

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 31761
Docket No. MS-30719
96-3-92-3-519

The Third Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Chicago and Northwestern Transportation Company**

STATEMENT OF CLAIM:

"Claim of Lodge 1847 of the Brotherhood that:

- (a) Carrier violated the Agreement between Chicago and Northwestern Transportation Company and its employees represented by the Brotherhood of Maintenance of Way Employes (hereinafter referred to as 'the Agreement') when it refused to reimburse employees on the 711 Rail Gang for reasonable expenses incurred for meals and lodging while required to live away from home throughout their work week;**
- (b) The Carrier must reimburse the Claimants listed in Exhibit 2d and any and all other employees who may have by displacement rights or any other means occupied any position on the 711 Rail Gang at Jefferson, Iowa, at any time and for any period from its beginning on 1 April 1991 and until such time as all positions on said gang were abolished at the rate of \$9.75 per day for meals and \$13.75 per day for lodging."**

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 were given due notice of hearing thereon.

On March 5, 1991, the Carrier bulletined the RC 711 Rail Gang with headquarters at Jefferson City, Iowa. The bulletin indicated that the job would exist until June 1, 1991. The work was completed and the positions were abolished by another bulletin dated May 22, 1991, to be effective on May 31, 1991.

Members of the gang were paid expenses under Rule 46, which states:

"Meals and Lodging

Employees will be reimbursed for actual necessary expenses for the cost of meals and lodging incurred while away from their regular outfits or regular headquarters by direction of management as follows:

Employees held away from their outfit or headquarters two hours beyond normal quitting time will be reimbursed for actual necessary expense incurred for the evening meal. Employees will begin their tour of duty at their regular outfit or headquarters and who are required to remain away therefrom one or more days (nights) will be reimbursed for the cost of the evening meal on the first day and for all meals on succeeding days except the evening meal on the day when they return provided the return is within two hours of normal quitting time."

The Organization believed that the members of Gang RC 711 should have been paid expenses in accordance with Rule 47. Rule 47 provides a more generous expense allowance for ". . . employees who are employed in the 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, hotels or motels."

The Organization believes that Rules 46 and 47 are the direct descendants of *Arbitration Board No. 298* and its Interpretations. *Arbitration Board No. 298* was the direct result of the 1966 Wage and Rules movement instituted by the Brotherhood of Maintenance and Way Employees and others. The issues of travel expenses went to binding arbitration which resulted in the subsequent Award. Specifically, the Organization believes *Interpretation 12* supports its contention that the members of Gang 711 should have been paid at the more generous rate provided by Rule 47. *Specifically, Interpretation 12 of Arbitration Board No. 298* reads:

"The Carrier may discontinue providing camp cars but may not escape payment under Section I except in locations where the men report for duty at a fixed point which remains the same throughout a period of twelve months or more."

The Organization also believes that its contention is supported by *Third Division Award 18596* in which the Board determined:

"An employee cannot be transferred from the coverage of Section I, into Section II, merely by the discontinuance of camp cars and/or the designation of a headquarters point."

The Organization also believes that this particular point was reaffirmed in *Third Division Award 27879* in which the Board determined:

"There is no requirement that the work location be different or distinct from the employee's headquarter point in order to obtain reimbursement for expenses."

In conclusion, the Organization suggests that the 711 Rail Gang was bulletined as a seasonal Gang with a life duration of 61 days. Its headquarters point remained the same for only 61 days and the designated headquarters point was an average of 108 miles from the employees' homes. The employees were not engaged in relief service and the nature of rail laying is such that it is performed in cycles measured in decades and therefore, it is doubtful that any of these employees will re-lay rail at this location again.

In short, the Organization argues that the designation of the 711 Gang's work life, namely, the 61 days, specifically requires the Carrier to pay the employees Rule 47 expenses as interpreted by *Interpretation 12 to Arbitration Board No. 298*.

Therefore, the Organization urges us to uphold this claim.

The Carrier, like the Organization, believes that Rules 46 and 47 descended from *Arbitration Board No. 298* but, with a significant difference. According to the Carrier, Article 5 of *Arbitration Board No. 298* allowed the individual carriers the right to negotiate their own rule either retaining some, all, or none of the provisions of *Arbitration Board No. 298*.

According to the Carrier, the Organization and the Carrier entered into the Implementing Agreement contemplated by Article 5 on August 15, 1968. The August 15, 1968 Memorandum revised then existing Rule 43, which determined travel expenses for 17 years until it was revised in 1974, 1978, and most recently, in 1985. The revisions resulted in the newly constituted Rules 46 and 47.

