

PUBLIC LAW BOARD NO. 6867

AWARD NO. 9

CASE NO. 9

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 W. Frasher, C. Roop, R. Cox, R. Kingery, G. Dorn, C. Elmberg, R. Johnson, D. Ashby, Mr. Corbin, R. Sullender, B. Dormady, J. Ziebarth, R. McIlrath, R. Nelson, K. Janes, T. Galvan, A. Kirchhoff, and R. Shaurette for their overtime service on April 4, 6 and 22, 2004 (System File UPRM-9555T/1399847).

(2) As a consequence of the violation referred to in Part (1) above, Claimants W. Frasher, C. Roop, R. Cox, R. Kingery, G. Dorn, C. Elmberg, R. Johnson, D. Ashby, Mr. Corbin, R. Sullender, B. Dormady, J. Ziebarth, R. McIlrath, R. Nelson, 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; Frasher, 7 hours; Roop, 4.5 hours; Cox, 8.5 hours; Kingery, 1.5 hours; Dorn, 3 hours; Elmberg, 7 hours; Johnson, 8.5 hours; Ashby, 7 hours; Corbin, 8.5 hours; Sullender, 8.5 hours; Dormady, 7 hours; Ziebarth, 8.5 hours; McIlrath, 7 hours; Nelson, 3 hours; Janes, 4.5 hours; Galvan, 4.5 hours; Kirchhoff, 4.5 hours; and Shaurette, 7 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 second meal period issue for a System Gang working a compressed half that is required to work overtime continuous with their regularly scheduled hours. The following provisions of Rule 32 - Meal Periods, are pertinent to this dispute:

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

(1) Employees required to work overtime following and continuous with their regularly assigned hours will be accorded a meal period during said overtime service within six (6) hours from the end of the regularly scheduled meal period. **No meal period need be allowed when employees are released from work and returned to their home station, headquarters location, or outfit cars within three (3) hours after their assigned quitting time.** Subsequent meal periods will be granted at six (6) hour intervals with it being understood the six (6) hour interval period would begin to toll at the end of the last meal period allowed.

* * * * *

(3) It is understood that "end of the last meal period allowed" as referred to in paragraphs 1 and 2 is considered to be the time the employees return to

work/duty.

(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.

(7) No employee will be requested, required or permitted to deviate from the provisions of this rule.

(Emphasis added)

In this case it is the interpretation of the highlighted portion of Rule 32(e)(1) involving the provision of subsequent meal periods that is primarily involved. System Gang 9048 worked a compressed half schedule in accordance with Rule 40, working the first eight (8) days of the work half and observing their rest days for the remainder of the half. Their

starting time was 6:00 a.m. and the regularly assigned meal period is from 11:00 a.m. to 11:30 a.m.

According to the Organization, on April 4, 2004 seventeen (17) of the Claimants began work at 5:30 a.m. and continued working until 8:30 p.m., past their scheduled quitting time of 6:00 p.m. On April 6, 2004, eleven (11) of the Claimants began work at 6:00 a.m. and continued working until 9:30 p.m., beyond their 5:00 p.m. scheduled quitting time. On April 22, 2004, ten (10) of the Claimants began work at 6:00 a.m. and continued working until 7:00 p.m., past their 5:00 p.m. scheduled quitting time. On each of these occasions, Claimants took their regular meal period between 11:00 and 11:30 a.m. and were not afforded another meal period.

During the correspondence on the property, Carrier introduced Employee Work History reports establishing that on April 6, 2004 twelve (12) employees worked 11 straight time (ST) hours and four (4) overtime (OT) hours, and on April 22, 2004 ten (10) employees worked 11 ST hours and 2 OT hours. There was confusion about whether the Organization was progressing a claim for April 2 or 4 caused by the Organization's July 20, 2004 appeal citing Sunday as April 2 rather than April 4, and Carrier's September 17, 2004 denial, giving records and information about April 2, where no employee worked overtime, rather than April 4, 2004 which is specifically mentioned as one of the claim dates. It does appear that Carrier's contention was that all of the Claimant's were returned to their headquarters within three (3) hours of their assigned quitting time on each of the claim dates, and were not entitled to a subsequent meal period under Rule 32(e)(1) or penalty pay under Rule 32(e)(6).

