-P018-8/10-06-0228(MW)BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants C. Wiemann, M. Reget, R. Bowen, M. Lynch, K. Johnson, D. Ashby, D. Jennings, M. Arteaga, C. Martin, D. Horn, S. Woods, S. Kessler, B. Finley and D. Ahlen shall now each be compensated for seven (7) hours’ [sic] 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.

On March 21, 2006, there were seven welding crews lodged and scheduled to work in the vicinity of Kirksville, Missouri. Before the start of the shift, the Welding Supervisor for the crews notified them that they were not going to work due to inclement weather. Welders normally work out of doors and cannot weld in adverse or wet weather conditions such as rain or snow without proper shelter. The crew members were paid three hours' pay pursuant to Rule 25 E. 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 when 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 filed a complaint on behalf of the Claimants for a lost work opportunity, alleging that the Carrier wrongly held them off work on March 21, 2006.

Specifically, Steel Gang RP10 and the associated Welding Gang RP10, who were also lodged in Kirksville and worked under a different Supervisor, worked their assigned hours that day regardless of the weather. The Claimants' scheduled work was to be performed in the same area as the gangs that worked and they should have been permitted to work. The Welding Supervisor who cancelled their shift was located 200 miles away in Galesburg, Illinois, and had no knowledge of local weather conditions. The Claimants were scheduled to work ten hours, but only received three hours pay. The Organization submitted statements from a number of the Claimants attesting to the fact that local weather conditions were such that they could have worked. The Carrier may only reduce the Claimants' scheduled hours for inclement weather, and the evidence is that weather conditions did not justify the Carrier invoking Rule 25 E. Accordingly, the Carrier violated the Agreement when it reduced the Claimants' regularly assigned work hours below ten hours. There is no evidence of severe weather at or near the work location, and the fact that other crews worked in the area establishes that there was no inclement weather that prohibited maintenance-of-way work. The Carrier presented no credible evidence of inclement weather, and the claim should be sustained.

According to the Carrier, the Welding Supervisor's decision was justified, and the Board should give it deference. It had snowed four inches the previous day, March 20, and on March 21, there was a trace of snow along with freezing rain. The temperature reached a high of 31 and a low of 17 degrees Fahrenheit. The Supervisor determined that weather conditions presented a possibly dangerous work environment as well as the possibility of porous or unacceptable welds. The thermite welding process cannot properly be performed in wet conditions. Moreover, the Organization failed to specify what other tasks the seven welding crews could have done. It was too dangerous to weld, and if the Carrier had assigned the welding crews to perform tasks other than welding, the Organization would have filed a claim alleging that the Welders should not have been assigned non-welding tasks. The Carrier properly paid the Claimants three hours straight time compensation under Rule 25 E. In the absence of proof of arbitrariness, the Board should defer to the Supervisor's judgment concerning safety matters. The Welding Supervisor's decision was not made arbitrarily: blowing snow and freezing rain have the potential for unsafe working conditions and failed welds. The Supervisor's decision was actually made to protect the health and safety of the crew. The claim should be denied.

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. This case presents the issue of whether the Carrier made the correct decision in this particular instance.

The record includes clear evidence of the dangers of attempting thermite welds in moist or wet conditions. The Carrier's Engineering Instructions include advice on thermite welding in bad weather:

"11.15.16 Weather Restrictions

In light rain or snow, protect the thermite weld and the weld area as required by the BNSF Thermite Welding Manual. Cover the work and materials to keep moisture from molds, crucibles, and welding hardware. Use a welding umbrella or other suitable device as a cover.

For cold weather restrictions, see section 6.7.5F in Engineering Instruction 6 Rail.

Do not thermite weld when the rail temperature is below 0° or in heavy rain, sleet, or blowing snow.

- Moisture in molds causes a porous weld.
- Moisture in the charge (portion) or in the crucible causes a violent reaction that may also result in hot steel splashing out of the crucible or slag pan.
- Moisture on the rail causes the temperature to drop, contracting the rail and tearing or pulling apart a hot weld."

In short, moisture is the enemy of thermite welding. The Welding Supervisor concluded that weather conditions were too moist to be able to weld safely and well. His decision must be evaluated not in terms of what the weather turned out to be on

March 21, 2006, but on what he reasonably thought it was going to be at the time he made the decision to cancel the crews' work. On March 20, the day before, it had snowed four inches, and even the statements from the Claimants acknowledged that the precipitation had continued into the early hours of March 21. The record also includes weather data from NOAA's National Climatic Data Center for March 21, 2006, for the Kirksville area, which reveals that there was snow, freezing fog, mist, and "unknown precipitation." It is worth noting that the NOAA data also establishes that March 21, 2006, was the coldest day of the month. While the Welding Supervisor did not have access to the weather data in advance, the data does corroborate and support his decision that the weather was too moist, under conditions of cold, for the thermite welding crews to be able to do their jobs safely and efficaciously.

The Welding Supervisor had to consider weather conditions - and the likelihood of continued damp weather - before sending the crews out to start work for the day. Based on existing weather conditions in the early morning, his decision is not palpably unreasonable or arbitrary. He did not need to be physically on site to be able to conclude that four inches of snow on the rails from the preceding day's snowfall, combined with continuing fog and mist, created moist conditions that were not conducive to safe and effective thermite welding. Even if there was no active precipitation, weather conditions were adverse enough to warrant sending the welding crews home because of inclement weather. The fact that a different Supervisor elected to keep his two crews together and working does not undercut the Welding Supervisor's decision for the Claimants' crews.

In Third Division Award 40387, the Board examined somewhat similar circumstances. In that case, the crews had worked for a brief period of time before it started to rain. Similar to this case, the Organization raised the issue of what conditions existed after the crew was told to go home. The Board's discussion could apply to this case:

"It is undisputed that inclement weather and inclement weather conditions existed at the time that Supervision made and announced its decision to work a shortened day. Supervision also took reasonable steps to determine that the weather might not improve for the remainder of the work day. There is no proof that it acted for no reason, for bad reason or in any arbitrary or other prohibited manner

at the time that it made its initial decision. Once properly made and begun, the Carrier is not required to prove that the weather proceeded in accord with its original expectation.

Even assuming that the severe weather abated by the time the Claimants left work, given the information from WeatherData, it was possible it might return. The Agreement permits managerial discretion not only when inclement weather exists but also when 'conditions' presage inclement weather. Weather predictions are highly unreliable. The Agreement does not require the Carrier to guarantee accurate weather forecasting.

Supervision has a wide range of reasonable discretion to base decisions on weather conditions. Its action here falls squarely within its permissible authority. It was rooted in sound available information. There is no evidence of improper purpose. Indeed, in substantial part, it reflects an effort to protect the Claimants' health and safety."

Here, the record establishes that weather conditions were both moist and cold, with snow having fallen the previous day, and freezing precipitation continuing into the morning of March 21. The evidence is that thermite welding in moist conditions can be dangerous. Moreover, welds done in moist conditions, particularly cold and damp conditions, can be porous and pose an unacceptable risk of failure. Under such conditions, Rule 25 E permits the Carrier to dismiss crews with a minimum three-hour payment. Accordingly, the Carrier's decision to send the welding crews home pursuant to Rule 25 E did not violate the Agreement.

For the reasons discussed above, the claim is denied.

AWARD

Claim denied.

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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.