

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42473
Docket No. MW-42059
16-3-NRAB-00003-120430**

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff 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 improperly changed the starting times for Surfacing Gang 9711 employes D. Fitch, N. Dial, C. Kurkendall, C. Carpenter, D. Mueller, J. Lueddecke, T. Hall, G. Squires, W. Williford, J. Artherton, E. Litters, J. Jones, C. Mayfield, K. Redus and J. Kelley and when it failed and refused to properly compensate said employes for their service on June 27 and 28, 2011 (System File UP711BT11/1558547 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants D. Fitch, N. Dial, C. Kurkendall, C. Carpenter, D. Mueller, J. Lueddecke, T. Hall, G. Squires, and W. Williford shall now each be compensated for a total of sixteen (16) hours at their respective straight time rates of pay and for eight (8) hours at their respective time and one-half rates of pay and Claimants J. Artherton, E. Litters, J. Jones, C. Mayfield, K. Redus and J. Kelley shall now each be compensated for a total of twenty-six (26) hours at their respective time and one-half 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 July 25, 2011, the Organization filed a claim with the Carrier alleging that on June 27-28, 2011, Surfacing Gang 9711 was tamping track in an attempt to keep it above flood waters. On these dates, the Organization asserts, the Carrier split Gang 9711 and had part of the gang work from the hours of 6:00 A.M. to 8:00 P.M. and the remaining members, from the hours of 6:00 P.M. to 7:00 A.M. The regular assigned hours of Gang 9711, according to the claim letter, is from 7:00 A.M. to 5:00 P.M. on a 4-10 workweek Monday through Thursday. The Carrier did not pay overtime for the hours worked before 7:00 A.M. and after 5:00, P.M. the Organization states, and therefore nine of the Claimants (as named in the letter) who worked the hours 6:00 A.M. to 8:00 P.M. are entitled to eight hours' straight time and four hours' overtime at time and a half for each of the two dates for a total of 16 hours' straight time and four hours' overtime each. The remaining six claimants (who are also named in the letter), the claim letter asserts, worked from the hours of 6:00 P.M. to 7:00 A.M. and are entitled to 13 hours of overtime at a rate of time and a half for each day or a total of 26 hours of overtime pay each. Rules 3, 26, 29, 32, and the Scope Rule were alleged to have been violated.

The Carrier replied by letter dated September 19, 2011. It acknowledged that it "did utilize some employees assigned to gang 9711 to work outside of their normally scheduled hours when it required some operators to work during the night." It "finds support" for its action, it stated, in Rule 32 of the Agreement:

"STARTING TIME

Rule 32. Regular assignments, except as otherwise provided, will have designated headquarters and will have a fixed starting time. The starting time will not be changed without at least thirty-six (36) hours' notice to the employees affected, except as otherwise agreed between the employees and local supervisory officer based on actual service requirements."

The Carrier attached to its letter a statement by the Manager of Track Maintenance, which stated as follows:

“Gang 9711 was working on the Fall city sub on the weekend of June 25th. We had traveled and was tamping track trying to raise the track ahead of the floods. I needed to split the gang so we could run the machines 24 hours. Cat tamper operators are often few and far between, many other qualified operators are already assigned to gangs working in other places on different schedules. I divided the operators up, to cover both of my cat tampers, the stabilizer, and both ballast plows. I don’t recall what day I split the gang. I know that the day shift was paid correctly. If they came in at 06:00, they were paid the one hour over time before their regular starting time, and went back on over time when their regular time ended at 17:00. These guys see their 660’s every pay period, and they keep track of all their over time. I can’t believe they would have let that get by them when they looked at their 660’s. No one said a word to me about unpaid over time or the shift change, and this included the time keeper Chris Mayfield. I will have to do more checking on the day and time I decided to split the gang, but I don’t understand how this came about after the time was put in, Checked by the operators, approved, and these guys were paid.”

In its September 19, 2011, letter, the Carrier asserted that the Manager of Track Maintenance’s statement “provides knowledge that an agreement had been made with the employees that worked the night hours and at the time there was no dispute.” The Carrier denied the claim.

The Organization appealed the denial by letter dated November 4, 2011. Addressing the Carrier’s argument based on Rule 32, the Organization asserted, “Rule 32 allows for the starting time of an entire gang to be changed with a thirty-six (36) hour notice. Nowhere does it allow for a gang to be broken up in two different starting times.” Further, the Organization argued, “Rule 29 (h) states: ‘Employees will not be required to suspend work during regular assigned workday period for the purpose of absorbing overtime.’” The Organization argued that “when the Carrier changed only part of the gang’s starting time to 6 p.m. it is obvious it was done to keep from paying overtime.”

The Manager of Track Maintenance's statement, the Organization asserted in its November 4 letter, "shows that changing the time was in violation of the Agreement unless there was an agreement with the men making the change." The Organization requested "some sort of documentation to validate [the Manager of Track Maintenance's] so called agreement with the men other than his word. We would like to see some kind of statement from the men that says they did agree to this move." The Organization suggested that "[t]here is none because the men didn't voluntarily change." Support for its position, the Organization contended, was found in the Manager of Track Maintenance's statement, "I will have to do more checking on the day and time that I decided to split the gang."

