

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42973
Docket No. 42769
18-3-NRAB-00003-140468**

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.

(Brotherhood of Maintenance of Way Employes 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 members of Gang TP-09 to work their basic ten (10) hour days on May 9-10 and May 30-31, 2013 and when the Carrier called Gang TP-09 in at 4:00 P.M. on May 16, 2013 and failed to compensate them for being called in prior to their regular starting time (System File C-13-P018-26/10-13-0480 BNR).

**(2) As a consequence of the violation referred to in Part (1) above:
“... The Claimants who are all members of TP 09 and assigned at the time of the claim dates should have been afforded their full 10 hours straight time pay on each of the days they were sent home and 4.5 hours overtime pay on the day they were called in early for a briefing but were not paid.**

Due to the stated rules violations I am requesting that each of the Claimants be paid 12.5 hours straight time and 4.5 hours over time at their appropriate rate of pay as settlement of this claim.”

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 Claimants have established and hold seniority in various classes and sub-departments within the Maintenance of Way and Structures Department. On the dates relevant to this dispute, they were all regularly assigned and working various positions on Gang TP-09 with regularly assigned work hours from 2030 hours until 630 hours the next day.

This claim involves whether the Claimants were improperly denied their basic work day and whether they were denied overtime pay for reporting early. The basic work day claims occurred on May 9-10, 2013, and May 30-31, 2013, when the Carrier sent the gang home early based on its determination that there was inclement weather. The overtime claim occurred on May 16, 2013, when the gang was called in 4 hours before the start of their shift and told they would not be working that day.

The Organization argues that the basic work day claim must be sustained on the basis of Rules 24 and 25. Rule 25 states, in relevant part:

RULE 25. BASIC DAY

A. Except as otherwise provided in this Agreement, eight (8) hours exclusive of the meal period shall constitute a day.

...

C. Except as provided in this rule, regular established working hours will not be reduced below eight (8) hours per day.

D. When less than eight (8) hours are worked for 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.

Rule 25 requires that work hours cannot be reduced below 8 hours per day, “[e]xcept as provided by this rule.” The gang here was working a 10-hour day, as provided under rule 24B, so when these two Rules are interpreted together, the Carrier was not permitted to reduce their work hours below 10 hours except as provided under Rule 25D. One of the exceptions to reducing work hours is for “inclement weather.”

Decisions to reduce employees’ working hours because of inclement weather are difficult and consequential. There are financial and labor relations impacts for all concerned, and they require a balancing of the need to accomplish important work with vital safety concerns. The Carrier is given wide latitude in making these decisions, unless the Organization can establish that the Carrier abused its discretion, or acted in bad faith or with an improper motive. See Public Law Board 4402, Award 26; Third Division Awards 32877, 35006, 36724, and 40387.

It is undisputed that the Carrier stopped work and reduced the work day for Gang TP-09 on May 9-10, 2013, claiming inclement weather. The Carrier submits that there was a forecast of light to heavy rains in the work area after the gang had experienced bad weather the night before. The Organization submitted a statement signed by 39 gang members. In that statement, the employees attested to working in a thunderstorm the evening before, but that on the day in question there was no precipitation around the gang and there were no weather issues. As evidence of the Carrier’s actual motive, the statement alleges that that the Carrier was “solely waiting on trains, and a train day should be declared.”

As to the Organization’s contention that there was no precipitation on the day in question, the Carrier maintains that it based its decision on a weather

forecast, coupled with the undisputed fact that there was bad weather the night before. Certainly, weather forecasts are often wrong, but the Carrier cannot afford to ignore them, and it is reasonable, and not an indication of bad faith or improper motive, to base a decision on a forecast, regardless of the accuracy of that forecast.

If the Organization could prove that the *sole* motive for the Carrier stopping work was that the gangs would have been waiting on trains, that evidence would establish an improper motive for use of the inclement weather exception. The Organization did not prove such an improper motive. As noted above, the Carrier had reasonable grounds to stop work based on a forecast of bad weather, so, even if waiting on trains was a reason, it was not the sole reason. As to the Organization's contention that the Carrier's actual motive was waiting on trains, the statement signed by 39 gang members, without anything else to support it, is simply their opinion. It might have been an accurate opinion, but to prevail, this claim must be supported by evidence. Thus, the Organization did not provide sufficient evidence to prove that the Carrier was using a claim of inclement weather to hide an improper motive.

It is also undisputed that the Carrier stopped work and reduced the work day for Gang TP-09 on May 30-31, 2013, claiming inclement weather. The Carrier submits that on May 30-31, 2013, it made the decision to stop work based on dangerous weather conditions that included heavy rains, hail and lightning in the Purcell, Oklahoma, area. The Organization submitted a statement signed by employee L. Milligan, stating that the bad weather around Purcell occurred hours before the stoppage. Employee L. Milligan further stated that the bad weather had held up train traffic, and a train day should have been declared.

As discussed above, if the Organization could prove that the *sole* motive for the Carrier stopping work was that the gangs would have been waiting on trains, that evidence would establish an improper motive for use of the inclement weather exception. The Organization did not prove such an improper motive. The Carrier had reasonable grounds to stop work based on dangerous weather conditions that included heavy rains, hail and lightning in the Purcell, Oklahoma, area. Thus, even if waiting on trains was a reason, it was not the sole reason. As to the Organization's contention that the Carrier's actual motive was waiting on trains, the statement signed by employee L. Milligan, without anything else to support it, is simply his opinion. It might have been an accurate opinion, but to prevail, this

claim must be supported by evidence. Thus, the Organization's did not provide sufficient evidence to prove that the Carrier was using a claim of inclement weather to hide an improper motive.

This third claim here involves whether the Claimants were denied overtime pay for reporting to work early on May 16, 2013. The Organization claims that the Claimants were required to report for a briefing 4.5 hours prior to their regular starting time. The Organization argues that this claim must be sustained on the basis of Rule 29 Overtime and Rule 30 Calls. Rule 29 requires that overtime be paid on an actual minute basis or time worked preceding or following and continuous to a regularly assigned 8- (or in this case 10-) hour work period. Rule 30A states:

“Except as otherwise provided in Rules 24 and 29, employees notified or called to perform work outside of and not continuous with the regular work period, will be allowed a minimum of two (2) hours and forty (40) minutes at time and one-half rate for two (2) hours and forty (40) minutes work or less, and if held on duty in excess of two (2) hours and forty (40) minutes, time and one-half will be allowed on the minute basis.”

The evidence provided by the Organization in support of this claim is a statement signed by 37 gang members. In that statement, the members attest that “[t]he Road Master Otis Frazier notified the gang and called a briefing at 16:00 p.m. that day to notify the gang that we would not be working. Our assigned briefing time was 20:30 p.m.” The Carrier asserts that on May 16, 2013, no work was performed that day, but the gang was paid a full 10 hours for the day because it was a no-window day driven by traffic volumes. Further, the Carrier notes that because this was the last day of scheduled work for the week, it made efforts to notify its employees at the hotel so they could travel home early if that is what they chose to do, and that employees did not report to the normal briefing location.

Rule 30A requires that employees be paid when they are called in to “perform work.” In this case, they were not called in to perform work. In what appears to have been done for the convenience of the Claimants, they were called in to be notified they could go home early if they wished and still be paid for the day. This was not a violation of the Agreement.

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 14th day of February 2018.