

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 4

)

) Award No. 13

)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 12, 2000

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier improperly required the employees assigned to System Curve/Welding Gangs 9018 and 9019 to suspend work at approximately 10:00 A.M. on October 13 and November 14, 15, 17 and 18, 1994, instead of allowing them to complete their scheduled eight (8) hour day as contemplated by Rule 28 (System File N-149/950174).
2. As a consequence of the violations referred to in Part (1) above, each of the members of System Curve/Welding Gangs 9018 and 9019 who were denied the right to work their eight (8) hour day, on the dates in question, shall be allowed:

... compensation for a minimum of eight (8) hours per day and forty (40) hours per week for the days of October 13, November 14, 15, 17 and 18, 1994 and a minimum of forty (40) hours for the weeks involved herein in accordance with Rules 26, 27 and 28 of our Agreement. ***

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

This claim involves five dates in 1994 when Carrier released the Claimants prior to the completion of their eight hour shifts. Carrier maintained that it acted in accordance with Rule

27(e), which provides:

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 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. Except in an emergency or when conditions fully justify, employees reporting will not be required to work in the rain for the sole purpose of receiving payment under this section.

During handling on the property, Carrier responded to the Organization with a handwritten statement from the Track Supervisor which stated:

Here are weather charts for area we were welding. Holland welders were working between Hermosa and Laramie at the time. Hermosa is MP 547.00 and Laramie is MP 565.0. Wind chill chart is also included with weather chart. We were welding alloy rail at the time of bad weather. Rules for welding rail state that 15 degrees or colder no welding.

Carrier maintained that because, on the dates in question, the wind chill was below 15 degrees, it acted properly in releasing the Claimants. The Organization responded that other gangs were working in the area. The Organization asserted that the ability to weld was dependent on the air temperature rather than the wind chill. It also maintained that the weather reports that Carrier submitted supported the Organization's position that welding could have been accomplished on the dates in question and observed that Carrier submitted no weather report for October 13.

Carrier responded that the presence of other gangs working in the area was irrelevant. Carrier further pointed out that the Organization's argument relied on weather reports for Cheyenne, Wyoming, whereas the Claimants were working at a much higher elevation, making the weather reports for Laramie, Wyoming more accurate indicators of the conditions confronting the Claimants. The Organization responded that higher elevation did not necessarily mean lower temperatures, but Carrier replied pointing out that on the days in question the temperatures for Laramie were, in fact, lower than Cheyenne.

The parties disagree over the significance of the presence of other gangs working in the area. We agree with Carrier that the presence of other gangs is not relevant. There is no evidence that the other gangs were engaged in the same kind of work as the Claimants, i.e. welding that could not be performed below 15 degrees. See Third Division Award No. 30443.

Carrier contends that the Organization had the burden to prove that the welding work was capable of being performed on the dates in question. We do not agree. Rule 27(c) provides, "Except as provided in this rule, regularly established working hours will not be reduced below eight (8) hours per day." Rule 27 (d) provides an exception where, "due to inclement weather

interruptions occur to regularly scheduled work period preventing eight (8) hours work . . .” Carrier is asserting that the dates in question fell within this exception. As such, Carrier is asserting an affirmative defense and it has the burden to establish it.

Carrier provided weather reports for the November dates in question. The Organization attacked this evidence on two grounds. First, it relied on weather reports for Cheyenne. However, the weather reports in evidence show that the temperatures in Laramie were significantly lower than in Cheyenne, and the Track Supervisor’s statement shows that the Claimants were working between Hermosa and Laramie.

Second, the Organization asserted that the relevant factor for the welding was the actual air temperature, rather than the wind chill. However, the Organization offered no evidence to contradict the signed statement from the Track Supervisor, which relied on wind chills. Thus, with respect to the November dates, we find that Carrier established its affirmative defense.

With respect to October 13, however, we find absolutely no evidence in the record establishing what the temperature or wind chill was. The Track Supervisor’s statement did not reflect the temperature or wind chill on October 13; it merely referred to the attached weather reports and there was no weather report provided for October 13. During handling on the property, the Organization pointed this out, but Carrier still provided no evidence of the weather on October 13, 1994. Accordingly, we find that Carrier failed to establish its defense for October 13, 1994.

Thus, we conclude that Carrier violated the Agreement when it reduced the Claimants’ hours below eight on October 13, 1994. Claimants were paid for four hours for October 13, 1994, in accordance with Rule 27(e). Therefore, the claim must be sustained, but only to the extent that Carrier must compensate each Claimant for an additional four hours at the pro rata rate that was in effect on October 13, 1994.

AWARD

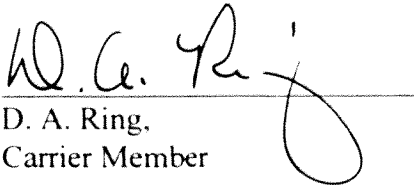
Claim sustained in accordance with the Findings.

ORDER

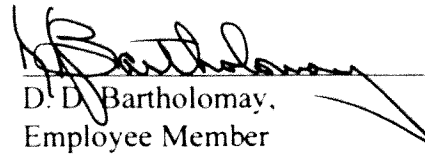
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, July 25, 2000.