The Carrier replied to the appeal by letter dated December 16, 2011. As for the employees on the gang who worked from 6:00 A.M. to 8:00 P.M., the Carrier asserted, these employees were paid ten hours of straight time and four hours of overtime for each of the claim dates, which is in excess of the claim for the employees who worked on the day shift. With regard to the employees on Gang 9711 who worked the night shift on the two claim dates, the Carrier asserted that Rule 32 states that "Regular assignments" will have a fixed starting time and does not say that "Gangs" will have a fixed starting time. "There is no requirement in the rule for an entire gang to have the same starting time," the Carrier contended. "So long as each regular assignment on the gang has a fixed starting time," the Carrier argued, "the Carrier has complied with the language of the agreement." In the case at hand, the Carrier asserted, all assignments did have a fixed starting time, and therefore no violation occurred.

A second argument made by the Carrier was that Rule 32 permits the Carrier to change the starting time of a regular assignment so long as 36 hours' notice is provided. The Carrier contended that the burden of proof is on the Organization with regard to the notice issue, and the Organization had failed to demonstrate that the Claimants were not given 36 hours' notice of the change in starting time. This being so, the Carrier maintained, the Claimants who worked the night shift were entitled to be paid three hours' overtime each for June 27 and 28 and ten hours' straight time. In fact, the Carrier asserted, they were paid ten hours of straight time and four hours of overtime. Even if Claimants were not given proper notice for June 27, there can be no doubt, according to the Carrier, that they did have proper notice for the shift worked on June 28.

A third argument made by the Carrier was that all Claimants had the opportunity to view their 660 form, which shows their hours worked and pay for

each week. The fact that they did not object to the time reported for them, the Carrier contended, shows that they must have agreed with the hours as presented. Fourth, the Carrier argued, the Organization's contention that the Carrier altered the working hours of the gang to avoid paying overtime is not true. There was flooding in the area, the Carrier noted, and the work that was taking place was tamping the track to raise it ahead of the flood waters. This was work, the Carrier asserted, that had to be performed 24 hours a day to avoid service interruptions. The Carrier denied the claim in its entirety.

On April 6, 2012, the Organization wrote the Carrier confirming their discussion of the claim in conference on February 14, 2012, without resolution. In its letter the Organization asserted that during the February 14 claims conference the Organization informed the Carrier that it interpreted the Carrier's statement in its December 16, 2011, appeal denial letter that "it is possible the Claimants were given 36 hour notice" as an admission that it was possible that Gang 9711 was not given proper notice. The Organization stated in its letter that "we as an organization challenge that the Carrier has provided nothing that would show that any notice was given at all let alone proper." The Organization also took issue with the assertion in the Carrier's letter of September 19, 2011, that the Manager of Track Maintenance's statement "provides knowledge that an agreement had been made with the employees that worked the night hours." "This is not true," the Organization declared, "and nothing in [the Manager of Track Maintenance's] statement affirms [the Carrier's] statement." The Organization argued that "[t]he Carrier has the burden to show proof that they served notice and it has yet to show that they did."

This case turns on an interpretation of Rule 32. The first sentence of Rule 32 requires that regular assignments "have a fixed starting time." The term "fixed" in the context used means "securely placed" or "not subject to change or fluctuation." Merriam-Webster On-Line Dictionary. The term denotes a degree of permanence. The second sentence of Rule 32 states, "The starting time will not be changed without at least thirty-six (36) hours' notice to the employees affected, except as otherwise agreed between the employees and local supervisory officer based on actual service requirements." The second sentence, in referring to "[t]he starting time," relates back to the starting time referred to in the previous sentence, namely a "fixed" starting time. The second permits changing the fixed starting time with 36 hours' notice.

Contrary to the Carrier's position, the change in starting time that occurred in this case was not a change in the fixed starting time. It was a temporary change for two days due to flooding after which the employees were put back on their normal or fixed schedule. Rule 32 did not apply to the present situation where there was not a change in the fixed starting time but only a temporary change of schedule. That situation is very similar to the facts in Third Division Award 3784, cited in the Organization's submission. In that case, the applicable rule was also Rule 32, which stated as follows:

"RULE 32. CHANGING STARTING TIME

Regular assignments will have a fixed starting time and the regular starting time will not be changed without at least thirty-six (36) hours notice to the employees affected, except as otherwise arranged between the employees and their immediate supervisor."

In that case a painter, whose regular hours were 8:00 A.M. to 5:00 P.M., was given more than 36 hours' notice that for a three-day period his hours were being changed to 5:00 P.M. to 1:00 A.M. The reason for the change in hours was service-connected in that the work involved was to paint an office, and it would not have been practicable to do the painting when the office employees were working there.

The Board rejected the Carrier's contention that because the painter was given 36 hours' notice there was no violation of Rule 32. The Board stated:

"This rule only permits a change in regular starting time on the giving of 36 hours notice. It clearly does not anticipate that the crew can be required to do emergency work or night work for the convenience of the Carrier for two or three days under the claim that the regular starting time has been changed by giving 36 hours notice.

Here it is very evident that there was no intention to change the starting time permanently or to make the regular starting time of these men 5:00 P.M. The starting time was changed only for this one job for three days for the convenience of the Carrier. We see no reason why the Carrier should be permitted to so work these men at night for its convenience and to prevent interference with its day-time office workers and not pay the members of this crew overtime."

The same reasoning is involved in the present case. Rule 32 deals with a change in employees fixed starting time, which means a change in starting time which will have some aspect of permanence to it. It is not concerned with the kind of situation here involved where the change was clearly temporary in nature and continued for only two days.

With regard to remedy, the evidence adduced by the Carrier seemed to establish that the employees permitted to work the day shift were paid correctly. The employees who worked on the night shift, however, are entitled to be paid as if their fixed starting time had not been changed – which, in fact, was the case.

AWARD

Claim sustained in accordance with the Findings.

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 28th day of November 2016.