

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41647
Docket No. MW-41624
13-3-NRAB-00003-110271**

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 (former Missouri
(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 furnish all employees assigned as machine operators on the Southern District and Texas District tie gangs such general tools as are necessary to perform their work and instead required said machine operators to provide their own tools beginning with the start up of these tie gangs for the 2010 production season (System File UP-2213-DA10/1533793 MPR).**
- (2) As a consequence of the violations referred to in Part (1) above, beginning with the start up of the Southern District and Texas District tie gangs in January 2010 and continuing until the violations are corrected:**
 - (a) ‘*** each Machine Operator assigned to the Southern District or Texas District Tie Gang shall be allowed \$50.00 per week for each week that the Carrier fails to provide these employees with the general tools necessary to perform their work. ***’ and**

- (b) “. . . each Machine Operator assigned to the Southern District or Texas District Tie Gangs during the 2010 production season shall be allowed: (1) one hour of pay at their respective time and one-half rates for time spent in advance of each workday handling and transporting their personal tools between their lodging site and work site; (2) one hour of pay at their time and one-half rates for each workday for making their personal tools available to the Carrier throughout the day for the purpose of adjusting and repairing the Carrier’s equipment and (3) one hour of pay at their respective time and one-half rates for time spent at the close of each workday for time spent handling, transporting and securing their personal tools for the benefit of the Carrier. ***”

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 claim involves the interpretation of Rule 48, which provides:

“Rule 48. The Carrier will furnish the employees such general tools as are necessary to perform their work.”

It seeks compensation for all Southern and Texas District Tie Gang Machine Operators based upon their having to provide their own tools commencing with the

2010 work season. The dispute was initially raised by General Chairman Albers to Labor Relations Director Naro in a letter dated January 27, 2010 as a result of employees being required to sign and agree to a document entitled "2010 Tie South Machine Operator Responsibilities" which contained the requirement that Machine Operators (MO) "have . . . the proper tools daily to maintain the equipment. Special tools will be provided by the company," and MO's being told that if they refused to sign and comply, they would be disqualified. Absent agreement with the interpretation of Rule 48 with respect to small tools needed to make running repairs - such as wrenches, pliers and screwdrivers - the claims process was initiated.

During the correspondence on the property, the parties submitted different written statements and emails pertaining to the historic practice with respect to the furnishing of these types of tools by MO's on the Missouri Pacific (MP) property and elsewhere within the Union Pacific (UP) system, as well as commonly by carriers across the country, and prior cases relied upon as precedent to support their respective positions. Twelve employee statements indicate that, during specific time periods on different gangs, certain Managers provided tool boxes with necessary tools to be signed for by employees and kept on machines, and that these boxes, along with including wrenches, screwdrivers and hammers, also contained hacksaws, punches and chisels. Email correspondence from Managers as well as Labor Relations, spanning the time period from the mid-1970's, confirm the practice of having MO's furnish their own tools to make running repairs, of the type that were "customarily furnished by skilled tradesmen," and that the "general tools" language in Rule 48 applied to specialized tools and equipment necessary to make repairs, such as spike mauls, track jacks, shovels, etc.

The Organization argues that the plain language of Rule 48 is clear and unambiguous, mandates Carrier to furnish general tools that are necessary to perform the MO's work, which would include the tools needed to make running repairs, which is part of their assignment. Thus, it asserts, external evidence is irrelevant, citing Fourth Division Award 3442 and Third Division Award 24306. The Organization contends that, should the language be found to be ambiguous, the bargaining history supports its position, because the tool language in the MP 1975 Agreement, as in all predecessor Agreements, was modified to delete the exception language, which stated "except such tools as are customarily furnished by skilled workmen." While admitting that such exception applied to the Work Equipment

Mechanics (WEM) and that there was a 1985 Agreement between the parties that the Carrier would begin purchasing all personal required tools for WEM's who previously provided the tools of their trade, which was memorialized in the 2000 Agreement. It notes that Rule 58 of the 2000 Agreement states that all prior practices and working conditions in conflict with the terms of the Agreement are superseded by its terms. The Organization asserts that under the current language, no employee needs to furnish his own tools, because no additional exception to the clear language can be implied.