In its initial claim, the Organization asserted that while Rule 32(e)(1) relieves Carrier of providing a meal period if an employee is returned to his headquarters within 3 hours of his assigned quitting time, it does not relieve Carrier from its obligation to make a penalty payment under Rule 32(e)(6) if it chooses not to give a subsequent meal period within 6 hours of the end of the regularly scheduled meal period. Carrier's denial of June 24, 2004 sets out Carrier's position that Claimants had no entitlement to either a meal period or penalty pay since they were released within the 3 hour time period, and posits that penalty pay would only apply if the employees were instructed not to take a dinner meal, which did not occur in this case. Carrier asserts that Claimants were given the opportunity to take a meal and chose to skip it despite being briefed to take one as necessary, which commonly occurred in shifts.

The Organization's July 20, 2004 appeal notes that Carrier is obligated to provide wholesome meals in sanitary conditions at no cost to the employees under Rule 32(e)(5), and it cannot shift the burden of responsibility to employees by saying it is up to them to take it, since Rule 32(e)(7) states clearly that employees are not permitted to deviate from the provisions of the Rule requiring meals every six hours. Therein the Organization requested a copy of the job briefing to support the statement that Claimants knew they had the opportunity to take a meal period but chose not to take one, asserting that Claimants would not have turned down a meal provided or an instruction to eat.

In Carrier's September 17, 2004 denial, Carrier attaches statements from a Track Supervisor and Manager indicating that the gang was instructed to observe meal periods whenever necessary to avoid violating the Agreement, and that the foreman never came to advise the supervisor

that the employees were due for a meal period, as required by Rule 32 (e)(4)(b). Carrier claimed that the rule has always been applied in the same fashion, e.g. that if an employee was released within 3 hours of his assigned quitting time, there was no entitlement to a meal period, and, if none were permitted, there is no basis for penalty pay.

In response, the Organization submitted October, 2004 statements from General Chairman Tanner and Vice President Wehrli. Wehrli indicates that in negotiating Rule 32(e) in 1981 the parties agreed to two principles: (1) that employees were to be accorded meal periods at no less than six hour intervals, and (2) the longest period of time an employee could work without being accorded a meal period or penalty pay was 8 consecutive hours following his last meal period, based on the earliest possible meal period beginning 3 1/2 hours after the start of a shift. Wehrli's statement notes that he was the chief negotiator of the 1990 Agreement in which Rule 40 establishing compressed halves was established, and that the parties did not contemplate any change to these two principles at the time. He concludes that Carrier's position would permit it to work an employee from 10 1/2 to 12 hours continuously without a meal period or penalty pay, which the Organization never agreed to. Tanner's statement confirms that the Organization never agreed that Carrier's application of Rule 32(e)(1) was correct, and asserts that he has filed claims protesting it. Tanner points out that meal period entitlement when working overtime as well as the commencement of the 3 hour period is to be calculated based on the regular bulletined hours of the position (8 hours/day).

Carrier's December 12, 2004 denial by Director of Labor Relations Ring states that it has consistently applied Rule 32(e)(1) since Rule 40 was

negotiated in 1990, as there was no change in the language of that provision at the time. Ring asserts that the Organization had knowledge of, and acquiesced in, its application of not providing a meal period or penalty pay to employees working overtime of less than 3 hours during a compressed half without filing any claims until 2003, and contends that he is not aware of the principles Wehrli refers to in his statement. Carrier notes that the Organization's argument would require it to provide a second meal period before the end of straight time hours if an employee was working a compressed half with 11 hour shifts, a result never intended by the parties under Rule 32.

The Organization argues that, under the clear language of Rule 32, employees are entitled to a second meal period within 6 hours of the end of their regularly scheduled meal period. It notes that the issue raised by this claim is whether employees were properly compensated for the time period after the sixth hour when Carrier failed to provide them a second meal period. The Organization contends that there is no contradiction between Rule 32(e)(1) and (6) since, under (e)(1) Carrier has the option of not providing a meal period if it returns the employee within 3 hours of his quitting time, but if it chooses not to provide the meal period, it must pay the employee in accord with (e)(6) at double their existing rate of pay from the sixth hour until the employee is given a meal period or is released from work. The Organization relies upon the overriding purpose of the rule, which is to assure that employees are provided meals every 6 hours when working, as exhibited by Rule 32 (e)(7) which prohibits employees from deviating from this provision. It notes that if Carrier's interpretation is accepted, employees working compressed halves may be required to work for periods of 10 to 12 hours without a meal period, a result it asserts is contrary to the purpose of the rule.

The Organization argues that Carrier was obligated to provide a second meal period at 5:30 p.m. on the claim dates, since the employees observed their first meal period from 11:00 a.m. to 11:30 a.m., and that Claimants were entitled to penalty pay from that time until they were released from work at 8:30 p.m. on April 4, 9:30 p.m. on April 6 and 7:00 p.m. on April 22, 2004. In support of its assertion that the claim should be sustained, the Organization contends that the Board must apply and interpret the agreement as written, and has no authority to change its terms, citing Third Division Awards 1248, 18423, 20276 and 20956.

