AWARD NO. 26
CASE NO. 26

PUBLIC LAW BOARD NO. 4402

PARTIES TO DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
) BURLINGTON NORTHERN RAILROAD COMPANY

AWARD

STATEMENT OF CLAIM:

"(1) The Agreement was violated when the Carrier failed and refused to allow the employes assigned to Regional Tie Gang No. 1 three (3) hours of pay for June 14, 1985 (System File GMWA 85-9-19D)

(2) Each employe assigned to Tie Gang No. 1 on June 14, 1985, shall be allowed three (3) hours of pay at his respective straight time rate."

OPINION OF BOARD:

Although the parties disagree concerning the precise timing of the incident (the Carrier asserts that the employees were notified by Foreman K. C. Chantry between 6:40 a.m. and 6:45 a.m. while the Organization asserts that notification by Chantry pursuant to instruction from Roadmaster B. Chatten was not made in some instances until as late as 6:58 a.m.) and further aside from the factual dispute discussed below arising as a result of subsequently submitted statements, the parties' initial handling of the Claim shows essential agreement that shortly before the scheduled starting time of 7:00 a.m. on June 14, 1985 when the employees of Chicago Region Tie Gang #1 were prepared to be transported to their daily work location and while they were dressed for work, had their tools, rain and safety gear ready, the employees were notified by the Carrier at their usual assembly point (a dining car) that the rain was sufficiently severe to prevent work that day and Claimants were not paid a minimum three hours of pay for that date.

Rule 25E states:

"E. When hourly rated employees are required to report at usual starting time and place for the day's work and conditions prevent

> work being performed, 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. This will not apply to employees notified in advance of usual starting time. Except in an emergency and when required to patrol track during heavy rains, employees reporting will not be required to work in the rain for the sole purpose of receiving payment under this Section."

The Organization's argument that since the employees were "required to report" and were not notified to the contrary before they left their bunk cars and since the employees were dressed for work and reported to work at the usual gathering spot, they were therefore entitled to the three hour minimum under Rule 25E has immense initial appeal. However, close examination of Rule 25E's exception, i.e., that the minimum pay provision "will not apply to employees notified in advance of usual starting time" leads us to a different conclusion when the Rule is applied to the facts of this case. Even under the Organization's interpretation that the employees "must be notified that they will not be 'required to report'" (Organization Submission at p. 13), the clear language of the Rule specifies *when* that notification must take place in order for the Carrier not to be liable for the minimum payment under the Rule, i.e., "in advance of usual starting time." The Rule does not additionally specify *where* the employees must be when they receive that notification in order to qualify or not qualify for payment (e.g., in the bunk cars or at the assembling point).

Under either party's initial version of the facts, the employees were notified that no work would be performed due to inclement weather in advance of the usual 7:00 a.m. starting time and hence, we believe that the exception comes into operation which requires this Board to deny the Claim since upon notification prior to 7:00 a.m., the employees were no longer "required to report" within the meaning of the Rule. For us to find in favor of the Organization's position in this case would require us to ignore the clear language of the exception that notification need only be "in advance of usual starting time" and would cause us to essentially delete that language from the Rule. Our review function does not give us that authority.

We recognize that with the exception language, the Rule reads in a fashion that could lead to a defeat of the general purpose of such rules "to assure the employees some compensation for having prepared themselves for the day's work in getting to the assembling point at the usual starting time, even though there may be no work for them ...." Third Division Award 5313. However, we are satisfied that the exception language found in Rule 25E requires the result we have reached in this case. Hopefully, on days when invocation of Rule 25E becomes necessary prior to starting time, the Carrier will endeavor to give as much advance notice to the employees as possible in order to avoid the kinds of preparations that were made in this case. But, lacking any concrete evidence that the Carrier purposely delayed notification to the employees or otherwise acted in less than good faith, we must find in favor of the Carrier in this matter.

The Organization's reliance upon language found in Third Division Awards 5313, supra, and 6917, even though denial awards, lends support to its argument but does not change the outcome. First, the facts presented in those cases were different than those presently before us. Award 5313 denied a claim where notification was given one hour before starting time to employees residing in camp cars that their services would not be needed. Award 6917 denied a claim where there was a general notification to employees not to report when it was raining. Second, and most important, the rules in effect and involved in those cases, while similar to Rule 25E, did not have the specific exception language found in Rule 25E that the pay provisions will not apply to employees notified in advance of their usual starting time. Therefore, those awards cannot require a different result.

The Organization has also offered an argument concerning the existence of a past practice of payment to employees who show up and are notified prior to starting time that work cannot proceed due to inclement weather conditions. Putting aside the question of whether such a practice can be considered in light of the seemingly clear language of Rule 25E, we must find that on the basis of this record the Organization has not carried its burden of sufficiently demonstrating the existence of such a practice. Also contained in the

record are statements from Carrier officials refuting the Organization's assertions. We further note that a number of the statements submitted by the Organization do not specify whether notification was before or after the employees' starting time. We are therefore unable to conclude on the basis of this record that the evidence clearly shows the existence of such a system wide practice.

Finally, the Organization has offered evidence that some of the Claimants were notified of the rain out after 7:00 a.m. on June 14, 1985. That evidence consists of statements from three of the approximate forty two employees in the Gang dated in October 1986, almost one and one-half years after the incident arose. We find that we are unable to give sufficient weight to those subsequently submitted statements to require a different result. First, the Carrier has disputed the assertions that notification was given after 7:00 a.m. and, as earlier noted, at the initial Claim handling stage there did not appear to be a contest to the basic fact that notification was before 7:00 a.m. Second, we note that the statements were made almost one and one-half years after the incident and it is difficult to afford those statements sufficient probative weight to cause us to discredit the Carrier's assertions that notification was given before the 7:00 starting time. In sum, we cannot conclude that the Organization's burden has been met for us to find that notification occurred after 7:00 a.m.

AWARD:

Claim denied.

Edwin H. Benn, Chairman
and Neutral Member

E. J. Kallinen
Carrier Member

P. S. Swanson
Organization Member

Denver, Colorado
April 22, 1988