While contending that past practice is also irrelevant, the Organization maintains that the evidence submitted by employees with personal knowledge supports its position that tool kits, including screwdrivers, pliers and wrenches that are needed for running repairs, were provided to them by supervision and kept on the machines, and undermines the contrary unsigned emails of some Managers and Labor Relations officials that MO's were required to provide their own such tools. It also relies upon a January 2005 response by Director of Labor Relations Hanquist to a complaint submitted by former General Chairman Sanchez, concerning an email from Manager Lemmerman, wherein he lists a number of tools he wanted to request MO's to provide, as an admission against interest, calling the Lemmerman document "one man's dream list" and informing the Organization to "throw it away."

Finally, the Organization asserts that the Carrier's defenses are without merit, pointing out that the Awards relied upon do not support their position, its failure to name the Claimants does not undermine the claim, because they can be easily identified through Carrier records, and that its failure to cite the overtime Rule is not procedurally objectionable, because the remedy clearly requested payment at the overtime rate, and the Carrier was not misled by its reliance upon only the main Rule in dispute. The Organization argues that its remedy request is not a penalty, because it is rationally based upon both the time spent transporting personal tools, and their use for the Carrier's benefit. It relies upon Third Division Awards 40551, 36942, 29578, 24833, 22388, and 13974 in support of these contentions.

The Carrier first contends that the claim is procedurally defective based upon its vagueness, in not naming any Claimants, citing Third Division Award 28596, as

well as the fact that the remedy sought is excessive, unwarranted, and represents an attempt to obtain a penalty payment, which the Board is not empowered to grant, relying on Public Law Board No. 5546, Cases 8-12.

The Carrier next argues that the "general tools" language in Rule 48 is ambiguous, and that its interpretation must take into account that on an industry-wide basis, such clauses historically and customarily exclude tools of skilled workmen, citing Third Division Awards 31082 and 26290. It also points to the evidence of its past practice establishing that the type of tools in issue - screwdrivers, pliers and wrenches - used by MO's to make running repairs, have historically been provided by employees throughout its extensive territory. The Carrier notes that the tools language is based on a National Rule applying to all Carriers and Organizations, and indicating that UP General Chairman Morrow recognized this practice on the UP territory and never protested it. It asserts that the fact that some of its 65 Track Managers may have provided tools does not prove a system-wide practice on the property or undermine the consistent position of Labor Relations with respect to the interpretation of Rule 48 and the requirement that MO's provide the tools customary for their skill in making running repairs.

The Carrier points to Third Division Award 40245 to show that the Organization was aware that MO's brought their own tools on this property, because it filed a claim for reimbursement of an MO's personal tools when they were stolen from a Carrier vehicle, which was unsuccessful based upon the finding that such tools were not covered by Rule 48. The Carrier cites the following precedent in support of its argument that the Organization failed to meet its burden of proof in this case: Third Division Awards 26033, 27851 and 27895. It contends that, at best, there is an irreconcilable dispute of fact requiring that the claim be dismissed, relying on Third Division Awards 26478, 33895, 36977 and 37204.

Initially, the Board finds that the claim is not procedurally defective as a result of the Organization's failure to name specific Claimants, because it clearly identifies their positions - all MO's on the Southern District and Texas District tie gangs commencing with the 2010 work season - and the Carrier maintains records that could be consulted to coordinate names with positions. Thus, the Board does not accept that the claim is too vague or that the Claimants' identities cannot be readily ascertained. See, Special Board of Adjustment No. 1100, Award 1 and Third

Division Award 29578. Additionally, without expressing an opinion about the validity of the remedy requested, we do not believe that requesting such remedy would invalidate the claim itself, or that it is a penalty payment, per se, that is clearly unrelated to any rational argument about upholding the validity of the Agreement.

A careful review of the record convinces the Board that the language of Rule 48 is not clear on its face, and that it is ambiguous with respect to the phrase "general tools as are necessary to perform their work," because that terminology may have a particular meaning in this industry which is susceptible to differing interpretations depending upon what is considered to be included in the nature of the work of MO's. The Carrier acknowledges that it has the responsibility to furnish specialized tools and equipment necessary for the performance of the maintenance of equipment by MO's, and it is only claiming that the tools common to the performance of the skills of the MO's with respect to making running repairs - e.g. screwdrivers, wrenches and pliers - have been the responsibility of the employees to provide over a long duration and a large territory.