According to the Carrier, the newly constituted Rules 46 and 47 provide the only conditions under which an employee may receive meal, lodging and travel expenses on this particular the Carrier. Also, the Carrier argues that prior to the final revision of the meal expenses rules in 1985, the Carrier regularly established headquarter gangs for periods of less than one year to perform specific projects and that the Carrier retained its inherent management right to direct the work of its employees.

The Carrier first argues that it has an unrestricted right to establish headquarter gangs. The basis of the Carrier's argument is that nothing in the Agreement prohibits it from establishing headquarter gangs with fixed headquarter points for less than one year. And, in fact, the Carrier engaged in this practice, apparently with the Organization's concurrence, until the present claim.

The Carrier also argues that Rule 46 governs the Claimants' expenses rather than Rule 47. In particular, the Carrier contends that the bulletin establishing Gang 711 specifically provided for a headquarters point at Jefferson City, Iowa, that the Claimants were well aware that this was a fixed headquarters point and apparently, decided that it was in their best economic interest to apply for the positions despite the fact that none of the gang members would be paid expenses under Rule 47.

According to the Carrier, the Claimants made a knowing choice after consulting the bulletin. The Carrier also argues that Rule 46 expenses apply since the employees reported to the fixed point in the morning and reported back to the fixed point at the end of the day and therefore, were not required to report to and from a variable work point each day.

While the Carrier concedes that *Arbitration Board No. 298* revisions to the travel and expense rules formed the basis of the present day Rules 46 and 47, the Carrier argues that the present day rules devolved from, rather than directly descended from, *Arbitration Board No. 298*. Moreover, the Carrier argues, the evolutionary basis of the new rules was established by the past practice on this property. Namely, since 1985, the Carrier designated short term, i.e., less than one year, fixed headquarter points and paid gang members in accordance with the provisions of Rule 46 and the Organization has not filed any claim requesting a Rule 47 payment until this very claim.

In short, the Carrier argues that it is the practice on this property to establish fixed headquarter point locations of less than one year duration and pay successful bidders' expenses in accordance with Rule 46. Nor is distance a factor, according to the Carrier, because no agreement on this property specifies whether a job is bulletined as a fixed point or a camp car location based on distance from an employee's home.

Therefore, the Carrier urges us to deny this claim.

In its correspondence with this Board, the Organization framed the question as follows:

"Shall the 711 Rail Gang be reimbursed for expenses incurred while engaged in work requiring them to live away from home throughout the work week as set forth in Rule 47 of the June 1, 1985 Agreement, between the Chicago and Northwestern Transportation Company and its employees represented by the Brotherhood of Maintenance of Way Employees?"

We believe the Organization succinctly framed the question to be decided. After considering all arguments and evidence presented upon the record, we must hold that the answer to the Organization's query is no. We reach this conclusion with much difficulty because both parties presented persuasive arguments in support of their viewpoints.

On the one hand, the Organization correctly states that *Interpretation 12 of Arbitration Board No. 298* provides that the Carrier must pay Rule 47 expenses to gangs whose fixed points are not set for less than a year. In this situation, Gang 711 was established merely for 61 days. Even though the plain reading of *Interpretation 12* would lend support to the Organization's position, we find the Carrier's line of argument to be more persuasive.

The Carrier correctly asserts that *Article 5* allowed the individual carriers and organizations to implement any portion of *Arbitration Board No. 298* on an individual carrier basis. Likewise, this Carrier and Organization implemented most of the terms of *Arbitration Board No. 298*. However, the parties revised the rule throughout the years resulting in the final iteration of Rules 46 and 47 during 1985.

Consequently, the collective bargaining relationship, with respect to travel expenses, evolved over time to meet the changing needs of the parties and this is as it should be. The deciding factor in our decision to deny this claim rests with the parties' interpretation of Rules 46 and 47 as established by the past practice on this Carrier since 1985. The Carrier has regularly established track gangs like No. 711 for durations shorter than a year and paid them expenses under Rule 46 without objection by the Organization. A practice continued for six years until the Organization instituted the present claim. Consequently, we believe that the actions of the parties in the form of their past practice in interpreting appropriate expense payments under Rules 46 and 47 established that gangs assigned to a fixed headquarters point were to be paid in accordance with Rule 46. Therefore, we must deny this claim.

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 24th day of October 1996.