Carrier contends that Rule 32(e) is specific and unambiguous and does not require a second meal period when the employees are released from duty within 3 hours of their assigned quitting time. It argues that it follows logically that there can be no entitlement to penalty pay for a missed meal period when the right to such meal period does not exist. Carrier asserts that since the parties did not change the language of Rule 32(e)(1) when they negotiated Rule 40, the 3 hour period is still measured from the assigned quitting time, which is no longer based upon an 8 hour day. Carrier argues that the language of Rule 32(e)(1) is clear, and that the general provision of a subsequent meal period during overtime within 6 hours is modified with a specific exception for employees released from work within 3 hours of their assigned quitting time. It asserts that the Organization's attempt to import Rule 32(e)(6) into Rule 32(e)(1) and to read out the second sentence must fail, based upon the clear language as well as the fact that its proposed interpretation may require a subsequent meal period during an employee's straight time hours when working a compressed half, a result never intended by the parties. Carrier maintains that the agreement must be enforced as written, which requires denial of the claim without resort to evidence of past

practice, citing Third Division Award 31082.

Carrier next argues that, even if the language of Rule 32 is deemed to be ambiguous, the claim must be denied based upon its unrefuted practice and application, relying on Third Division Awards 31082, 29142, 29057, 28030. Carrier asserts that since its inception it has applied Rule 32(e)(1) by not providing a meal period or penalty pay to employees working overtime who are released from work within 3 hours of their assigned quitting time, including employees working compressed halves under Rule 40, with the knowledge and acquiescence of the Organization until the first claim was filed in 2003. In the event the Board finds the relevant language to be ambiguous, Carrier contends that it should be interpreted consistent with its established past practice.

Finally, Carrier argues that the Organization did not sustain its burden of proving a contract violation in this case, citing Third Division Awards 26033, 27851, 27895. Carrier notes that none of the named Claimants worked beyond three hours of their assigned quitting time, so there was no entitlement to a subsequent meal period or penalty pay established by the Organization.

A careful review of the record convinces the Board that Rule 32(e)(1) does not support the Organization's position that Claimants are entitled to penalty pay under Rule 32(e)(6) for the overtime hours worked on April 4 and 22, 2004, since they were all released from work within three hours of their assigned quitting time on those dates, but does support Claimants' entitlement to penalty pay under Rule 32(e)(6) for the entire four hours of overtime they worked on April 6, 2004 without receiving the required meal period.

Initially we note that we agree with both parties that the agreement must be interpreted and enforced as written, and that the Board has no authority to change its terms or find a presumed intent based on other than the language agreed to and/or practice applied. See, Third Division Awards 20276, 20956, 31082.

Rule 32(e) deals with subsequent meal periods when employees are working in overtime service. Subsection (1) applies to the assignment of a meal period during overtime service following and continuous with regularly assigned hours, the situation present in this case. Subsection (2) applies to employees called in to work overtime. Subsection (4) defines whose responsibility it is to see to it that meal periods are given. Subsection (5) addresses what Carrier's meal time obligation is - to furnish wholesome meals at no cost to the employee in sanitary conditions or to reimburse the employee for the cost of such meal. Subsection (6) is the penalty pay provision in the event the subsequent meal period is not afforded at the designated time, and notes that double the employee's existing rate will be paid from the designated time until the employee is accorded a meal period. Finally, Subsection (7) does not permit the employee or Carrier to opt out of the rule.

It is clear that this provision was negotiated into the agreement prior to the introduction of Rule 40 permitting compressed half work periods, and at a time when jobs were primarily bulletined for 8 hours/day. Since Rule 32(a) defines when the initial meal period will be given - between the end of the third hour and beginning of the sixth hour of work - and the 6 hour period for subsequent meals is measured from the end of the regularly scheduled meal period, it was understood by the parties that an employee would not normally be required to work over 12

hours without the provision of a subsequent meal period or penalty pay. On an 8 hour shift, a subsequent meal period entitlement might routinely occur between 2 and 4 hours of overtime service.