In determining the intention of the parties in agreeing to the language contained in Rule 48, a review of the bargaining history is helpful, but not determinative. A reading of the change in language in Rule 48 between the 1975 and 2000 MP Agreements, would tend to support the Organization's position that the elimination of the exception for the provision of furnishing tools customarily furnished by skilled workmen, in conjunction with the "zipper clause" found in Rule 58, did away with any prior practice of employees furnishing their own tools. However, both parties agreed that the exception language found in the 1975 and predecessor Agreements applied only to the category of WEM's, and that the 1985 Agreement to have the Carrier provide all such tools to WEM's was the reason for the change in the language to Rule 48 eliminating such exception. Because there is no contention that the prior exception language applied to MO's, or that its elimination in the 2000 Agreement was meant to change whatever the prior practice had been with respect to MO's furnishing their own hand tools, the Board is unable to conclude that such "practice" is inconsistent with the Agreement and has been superseded by Rule 48 in conjunction with the terms of Rule 58.

With respect to the evidence of past practice, the Carrier agrees that some managers may have provided these hand tools in conjunction with tool kits containing other more specialized tools and equipment used with respect to maintaining particular machines, as set forth in the statement of the employees submitted by the Organization. The employee statements that have some specificity confirm that what was supplied in the tool kits (primarily by one or two named managers) also included such items as tire gauges, hack saws, punches and chisels, along with various wrenches, screwdrivers, hammers and sockets. The Board understands the record to affirm that MO's were not expected to supply items such as hack saws, punches, chisels and tire gauges, and that these were to be provided by the Carrier. In fact, the emails of managers and Labor Relations personnel, as well as the correspondence on the property, confirm that what was required of MO's was what was necessary to make running repairs - screwdrivers, wrenches, pliers - but not tools such as claw bars, sledge hammers, spike mauls, spike lifters and locks, which were provided by the Carrier. No employee stated that they were not requested to provide their own hand tools for making running repairs; the statements deal primarily with static repairs. The state of the record convinces the Board that the Organization failed to adequately establish a binding past practice that would support its interpretation of the intention of the parties in agreeing to the "general tools" language in Rule 48.

The parties argued the applicability of Third Division Award 40245 to this dispute on the property. That case dealt with a 2005 claim by the Organization under Rule 48 seeking reimbursement for the expense of replacing "required tools" of an MO on the MP property that were stolen from a Carrier vehicle. In denying the claim, the Board noted that the tools in dispute were the employee's "personal tools" which were not covered under Rule 48, and that the claim sought payment for stolen personal property, and did not allege that the Carrier failed to supply the necessary tools under Rule 48. The Board notes that Award 40245 does not interpret the "general tools" language of Rule 48, as we are called upon to do in the instant case, but does point out that, at least with respect to this MO, the Organization was aware that he was supplying his own personal tools and chose not to contest the Carrier's failure to furnish him the necessary tools under its Rule 48 obligation. While this single instance does not amount to acquiescence, it does undermine the Organization's assertion of a past practice of the Carrier furnishing such tools to its MO's on this property. We are unable to accept the Organization's

reliance on the January 2005 email from Hanquist as an “admission against interest,” because the list that was forwarded to him contained some items that the Carrier does not dispute it has an obligation to provide, and was not limited to the hand tools necessary to make running repairs that are the subject of the instant claim.

Based upon all of these circumstances, the Board concludes that the Organization failed to sustain its burden of proving that the Carrier violated Rule 48 by requiring MO’s on the Southern and Texas District tie gangs during the 2010 work season to provide their own personal hand tools - screwdrivers, pliers, wrenches - necessary for making running repairs. This finding does not relieve the Carrier of its Rule 48 obligation to provide the bulk of the tools used by MO’s to perform stationery maintenance and repairs, as well as any tools necessary for performance of their duties not customarily or historically considered to be those hand tools maintained by skilled workman in the normal course.

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 April 2013.