

PUBLIC LAW BOARD NO. 6867

AWARD NO. 10

CASE NO. 10

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

PARTIES

TO DISPUTE:

and

UNION 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 properly compensate System Gang 9048 employees C. Roop, R. Cox, R. Kingery, C. Elmberg, R. Johnson, W. Wenninghoff, T. Arter, M. Corbin, J. Ziebarth, J. Bliley, R. McIlrath, J. Redeker, B. Hammes, J. Stott, G. Balch, G. Koski, K. Janes, T. Galvan, A. Kirchhoff, and R. Shaurette for their overtime service on April 24, 2004 (System File UPRM-9570T/1401926).

(2) As a consequence of the violation referred to in Part (1) above, Claimants C. Roop, R. Cox, R. Kingery, C. Elmberg, R. Johnson, W. Wenninghoff, T. Arter, M. Corbin, J. Ziebarth, J. Bliley, R. McIlrath, J. Redeker, B. Hammes, J. Stott, G. Balch, G. Koski, K. Janes, T. Galvan, A. Kirchhoff, and R. Shaurette shall now '*** be compensated at double their respective, applicable overtime rates of pay for the hours of overtime cited; C. A. Roop 1.5 hours, R. L. Cox 1.5 hours, R. D. Kingery 1.5 hours, C. L. Elmberg 4 hours, R. E. Johnson 1.5 hours, W. J. Wenninghoff 1.5 hours, T. J. Arter 1.5 hours, M. L. Corbin 1.5 hours, J. A. Ziebarth 1.5 hours, J. A. Bliley 1.5 hours, R. A. McIlrath 4 hours, J. R. Redeker 1.5 hours, B. T. Hammes 1.5 hours, J. D. Stott

1.5 hours, G. L. Balch 1.5 hours, G. A. Koski 1.5 hours, K. A. Janes 1.5 hours, T. J. Galvan 1.5 hours, A. S. Kirchhoff 1.5 hours, and R. D. Shaurette 4 hours."

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

This claim raises a first meal period issue for a System Gang working a compressed half that was scheduled to work predetermined overtime on April 24, 2004, the first of their rest days. The following provisions of Rule 32 - Meal Periods, are pertinent to this dispute:

(a) Where a meal period is allowed it will be between the ending of the third hour and the beginning of the sixth hour after starting work. The regular meal period will not be less than thirty (30) minutes or more than one (1) hour.

(b) if the meal period is not afforded within the time limit specified in Section (a) and is worked, the meal period will be paid for at the pro rata rate and twenty (20) minutes with pay in which to eat will be afforded at the first opportunity.

* * * * *

(e) When employees are required for overtime service, they will be accorded subsequent meal periods as specified hereinafter:

* * * * *

(2) Employees called to work overtime pursuant to Rule 35(c) will be allowed a meal period within or immediately following six (6) hours of continuous duty unless released from work and returned to their home station headquarters location, or outfit cars within said six (6) hour period. Subsequent meal periods will be granted at six (6) hour intervals, with it being understood each six (6) hour interval period would begin to toll at the end of the last meal period allowed.

* * * * *

(4) (b) In the event the employees are working under the supervision of an employee superior to the gang foreman, it will be the responsibility of the foreman to advise the supervisor when the employees on that gang are due for a meal period as prescribed by this rule, before going into penalty time.

(5) The Company will furnish meals at no cost to the employee or reimburse said employees for the cost thereof, provided, however, if an employee is called for overtime work at least two (2) hours in advance of the time required to report, it will be the employee's responsibility to carry a lunch or provide the first meal. The Company will make every effort, if possible, to provide wholesome meals and sanitary conditions for the employees during the referred to meal periods.

(6) In the event a meal period is not afforded at the designated time, the employees will be compensated at double their existing rate of pay from that time until such time as they are accorded a meal period; there will, however, be no compounding of the penalty payments provided herein.

The Organization initiated this claim on June 16, 2004 seeking penalty pay for all hours worked by System Gang 9048 members on

Saturday, April 24 after the sixth hour under the provisions of Rules 32(e)(2) and 32(e)(6), contending that they were not granted their required meal period. In its July 29, 2004 denial, Carrier noted that this was scheduled overtime, Claimants were not called to work pursuant to Rule 35(c), they were entitled to a regular assigned meal period under Rule 32(a) and not a subsequent one under Rule 32(e).

Carrier attached statements from Supervisor David Baxter and Manager Jim Mallory stating that this gang was instructed in their morning briefing to take meal periods whenever needed so as not to violate the rule, and that if they could not, to inform the foreman or supervisor and a meal will be given. Baxter stated that neither of the working foremen, Cox or Roop, advised him that the gang would be in penalty time for a meal period on the date in question. Carrier noted that Claimants sat for four hours after arriving at work waiting for transport to the job and there was sufficient opportunity for them to take their meal period during the fourth hour. Carrier asserted that even if this situation was covered by Rule 32(e), the lack of compliance with Rule 32(e)(4)(b) precludes the awarding of penalty pay.

