

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 49

Carrier File No. 6MWA 90-09-17

Organization File No. C-90-PO18-5

STATEMENT OF CLAIM

1. The Carrier violated the Agreement when it required the members of P-811 Gang No. 2 to suspend work on their regularly assigned positions on May 8, 1990.

2. As a consequence of the violation referred to above, the Claimants* listed below shall each be allowed five (5) hours' pay at their respective straight time rates.

*J. A. Walentine	J. J. Buettgenbach
T. L. Feighner	T. L. Wallman
G. P. Collier	J. L. Bartch
G. C. Christolear	J. T. Villagomez
D. P. Mullaney	J. D. Butcher
M. H. Poppen	J. D. Wilkinson
A. C. Henry	C. A. Moyer
M. J. Jakoubek	G. R. Stall
N. E. Shallenberger	D. J. Potter

F I N D I N G S

The Claimants were assigned to the P-811 Concrete Tie Gang No. 2. They were regularly assigned to work eight hours a day, Monday through Friday, with starting time of 7 a.m. The Claimants reported for work on May 8, 1990 at

Falls City, Nebraska, and commenced work. At approximately 10 a.m., they were notified they were being sent home due to the inoperability of the tie-laying machine, which was owned and maintained by a contractor.

The Organization argues that this situation did not provide the Carrier with the right to shorten the Claimants' scheduled eight-hour work day, citing these rules:

RULE 24. FORTY HOUR WORK WEEK

A. Subject to the exceptions contained in this Agreement, a work week of forty (40) hours, consisting of five (5) days of eight (8) hours each, with two (2) consecutive days off in each seven (7) is hereby established. The work weeks may be staggered in accordance with the Company's operational requirements. So far as practicable the days off shall be Saturday and Sunday. This work week rule is subject to the provisions which follow:

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 employees, 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 periods 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.

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 presented 146 statements from "long-time employees", wherein they contend that "on this property an equipment breakdown has NEVER resulted in the implementation of either Rule 25D or E".

The Carrier relies on the portion of Rule 25E referring to "conditions [which] prevent work being performed". Since the tie-laying machine became inoperable, the Carrier contends that this served to "prevent work being performed" and thus sanctioned ending the Claimants' work day after three hours. As to past practice alleged by the Organization, the Carrier contends that the "plain language of Rule 25E is controlling".

The Carrier points to Public Law Board No. 4402, Award No. 26 (Benn), which also involved review of Rule 25E including allegations of past practice. In the dispute reviewed in PLB 4402, employees were notified just prior to starting time as to no work because of heavy rain and were denied three hours' pay for the day. In denying the claim, PLB 4402 stated:

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.

PLB 4402 reviewed in particular the obviously precise wording as to notification in advance of starting time.

Here, the Board does not find the language equally clear and unambiguous. The operative sentence is as follows:

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.

There are at least two possible ambiguities here. The first is whether this refers to a situation in which employees actually report and, at that point, there is no work which can be performed. If such is the case, it clearly differs from the situation here under review, wherein the Claimants were actually on duty for three hours and only then were advised as to the equipment breakdown. The second possible ambiguity refers to "conditions" preventing "work" being performed. Does this refer to conditions (i.e., weather, fire, etc.) which make any activity impossible? Or may it include, as the Carrier would interpret it, a condition under which a particular scheduled assignment cannot be undertaken?

The Board does not propose to resolve these questions. They are raised simply to indicate that the usual rule of "clear language" does not apply here, and attention must be given to past practice. The Organization's presentation in this regard was not countered by any convincing demonstration by the Carrier as to previous application of the rule in the manner undertaken here.

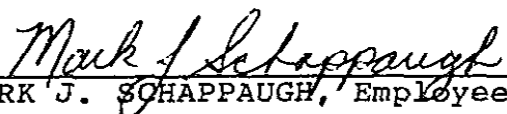
The cited PLB 4402 Award is in meaningful contrast.


Therein, PLB 4402 found no ambiguity in the clearly stated exception as to advance notification, and alleged past practice was thus not determinative. Here, as noted above, such clarity is missing.

A W A R D

Claim sustained. The Carrier is directed to put this Award into effect within thirty (30) days of the date of this Award.


HERBERT L. MARX, JR., Chairman and Neutral Member


MARK J. SCHAPPAUGH, Employee Member


D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: February 24, 1994