PUBLIC LAW BOARD NO. 2529

Joseph Lazar, Referee

AWARD NO. 16
CASE NO. 21

PARTIES TO DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and FORT WORTH AND DENVER RAILWAY COMPANY

STATEMENT OF CLAIM:

1. That the Carrier violated the terms of the Parties' Agreement when they released employes on Tie and Ballast Gang #1 at intervals on February 5, and 9, 1982, thus depriving them of just compensation on those dates.

2. That the Carrier shall compensate Claimant employes the difference between the amounts they were paid and eight (8) hours each at their respective pro-rata rates for the dates of February 5 and 9, 1982

FINDINGS: By reason of the Memorandum of Agreement signed November 16, 1979, and upon the whole record and all the evidence, the Board finds that the parties herein are employe and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

The facts, as stated by the Employes, are as follows "On Friday, February 5, 1982 the employes employed on Tie and Ballast Gang #1 reported for work at the designated 7:30 AM starting time. The employes commenced at the usual starting time and after an elapse of one (1) hour's time, twenty (20) employes of the Gang were released from duty and were allowed compensation for one (1) hour's time. The remaining nine (9) members of the Gang continued working until 11:30 AM, at which time they too were released and compensated for four (4) hours each at their respective pro-rata rates.

"On Tuesday, February 9, 1982 a similar situation occurred in that the employes of Gang #1 reported for work at 7:30 AM, nineteen (19) of these employes were released at 9:30 AM, and allowed compensation for two (2) hours at their respective pro-rata rates. The remaining nine (9) employes worked until 11:30 AM at which time they were released with an allowance of four (4) hours each at their respective pro-rata rates."

The facts, as stated by the Carrier in its initial response to the Organization (Chief Engineer's Letter of April 26, 1982), are as follows:

"On February 5, 1982, Mr. D. R. Hancock, Assistant Roadmaster, informed men on Gang No. 1 that due to cold weather and frozen ballast, machines would not be operated, and they would put on anchors and do hospital work. The men whom you claim worked 30 minutes and were sent home worked one (1) hour and went home on their own with the knowledge that would be paid actual time worked. The rest of the crew worked four (4) hours, and then went home. Employees were paid actual time they worked.

"On February 9, 1982, weather again was cold and machines were not used. Mr. Hancock instructed crew to put on anchors and do hospital work. Again those men whom you claimed were sent home after two (2) hours work worked two (2) hours and went home on their own knowing that they would be paid for actual hours worked. The rest of the crew worked four (4) hours and then went home. Employees were paid actual time worked.

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"Due to the fact that there was work that could be done, and employees went home of their own choice, and after four (4) hours the rest went home account inclement weather, your claim is declined in entirety."

Based on the entire evidence of record, the Board finds that the release of twenty members of Gang #1 on Friday, February 5, 1982, after about one hour of starting time work, was at their choice and with the knowledge that they would be paid actual time worked. The Board also finds that the release of nineteen members of Gang #1 on Tuesday, February 9, 1982, at 9:30 AM, after two hours of work, was at their choice and with the knowledge that they would be paid for actual hours worked. The Board also finds that the remainder of the crew, on February 5 and February 9, 1982, worked four hours and were then released from duty, being paid for actual time worked.

The Organization's claim for the difference between the amounts Claimants were paid and eight (8) hours each at their respective pro-rata rates for the dates of February 5 and 9, 1982, is based upon Carrier's alleged violation of Rules 13, 15, 16(c), and 19(a), reading:

RULE 13:

> **"....positions will not be abolished nor will forces be reduced until the employes affected have been given at least five (5) working days advance notice."**

RULE 15:

> **"There is established for all employes, subject to the exceptions contained in this rule, a work week of forty (40) hours consisting of five (5) days of eight (8) hours each, ..."**

RULE 16(c):

> **"Regularly established daily working hours will not be reduced below eight (8) hours per day five (5) days per week, except in a week in which one of the designated holidays occur and then only by the number of such holidays."**

RULE 19(a):

> **"Employes time shall start and end at designated assembly point as provided in Rule 18."**

The Carrier's position is that Rule 16(b) governs and was correctly applied in the facts of this case. This Rule 16(b) reads:

> "When less than eight (8) hours are worked for convenience of employees, they will be paid only actual time worked. When due to inclement weather interruptions occur to regularly established working periods preventing eight (8) hours work being performed, only actual hours worked or held on duty will be paid for with a minimum of four (4) hours."

It is expressly provided in Rule 16(b) that "When less than eight (8) hours are worked for convenience of employees" that "they will be paid only actual time worked." Also, it is expressly provided in Rule 16(b) that "When due to inclement weather, interruptions occur to regular established working periods preventing eight (8) hours work being performed" that "only actual hours worked or held on duty will be paid for with a minimum of four (4) hours." These specific and explicit terms, in the opinion of the Board, provide clear exceptions to the rules relied upon by the Organization. Accordingly, it is necessary to determine the meaning and application of the provisions of Rule 16(b) to the facts in this particular case.

