Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32615
Docket No. MW-32062
98-3-94-3-445

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed and refused to pay all machine operators assigned to TO 201, TO 201S, SM 201 and SM 201S Gangs for the work performed prior to and after their assigned work period beginning April 7, 1993 and continuing (System Docket MW-3008).

(2) The Agreement was violated when the Carrier failed to compensate the foremen assigned to TO 201, TO 201S, SM 201 and SM 201S Gangs for service performed while traveling to and from their assigned work location beginning April 7, 1993 and continuing (System Docket MW-3011).

(3) As a consequence of the violation referred to in Part (1) above, the machine operators assigned to TO 201, TO 201S, SM 201 and SM 201S Gangs during the period in question shall each be allowed one (1) hour's pay at their respective time and one-half rates for each day they were required to perform the work in question beginning April 7, 1993 and continuing until the violation ceases.

(4) As a consequence of the violation referred to in Part (2) above, the foremen assigned to TO 201, TO 201S, SM 201 and SM 201S Gangs shall each be allowed one (1) hour's pay at their respective time and

one-half rates for each day they performed service beginning April 7, 1993 and continuing until the violation ceases."

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.

Claimants in this case hold seniority as Machine Operators and Foremen assigned to the gangs identified above. The record indicates they were, at the time of the claims, regularly required to assemble at designated points and travel a minimum of 30 minutes to their work sites. Machine Operator Claimants assert that they are entitled to pay for such travel time because they are directed to transport their own tools during such periods. Foremen contend they are required to tend two-way radios during travel to the work site.

Resolution of these claims turns on analysis of two distinct fact patterns as well as an understanding of Article VII of the July 28, 1992 Agreement and Rule 23 (c) as interpreted by several prior Awards. Article VII - WORKSITE REPORTING, reads as follows:

"(a) Paid time for production units* that work away from home shall begin after thirty minutes of travel time to the work site from the camp car/lodging facility.

(b) Paid time for production units* that work away from home shall end at the camp car/lodging facility with a thirty (30) minute deduction of travel time from the work site to the camp car/lodging facility.

*/ Production units include all supporting BMWE employees who are advertised to work with, or as part of, a production unit."

Rule 23 (c) - WAITING OR TRAVELING BY DIRECTION OF COMPANY, reads:

"(c) Employees traveling on a motor car, trailer or highway vehicle, who are required to operate, supervise (Foreman), flag or move the car or trailer to or from the track, or handle tools to and from such vehicles, shall be paid for time riding as time worked."

Two separate claims were processed on the property and consolidated for presentation to this Board. In the first, Machine Operators argued that they were directed by bulletin to carry their personal tools consisting of a screwdriver, pliers and an adjustable wrench to and from the vehicles used for transport to their work sites beginning April 7, 1993. In the second, Foremen assert they were required to operate two-way radios during such transit.

With respect to Machine Operators, the Organization first invites our attention to the interpretation of Rule 23 (c) in Award 37 of Special Board of Adjustment No. 1016 involving the same parties and similar circumstances. It suggests that decision is *res judicata* in this instance.

The Board finds no valid basis for such a conclusion. Award 37 interpreted Rule 23 as it existed prior to the negotiated changes incorporated in the February 28, 1992 Agreement. That Award held that overtime pay was required for employees directed to carry their personal tools while traveling to or from vehicles used to get them to their job sites based upon a finding that "[t]he rule as written contains no qualifying language that would permit the term 'tools' to be read as referring only to 'Company tools.'" But the 1992 Agreement hatched important differences that distinguish the current Rule. Thus, in the context of this dispute, Award 37 has lost its saliency.

The issue of free or paid travel time for production units was clarified by the terms of the July 28, 1992 Agreement and Letter No. 13 therein. Article VII continued to state in pertinent part that paid time for production units working away from home begins after 30 minutes of travel time to the work site and ends 30 minutes after arrival

back at the camp car/lodging facility. Letter 13 established two specific exclusions to the free travel time set forth in Article VII: senior Foremen and Drivers of production units. Letter 13 reads in part:

> "During our discussions it was agreed that the free travel time provisions which are set forth in Article VII do not apply to the senior foreman of the production unit and do not apply to drivers transporting production units to the work site from the camp car/lodging facility and from the work site to the camp car/lodging facility. It was further agreed that the free travel time provisions will not result in a deduction from the basic day's pay."

