Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31359
Docket No. MW-30799
96-3-92-3-603

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Soo Line Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed to properly reimburse Tamper Operator R. J. Keto for lodging expenses incurred on May 4, 5, 11, 12, 18, 19, 25 and 26, 1991 away from Tripoli, Wisconsin (System File R661/8-00018-003).

(2) The Agreement was further violated when the Carrier failed to properly reimburse Tamper Operator R. J. Keto for lodging expenses incurred on June 1, 2, 9, 10, 15, 16, 21, 22, 29 and 30, 1991 away from Tripoli, Wisconsin (System File R662/8-00018-004).

(3) As a consequence of the violation referred to in Part (1) above, Mr. R. J. Keto shall be allowed $110.00 as reimbursement for the lodging expenses incurred on the dates enumerated in Part (1) hereof.

(4) As a consequence of the violation referred to in Part (2) above, Mr. R. J. Keto shall be allowed $137.50 as reimbursement for the lodging expenses incurred on the dates enumerated in Part (2) hereof."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant is a Machine Operator in the Track Subdepartment. During the period in dispute, Claimant worked on the Carrier's Northern Division with a Monday through Friday work week. During that period, Claimant was assigned to work with a mobile gang working over 400 miles from his home in Tripoli, Wisconsin. On the dates set forth in the claim, which were Claimant's rest days, the Carrier did not reimburse Claimant for lodging expenses.

Rule 35 states:

> "The railroad company shall provide for employees who are employed in a type of service, the nature of which regularly requires them throughout their work week to live away from home in camp cars, camps, highway trailers, campers, hotels, or motels as follows:
>
> (A) Lodging
>
> * * *
>
> (2) If lodging is not furnished by the railroad company, the employe shall be reimbursed for the actual reasonable expense thereof not in excess of $13.75 per day."

Because this is a contract dispute, the Organization must carry the burden to demonstrate a violation of the relevant language. It has not done so. As far as lodging reimbursement is concerned, Rule 35 clearly only focuses upon the "work week". In this claim, Claimant seeks reimbursement for his rest days when those expenses were voluntarily incurred by Claimant. Notwithstanding the equities of the situation which could require Claimant to travel great distances on his rest days to return home to avoid having to pay for rest day lodging, this Board does not have the authority to change the clear language of the rule.

Our conclusion is underscored when other provisions of the rule are considered. When the parties intended payment for a rest day (as opposed to a day during the work week), they plainly said so. See Rule 35(B)(4) ("The foregoing per diem meal allowance shall be paid for each day of the calendar week, including rest days and holidays ...." [emphasis added]). From a contract interpretation standpoint, the failure to make similar provisions for lodging on rest days is eloquent silence to establish that such payment was not intended.

The claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of February 1996.

LABOR MEMBER'S DISSENT
TO
AWARD 31359, DOCKET NO. MW-30799
(Referee Benn)

The Neutral Member has clearly made a mistake in this case. Whether that mistake was solely because of clever and misleading advocacy by the Carrier or whether the Organization must bear some responsibility for failing to clearly shine the light of reason on this case is no longer material. The critical point is that a mistake has been made and must be corrected because important national rules are at stake. Hence, this dissent is filed not to blame or castigate, but to shine the light of reason to ensure that the mistake will not be perpetuated.

Award 31359 is in direct conflict with the plain language of one national rule and the written interpretation of another national rule. These two national rules - the Forty Hour Week Rule and the Award of Arbitration Board No. 298 (Award 298) - have been in existence for 47 years and 29 years, respectively. In all of this time, no other carrier has applied these rules as Soo applied them in this case. Hence, no other neutral has accepted such application as being correct as the Majority has here. Since this award is so clearly in conflict with the plain language of a fundamental national rule, i.e., the Forty Hour Week Rule and with the written interpretation of Award 298, it rises to the standard of being "palpably erroneous". As such, it can have no precedential value.

The Majority's error in this case is founded upon its interpretation of the term "work week" in Rule 35. Rule 35 of the Soo Agreement is an adoption of the national rule known as Award 298 which was arrived at through a national arbitration award dated September 30, 1967. However, the term "work week" had been defined in the railroad industry for all non-operating crafts, including BMWE, long before Award 298. The March 19, 1949 National Forty Hour Week Rule, which has been adopted as Rule 26 in the Soo Agreement, defined a "work week" as follows:

"**RULE 26**
FORTY HOUR WORK WEEK

* * *

(a) General -

There is hereby established for all employes, subject to the exceptions contained in this Rule 26, **a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven**; the work weeks may be staggered in accordance with the Carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the provisions of this Rule 26 which follow:

(b) Five-day Positions -

On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.

* * *

"(i) Beginning of Work Week -

The term 'work week' for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work, and for unassigned employes shall mean a period of seven consecutive days starting with Monday."

Contrary to the findings of the Majority in this case, a work week is a consecutive seven day period consisting of five workdays and two rest days. If any ambiguity could be imputed to the term "work week" in Rule 35, that ambiguity is definitively resolved by reading Rule 35 in the context of Rule 26, which is the seminal national rule on work weeks. Moreover, it is clear that Arbitration Board No. 298 was not unmindful of the national Forty Hour Week Rule as is evidenced by the fact that the Forty Hour Week Rule is referenced in the Award of Board 298.

Further error in Award 31359 is evidenced by a review of Rule 35(A)(2) which the majority quotes and then promptly misinterprets. Rule 35(A)(2) provides lodging reimbursement for "the actual reasonable expense thereof not in excess of $13.75 **per day**". Rule 35(A)(2) clearly contemplates reimbursement for actual reasonable expenses for each **"day"** such expenses are incurred rather than each **work day**. If the drafters had meant **work day** rather than **day** that is what they would have written. However, they clearly chose <u>not</u> to write **work day** and the Majority is prohibited from so changing the Agreement through the guise of interpretation.

Finally, it should be noted that the parties themselves have never interpreted Award 298, from which Rule 35 was adopted, in the manner suggested by the Majority. In the case decided by Arbitration Board No. 298, the National Carriers Conference Committee's (NCCC) lead counsel was Mr. C. I. Hopkins, Jr., who later became the chairman of the NCCC. In recent litigation between BMWE and most of the nation's rail carriers in the United States District Court For The District of Columbia (Alton & Southern Railway, et al. v. BMWE, Civil Action 94-2365-TFH), Mr. Hopkins submitted an affidavit in which he stated:

> "*** Moreover, pursuant to pre-existing national rules, employees who elect not to return home are paid their away-from-home expenses **even on rest days and holidays**. See Award of Arbitration Board No. 298 (Sept. 30, 1967), Hopkins Aff. Exh. 9." (Emphasis added) (Second Affidavit of C. I. Hopkins, Jr. dated May 26, 1995, Page 8)

Mr. Hopkins' affidavit speaks for itself and it is clearly and inexorably in conflict with the Majority's findings in Award 31359.

It is beyond question that the capable Neutral Member was misled in this case. If the Organization must share some of the blame for not rising above the Carrier's clever advocacy and clearly debunking the Carrier's case, then so be it. However, whatever the cause, it is clear that the outcome is palpably erroneous and therefore has no precedential value. Indeed, the Majority recognized that the results of its findings were inequitable and it would be a travesty to visit those inequities on the employes when the contract language so plainly does not contemplate such inequities.

Therefore, I must respectfully dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member