The Organization argues: "On the two dates in question, the weather at 7:30 AM was at its severest point, insofar as the work assignment was concerned and it follows that, if under that condition the weather was not inclement at 7:30, how could such weather, which had since moderated to some degree, be considered inclement at 8:30, 9:30 or 11:30 AM on the dates in question.

"It is evident that the Carrier is endeavoring to misapply Rule 16(b) of the Agreement in that, (1) they contend that a part of the employes left the assignment of their own accord and, (2) it is obvious that they feel that it is their right to work the employes during the period covered by the second portion of Rule 16(b) requiring four (4) hours payment.

"That portion of Rule 16(b) was never intended to apply under such circumstances. Its obvious purpose is to insure the employes of some compensation for having prepared themselves for a day's work and, reporting to the assembly point, even though because of severe weather conditions there may be no work for them at the time of reporting.

"The Carrier should not be permitted to take undue advantage of this Rule, as they have attempted in this instance. We, therefore, respectively request this claim be allowed."

The Organization, in support of its position as to the intention of Rule 16(b), refers to the language of Referee Francis J. Robertson in Award No. 5313-3, on a reporting and not used rule not the same as Rule 16(b), but somewhat analogous: "...Its obvious purpose is to assure the employes some compensation for having prepared themselves for the day's work in getting to the assembly point at the usual starting time, even though there may be no work for them at the time of reporting."

The Carrier here has traced the roots of Rule 16(b). The Carrier shows that Rule 16(b) dates back to United States Railroad Labor Board Decision No. 501 (Docket 475) AT&SF RY. CO. et al vs. United Brotherhood of Maintenance of Way Employes and Railway Shop Laborers, effective December 16, 1921, Article V, Hours of Service, Overtime and Calls, Hours Paid For, paragraph (a-3) and Reporting and Not Used, Paragraph (j). Paragraph (a-3) reads: "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 Sundays and holidays, or when due to inclement weather interruptions occur to regular established work period preventing eight (8) hours' work, only actual hours worked or held on duty will be paid for, except as provided in these rules." Paragraph (j) reads: "Regular section laborers required to report at usual starting time and place for the day's work and when conditions prevent work being performed will be allowed a minimum of three (3) hours. If held on duty over three (3) hours, actual time so held will be paid for."

The Carrier states, in connection with paragraphs (a-3) and (j) of Article V of Decision No. 501: ..."the practice applied on Fort Worth and Denver Railway was to pay for only actual hours worked or held on duty, with a minimum of three (3) hours (later changed to four (4) hours), when inclement weather was involved. It has never been the practice to pay eight (8) hours. We have always paid actual hours worked or held on duty (stet) with a minimum or three (3) hours, now four (4) hours as provided by rule 16(b)."

As stated earlier, the Organization has contended: "It is evident that the Carrier is endeavoring to misapply Rule 16(b) of the Agreement in that, (1) they contend that a part of the employes left the assignment of their own accord and, (2) it is obvious that they feel that it is their right to work the employes during the period covered by the second portion of Rule 16(b) requiring four (4) hours payment. That portion of Rule 16(b) was never intended to apply under such circumstances. Its obvious purpose is to insure the employes of some compensation for having prepared themselves for a day's work and, reporting to the assembly point, even though because of severe weather conditions there may be no work for them at the time of reporting. The Carrier should not be permitted to take undue advantage of this Rule, as they have attempted in this instance."

When we get into the realm of what is reasonable and what is not, the Board will not engage in speculation, guess or surmise. What might be reasonable under one set of facts and circumstances could be unreasonable in another, and, of course, the reverse is also true. So, in cases like the instant one, the facts take on greater prominence than usual and are largely controlling.

On February 5 and 9, 1982, due to weather conditions preventing normal operations of machinery customarily used by the Tie and Ballast Gang, the Assistant Roadmaster authorized the employes, as weather permitted, the opportunity to work installing rail anchors and cleaning up the work area, or to leave the work site for their "own convenience". Certain employes of the Tie and Ballast Gang, after working one hour on February 5 and two hours on February 9, chose to leave the work site for their "own convenience" and were properly compensated for actual hours worked. They asked and were granted permission to leave. The remaining employes of the Tie and Ballast Gang worked four hours on each of the two dates and were properly compensated for actual time worked.

Under the foregoing facts and circumstances, we find no evidence to support the Organization's claim for eight hours compensation each day on the behalf of each of the Claimants.

A W A R D

1. Under the peculiar facts and circumstances of this case, the Agreement was not violated.

2. Claim denied.

JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

S.E. FLEMING, EMPLOYE MEMBER

B. J. MASON, CARRIER MEMBER

DATED: May 23, 1983