Rule 32(e)(1) first states the general proposition that employees will be afforded subsequent meal periods every 6 hours when in continuous overtime service. However, the second sentence, by its clear language, provides a specific exception to such entitlement. Therein the parties agreed that "no meal period need be allowed" when employees are released from work and returned to their home station, headquarters location or outfit cars "within three (3) hours after their assigned quitting time." In an 8 hour shift, this would mean that an employee would not normally be required to work more than 11 hours total before being entitled to a subsequent meal or penalty pay in lieu of such under Rule 32(e)(6). Carrier's asserted practice of not providing either subsequent meal periods or penalty pay to employees who worked 3 hours of overtime or less was unrebutted on the property.

With the adoption of Rule 40 in 1990, the regularly scheduled work day of an employee could now be between 10 and 12 hours. An employee working a compressed half would work longer straight time hours before commencing overtime. Any entitlement to a subsequent meal period under Rule 32(e)(1) applies specifically to employees in overtime service. The parties knew this at the time they adopted Rule 40, and, as noted by Carrier, did not change the language of Rule 32(e)(1) with respect to when a subsequent meal period need not be allowed - 3 hours from "their assigned quitting time." Without any proffered evidence of specific negotiations concerning the application of this provision to employees working compressed halves, the Board is unable to accept the

Organization's assertion noted in Tanner's statement that the 3 hours is intended to be measured from the original 8 hour posting rather than the 10-12 hour assignment typical of working a compressed half. Such approach would lead to an argument of entitlement to a subsequent meal period after 11 hours of service, even if it was part of an employee's straight time shift, when Rule 32(e), by its clear terms, applies only to overtime service.

Even were the Board to conclude that the language of Rule 32(e)(1), when read in conjunction with Rule 32(e)(6), is ambiguous, Carrier asserted a consistent past practice, continuing after the 1990 adoption of Rule 40, of giving subsequent meal periods or penalty payment in lieu thereof only after 3 hours of overtime service. The Organization never rebutted such assertion or contended that it was unaware of Carrier's interpretation and application of Rule 32(e)(1). It merely stated that it disagreed with such approach, and made its position clear through the filing of claims. On the property Carrier established that the referenced claims did not deal with the same issue or interpretation, and that it was not until 2003 that claims protesting this practice were filed. The Board is left with a record that supports the existence of a long time practice confirming Carrier's interpretation and a lengthy period of acquiescence by the Organization.

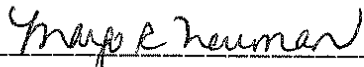
On this record the Board concludes that Rule 32(e)(1), as written, and consistent with its past application, provides an exception to the general requirement that Carrier must furnish meal periods every 6 hours for employees working in continuous overtime service who are released from work within 3 hours of their assigned quitting time. We do not accept the Organization's argument that Rule 32(e)(6) is a separate

monetary obligation that arises independently if Carrier chooses not to provide a meal period during that 3 hour overtime service under Rule 32(e)(1). To do so would negate the operation of the specific language adopted by the parties to create an exception to the provision of a subsequent meal period in Rule 32(e)(1). Additionally, the condition precedent to the application of the penalty pay provision in Rule 32(e)(6) is that "a meal period is not afforded at the designated time." The entitlement to a meal period at a specific time must exist prior to the payment of penalty pay for its denial. The second sentence of Rule 32(e)(1) negates such entitlement for employees working overtime who are released within 3 hours of their assigned quitting time. While this interpretation may permit the passage of long periods of time without meal periods for employees working compressed halves, it is not within the province of the Board to protect against harsh results by modifying the agreed upon contract language. It is up to the parties to negotiate any revision to Rule 32(e)(1) to deal with such consequences.

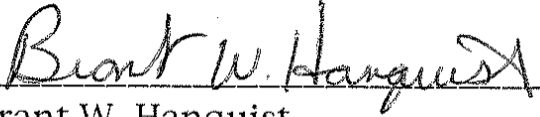
Accordingly, since Claimants did not work more than 3 hours overtime on either April 4 or 22, 2007, that portion of the claim seeking penalty pay for those dates is denied. However, since the Claimants who worked overtime on April 6, 2004 exceeded the 3 hour window, that portion of the claim is sustained and they shall be compensated penalty pay for the entire 4 hour overtime period under Rule 32(e)(6).

AWARD:

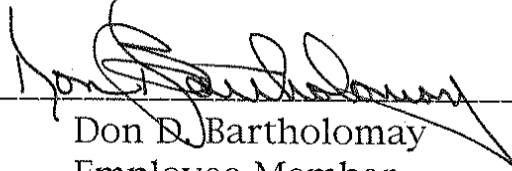
The claim is Sustained in Accordance
with the Findings.



Margo R. Newman
Neutral Chairperson



Brant W. Hanquist
Carrier Member



Don D. Bartholomay
Employee Member

Dated: 8-1-07

Dated: 8-1-07