Carrier asserts that recognized canons of construction demand that Article 23 be read in conjunction and harmonized with Letter No. 13, and its meaning determined not in isolation but in relation to all other parts of the Agreement. In that process, if possible, reasonable effect must be given to all provisions of the contract. Since the parties agreed to only two express exceptions to the 30 minute free travel periods, Carrier says it is clear that they intended no other implied exceptions.

We are compelled to agree. The Board finds that the Claimants' argument disconnects Article 23 from context, and fails to consider or reconcile Letter 13 with its terms. If, as the Organization asserts, Machine Operators and Foremen are to be paid for travel time, what possible meaning can this Board give to Letter 13, which identifies only two classes of employees to which such pay is extended.

The Organization cites Awards 91 and 98 (consolidated cases hereinafter referred to as Award 91) of Special Board of Adjustment No. 1016 as additional support for its position here. The Board there expressed the well-established principle that precedent in this Division must be respected, and accordingly placed significant reliance on Award 37 in sustaining the claims it considered. Since we decline to follow Award 37 for the reasons stated above, Award 91 is similarly distinguished and found not controlling on the issue before this Board.

First, as indicated, Award 37 dealt with claims governed by a materially different Agreement. To the extent Award 91 relies on the inapposite Award 37, it is in palpable error. More significantly, Award 91 found merit in several pay claims by Machine Operators and others based upon facts obviously distinguishable from the facts here. The claim in that dispute characterized the violation as failure to pay for time spent in

"handling and carrying tools." Award 91 rests on findings that: (i) services were performed en route to the job site, and (ii) neither Article VII nor Letter 13 modified the terms of Rule 23 "that require travel time be counted as work time when employees perform some service while traveling." But no Machine Operator Claimant in this case maintains that he performed services or "handled tools" without pay while traveling to his work site. Claimants were not asked to use implements or devices to perform work *en route, but to carry light tools to work with their safety equipment.* To apply Award 91 to the situation complained of here would be to stretch that Award to its breaking point. If the Organization wishes to secure pay for its members for the very specific activity of carrying light tools to work while not using them - facts not adjudged by Award 91 - it must secure that result through bargaining.

One further observation regarding Award 91 warrants mention in view of the outcome here, which may facially conflict with prior authority. Award 91 determines that Article VII and Letter 13 do not modify Article 23, but rather Article 12 (a) which deals with starting times. (". . . [t]here is no indication that Article VII was intended to alter other compensation rules, such as Rule 23. . .") Whatever evidence may have supported that raw conclusion is not revealed, nor was any produced in the case handling of this dispute. In the context of this case, the normal rules of interpretation would require the party claiming non-application of the exception to prove that case. Here that means the Organization should be required to produce persuasive evidence, for example, in the form of bargaining history, to establish that non-working Machine Operators were intended to be paid while traveling despite the contrary terms of Letter 13, or alternatively, that that Letter was in no way intended to modify Article 23. In the absence of such proof, Award 91 turns the normal canons of construction upside down, misallocating the burden of proof in the process. We reject that approach as inconsistent with both established canons of construction and vast tracts of Third Division precedent. Given those deficiencies, to give Award 91 precedental effect would exemplify *stare decisis* run amok. Lastly, we read Award 106, dealing with damages issues arising out of Awards 91 and 98, as irrelevant to the issues before us.

Are Foremen entitled to compensation for keeping their radios on while en route to their work sites? As with the issue of Machine Operators and the use of tools, the Board finds on this record no evidence either that the Carrier required that Foremen operate radios in transit to their work sites, or that they actually did so. The current language of the Agreement does not prescribe pay for Foremen who are not directed to, but do leave their radios on in transit without actually using them. Again, Article VII

establishes a 30 minute period of travel time to and from the job site without pay except for the senior Foreman of the production gang and the Drivers. Neither Third Division Award 31529 (sustaining pay claims under other rules for flagging trains during lunch periods), nor Third Division Awards 18513 or 20914 (sustaining pay claims for being required to "stand by" during assigned meal periods) represent relevant contrary authority. Under the instant circumstances, the Board cannot hold the Carrier liable for pay obligations to Foremen who merely kept their radios on during travel.

It is the opinion of this Board that the instant claims cannot be sustained.