The Organization's August 17, 2004 appeal maintains that the phrase "subsequent meal periods" in Rule 32(e) refers to a period subsequent to reporting for service and includes first meal periods within 6 hours of reporting for overtime service. The Organization noted that Claimants were governed by Rule 35(c) since that rule encompasses situations where employees are "notified" in advance that overtime is scheduled, and not Rule 32(a) since there is no regular assigned meal time on rest days. The Organization averred that what Claimants did the first four hours of their shift is irrelevant, and that the only thing that matters

is that they were not allowed a meal period. It stated that there was no evidence that meal periods were covered in the morning briefing, and requested a copy of the job briefing. The Organization asserted that Carrier's obligation to afford meal periods is not satisfied by leaving it up to employees when to take them. It notes that regardless of the foreman's responsibility to notify the supervisor, the fact remains that Claimants were not allowed a meal period.

Carrier's October 15, 2004 denial asserts that the Organization has failed to meet its burden of proving a violation, referring specifically to the statements of the Track Supervisor and Manager concerning verbal instructions given to observe meal periods and the lack of showing that Claimants were told not to take a meal period or hindered in their ability to do so. Carrier stated that the Organization failed to show that any of the Claimants were not afforded a 20 minute opportunity to eat during the first 6 hours of overtime service on April 24, 2004, or that the lack of a meal period was brought to a supervisor's attention. Carrier argued that Claimants cannot avoid the opportunity to take a meal period, fail to notify a supervisor, and then claim entitlement to penalty pay.

The record also contains Employee Work Records showing that punitive overtime has been paid on occasion, as well as the statements from Wehrli and Tanner concerning the intent of Rule 32(e) with respect to employees working compressed halves and Ring's rebuttal and assertion of the consistent application of Rule 32(e) for many years referenced in more detail in Award No. 9 of this Board.

As set forth in the correspondence on the property noted above, the Organization argues that Carrier failed to fulfill its Rule 32(e)(2) meal

period obligation on April 24, 2004, thus requiring compensation at the penalty rate set forth in Rule 32(e)(6) for all hours in excess of six worked by Claimants on that date. Carrier contends that the Organization failed to meet its burden of proving a violation of any part of Rule 32 in this case, since it did not show that Claimants were denied the opportunity to take a meal period between the end of the third and beginning of the sixth hour of work, and/or that the supervisor was advised by the foremen that the gang was due for a meal period, a necessary prerequisite for penalty pay under Rule 32(e)(4)(b). Carrier notes that in planned overtime such as this, Claimants know to bring their lunch, and are responsible for doing so for the first meal as set forth in Rule 32(e)(5). At best, Carrier argues that there is an irreconcilable dispute of fact which cannot be resolved by the Board requiring that the claim be dismissed, citing Third Division Awards 33487, 33895 and Public Law Board No. 2960, Award 154.

A careful review of the record convinces the Board that the Organization has failed to meet its burden of proving a violation of Rule 32 in this case. Regardless of whether the meal period allowance for Claimants' overtime work on April 24, 2004 is governed by Rule 32(a), requiring a 30 minute meal period between the ending of the third hour and the beginning of the sixth, or Rule 32(e)(2) relating to advance notification of overtime service, there is no dispute that Claimants were entitled to a meal period after six hours of service, which they all performed on the claim date. The area of dispute centers around whether Carrier met its contractual obligation by instructing Claimants to take their meal period to be in conformity with the rule in a situation where Claimants had the opportunity to take a meal period during their fourth hour of service, Claimants were responsible for providing their own first

meal, and the supervisor was never advised that Claimants were due for a meal period.

The record in this case contains written evidence from supervisors confirming both their verbal instruction concerning meal periods to the gang at the morning briefing and the lack of notification from the foremen that the gang was due a meal period at any time on April 24, 2004. While the Organization requested additional proof, it provided no evidence claiming that such instruction was not given or received or that supervision was notified that a meal period was due under the rule. In fact, there is no statement from any of the Claimants that they did not take a meal period during their four hour wait or within the 6 hour time period permitted, or that they were not allowed an opportunity to take the meal period to which they were entitled. Only the Organization claims that such meal period was denied. This record does not present an irreconcilable dispute of fact since mere allegations do not rise to the level of facts.

Also fatal to the Organization's claim for penalty pay is the un rebutted fact that the gang foremen did not advise the supervisor that Claimants were due for a meal period under the rule. Rule 32(e)(4)(b) makes clear that the responsibility for such notification lies with the foreman, and is a condition precedent to employees "going into penalty time." As noted by Carrier, Rule 32(e) does not permit employees to sit mutely by and allow the time for provision of a meal period to lapse without bringing to the attention of a supervisor that a meal period is due and then claim penalty pay for Carrier's failure to afford a meal period at the designated time. It would appear that this is what is being sought in this claim. Having failed to establish a violation of Rule 32, the claim must

be denied.

AWARD:

The claim is denied.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

Brant W. Hanquist

Brant W. Hanquist
Carrier Member

Don D. Bartholomay

Don D. Bartholomay
Employee Member

Dated: 8-1-07

Dated: 8-1-07