

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40892
Docket No. MW-41005
11-3-NRAB-00003-090346**

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

**(Brotherhood of Maintenance of Way Employees 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 improperly reduced the work day for the employes on Consolidated System Gang 9049 on January 17, February 6, 17, 19 and 20, 2008 (System File R-0826U-307/1498823).**
- (2) As a consequence of the violation referred to in Part (1) above, the employes of Gang 9049 shall now “*** each be compensated for thirty-four (34) hours, for January 17, February 6, 17, 19 and 20, 2008, at their applicable 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.

The issue raised by this claim is whether the Carrier was justified in requiring employees of Gang 9049 to suspend work on the claim dates due to inclement weather. The relevant Agreement provisions appear below.

“RULE 27 - BASIC WORK DAY

- (d) When less than eight (8) hours are worked for convenience of employees, 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 hourly rated employees are required to report at usual starting time and place for the days work, and conditions prevent work being performed, they will be allowed a minimum of four (4) hours at the pro rata rate. If held on duty over four (4) hours, actual time so held will be paid for. This will not apply to employees notified in advance of usual starting time.”

The facts are basically undisputed. At the relevant time, Gang 9049 was a production gang working compressed halves in the vicinity of Cedar Rapids, Iowa, with assigned work of building track panels or installing insulated joints. On each of the claim dates, based upon the weather forecast and conditions at 5:00 A.M., Gang 9049 Manager Haskell determined that it was unsafe for the employees to work due to horrible driving conditions and the fact that travel was not advised by the Iowa Highway Patrol. When gang members reported to the designated meeting place, Haskell sent them home with four hours of compensation (referred to as “4 and go”). This claim takes issue with such determination in light of (1) the actual weather conditions on each of the claim dates (as established by documentation) not being outside the normal range for the area in winter (2) the fact that all other gangs in the area were permitted to work full shifts and overtime (3) the fact that the Gang’s Foreman was permitted to work full days and (4) that many of the Claimants drove to work over the same roads that would be traveled to the work site without any problems, and were permitted to drive home the same way. One of the Claimants submitted a detailed statement setting forth the actual weather

conditions on each of the claim dates, the circumstances going on with work in the area, and his opinion that if weather forecasts were the basis for not permitting employees to work then the Gang would be off 90 percent of the time during the winter months. No documentation was submitted concerning the position of the Iowa Highway Patrol on these dates.

The Organization argues that all of the evidence it presented with respect to the actual weather, the work performed by other gangs and Foremen, and driving conditions was unrefuted on the property and must be accepted as fact, citing Third Division Award 32089. It notes that the Carrier presented no documentation to support the argument that there were horrible driving conditions or what the Iowa State Highway Patrol said, and the Manager's email is hearsay with respect to those allegations, and is insufficient to support its affirmative defense, relying on Third Division Award 17051. The Organization contends that the weather was not bad enough to postpone work for the entire gang on all of those days, especially when the gang members reported to work and were ready to perform service, and they were entitled to their guaranteed work hours on each of the claim dates.

The Carrier contends that it has the contractual right to work employees less than eight hours per day due to inclement weather, and that it did so in this case and complied with the provisions of the Agreement with respect to pay on those occasions. It submits that the weather reports show snow, freezing rain and extremely cold temperatures, people were advised against travel on the roads, and this gang had to travel a distance by bus to get to the work site, all of which support the Manager's good faith judgment to put the safety of his employees before deadlines and schedules for his projects, a decision that does not benefit him. The Carrier argues that its decisions to protect the safety of its employees during inclement weather have been upheld for years, and the Manager cannot be faulted for relying on current as well as forecasted conditions in determining it was unsafe for his employees to work, relying on Third Division Awards 33481 and 35958. It asserts that the decisions made by other Managers on the same days are not relevant to the bona fides of Manager Haskell's determination that there was inclement weather affecting employee safety. The Carrier asserts that the Organization failed to meet its burden of proving the alleged Rule violations, citing Third Division Awards 12821, 26257 and 31930.

A careful review of the record convinces the Board that the Organization met its burden of proving a violation of the established working hours in Rules 27 and 28

by the Carrier not providing a full shift of work to all members of Gang 9049 on each of the claim dates. There is evidence in the record supporting the fact that there were winter conditions with some snow, wind and/or very cold temperatures on each of the days in dispute, and a statement from the Manager as to why he did not allow the gang members to work - "safety of the men & horrible driving conditions were the reasons for the "show & go." However, in light of the fact that there was no proof from the Iowa State Highway Patrol supporting the assertion that travel was not advised, a large part of the reason why the Carrier felt it unsafe was because the gang had to travel in a bus to the work site, the employees came to work (some driving over the same hard top roadway that would have been traveled by the gang) and were not called before traveling, other gangs in the area were permitted to work, and the gang's Foreman worked his full schedule and allegedly drove to various work sites on those dates, we find that the Organization effectively rebutted the Carrier's inclement weather defense in this case.

If, as the Carrier argues, the Manager is entitled to rely upon forecasted weather conditions in making his safety assessment, regardless of whether they come to fruition, the record should contain evidence of those forecasts. The only record evidence is of the actual weather, and it reveals that the claim dates fell within the average for weather conditions in that location at that time of year. In fact, the written Claimant statement admits that there was a severe storm that started later in the afternoon on February 17 and continued through February 18, making clear that the gang was not taking issue with the Manager's decision not to have them work on that date, and was admitting inclement weather. Unlike the situation in Third Division Award 33481 relied upon by the Carrier, there were no discussions in this case with the Foreman and gang members about any safety concerns prior to deciding to send the gang home on the claim dates, and no evidence that any employee actually raised a safety issue about working on these days. While we understand and commend the Manager for putting safety before production, acknowledge his entitlement to rely upon weather forecasts, and do not want to second guess the validity of his exercise of discretion after-the-fact, we are unable to find any evidence in this record that would rise to the level of inclement weather outside of the norm expected in winter time in Iowa to justify the decision to not permit the gang to perform their full schedule of work on the claim dates. Accordingly, the claim is sustained.

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 10th day of March 2011.