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 23rd day of June 1998.

ORGANIZATION MEMBER'S DISSENT
TO
AWARD 32615, DOCKET MW-32062
(Referee Conway)

This dispute involved the Carrier's failure and refusal to compensate employes for work performed before and after their regularly scheduled work period. The strongest of dissents is required here because the reasoning of the arbitrator in this case is totally misguided and fundamentally flawed. In fact, the misguided and fundamentally flawed reasoning of this award serves to reject arbitral precedent established by two (2) previous awards on this property that considered the very same issues and Agreements involved here. Namely, Award 37 of Special Board of Adjustment (SBA) No. 1016 (Blackwell) and Awards 91 and 98 of SBA No. 1016 (Fletcher). Despite the existence of these two (2) prior decisions, this arbitrator, who is a neophyte in railroad industry arbitration, elected to reject the prior findings of two (2) well-respected and long-time railroad industry arbitrators who possess more than fifty (50) years of combined railroad industry arbitration experience to dish out his own brand of industrial justice. Such action does nothing to promote the timely and orderly resolution of similar claims and grievances. It only serves to foster regeneration of claims. Consequently, this award is palpably erroneous and can have no value as precedent.

The claims involved here were initiated and progressed on the property on the basis that the Carrier failed to compensate the involved Claimants (machine operators and foremen) in accordance with Rule 23(c). The machine operators were required by bulletin to possess and carry hand tools to and from the work site each workday. The foremen were required to tend two-way radios during travel to and from the work site each workday. In this instance, the arbitrator denied the claims on the basis of his determination that Rule 23(c) was inapplicable in light of Article VII of the July 28, 1992 Agreement and Letter No. 13 dated July 28, 1992. According to this arbitrator, Rule 23(c) could not be reconciled with Letter No. 13 dated July 28, 1992, which specified that only senior foremen and drivers would be exempt from the free travel time provisions of Article VII of the July 28, 1992 Agreement. The problem here is that these claims were NOT initiated or presented on the basis that the Carrier violated Rule 12 - STARTING AND ENDING TIME AND CHANGES THEREIN. These claims involved a failure on the part of the Carrier to compensate the Claimants for time worked under the provisions of Rule 23(c). There are two (2) separate and distinct provisions under this Agreement. That is precisely why Rule 23(c) does not have to be melded or reconciled with Article VII or Letter No. 13. It operates separately from Rule 12, Article VII and Letter No. 13. Article VII specifically modified Rule 12, not Rule 23(c). Article VII by its very application was a modification of the STARTING TIME RULE which is Rule 12, NOT Rule 23.

In his attempt to explain away the precedential value of Award 37 and Awards 91 and 98 of SBA No. 1016, this arbitrator stated that:

> "The Organization cites Awards 91 and 98 (consolidated cases hereinafter referred to as Award 91) of Special Board of Adjustment No. 1016 as additional support for its position here. The Board there expressed the well-established principle that precedent in this Division must be respected, and accordingly placed significant reliance on Award 37 in sustaining the claims it considered. Since we decline to follow Award 37 for the reasons stated above, Award 91 is similarly distinguished and found not controlling on the issue before this Board.
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> First, as indicated, Award 37 dealt with claims governed by a materially different Agreement. To the extent Award 91 relies on the inapposite Award 37, it is in palpable error. More significantly, Award 91 found merit in several pay claims by Machine Operators and others based upon facts obviously distinguishable from the facts here. The claim in that dispute characterized the violation as failure to pay for time spent in 'handling and carrying tools.' Award 91 rests on findings that: (i) services were performed en route to the job site, and (ii) neither Article VII nor Letter 13 modified the terms of Rule 23 'that require travel time be counted as work time when employees perform some service while traveling.' But no Machine Operator Claimant in this case maintains that he performed services or 'handled tools' without pay while traveling to his work site. Claimants were not asked to use implements or devices to perform work en route, but to carry light tools to work with their safety equipment. To apply Award 91 to the situation complained of here would be to stretch that Award to its breaking point. If the Organization wishes to secure pay for its members for the very specific activity of carrying light tools to work while not using them - facts not adjudged by Award 91 - it must secure that result through bargaining.
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> One further observation regarding Award 91 warrants mention in view of the outcome here, which may facially conflict with prior authority. Award 91 determines that Article VII and Letter 13 do not modify Article 23, but rather Article 12 (a) which deals with starting times. '. . . [t]here is no indication that Article VII was intended to alter other compensation rules, such as Rule

> "'23. . .') Whatever evidence may have supported that raw conclusion is not revealed, nor was any produced in the case handling of this dispute. In the context of this case, the normal rules of interpretation would require the party claiming non-application of the exception to prove that case. Here that means the Organization should be required to produce persuasive evidence, for example, in the form of bargaining history, to establish that non-working Machine Operators were intended to be paid while traveling despite the contrary terms of Letter 13, or alternatively, that that Letter was in no way intended to modify Article 23. In the absence of such proof, Award 91 turns the normal canons of construction upside down, misallocating the burden of proof in the process. We reject that approach as inconsistent with both established canons of construction and vast tracts of Third Division precedent. Given those deficiencies, to give Award 91 precedental (sic) effect would exemplify *stare decisis* run amok. ***"

There are at least two (2) glaring problems with the above determinations. The first problem involves the Board's finding that in relation to Award 37 of SBA No. 1016, "*** Award 91 is similarly distinguished and found not controlling on the issue before this Board." That is plainly an erroneous determination since the findings of Awards 91 and 98 were NOT solely dependent upon the findings of Award 37 of SBA No. 1016. In this connection, the dispute decided by Award 37 of SBA No. 1016, by Referee Blackwell, centered mainly on whether "personal" hand tools carried by machine operators were covered by Rule 23(c). Referee Blackwell determined that they WERE covered by Rule 23(c) and that it was improper for the Carrier not to compensate machine operators for time worked when they carried such tools to and from work. Award 37 of SBA No. 1016 was rendered on December 27, 1990. In the disputes decided by Awards 91 and 98 of SBA No. 1016, the Carrier again failed to comply with Rule 23(c) when it failed to compensate affected machine operators and repairmen for time worked carrying and handling tools to and from the work site beginning in March and April of 1993. In those instances, the Carrier argued once again that "personal tools" were not covered by Rule 23(c) and for the first time that Article VII of the July 28, 1992 Agreement and Letter No. 13 dated July 28, 1992 somehow modified Rule 23(c) to the extent that payments were not warranted. In rejecting both of these arguments, Arbitrator Fletcher held:

> "The issue of whether personal tools are included within Rule 23 has been decided by Award 37 of this Board on December 27, 1990. In that Award, which was dissented to by the Carrier Member, the Board majority noted:

> "Despite the Carrier's argument that the Claimants were not required to transport the tools in question, and that Rule 23(c) should be construed as covering Company tools only, and not personal tools, an ordinary reading of the rule yields the construction that the fact that the tools are used to maintain Company equipment, which in turn carries out the work required by the Company's business purposes, is sufficient to bring the tools under the rule. The rule as written contains no qualifying language that would permit the term 'tools' to be read as referring only to 'Company tools;' and the fact that the tools are used to maintain Company equipment suffices to treat the Employees as being 'required to handle ... tools' with the meaning of the language in Rule 23 (c).

Carrier has not provided this Board with a sufficient basis to depart, in any fashion, from the previous holding of the majority, except to note that Award 37 was overly broad and ignored the intent and practice of the parties. Accordingly, not finding Award 37 in palpable error, under well established requirements of this industry that precedent setting awards be followed, the decision of Award No. 37 is reaffirmed.

Turning next to Carrier's arguments that Article VII and Side Letter 13 excuse it from payments that may be required under Rule 23 when employees are required to handle tools while traveling. The Board does not find these arguments persuasive. Article VII and Side Letter 13 deal with one type of situation, mainly providing certain relief in payment of travel to and from the headquarters point to the work site. It is a modification of the starting time rules. Rule 23 deals with something different. It treats as 'time worked' travel time when employees are required to perform some service at the same time they are traveling, i.e., 'operate, supervise, flag, or move the car or trailer to or from the track, or to handle tools to and from such vehicles.'

It is clear from the history of the development of Article VII that it was only intended to provide relief to Carrier (provide 'free time' as they term it) when moving production gangs back and forth between the headquarters and the work site. Article VII specifically modified requirements of Rule 12(a) that 'time of the

> "'employees would begin and end at their headquarters point.' There is no indication that Article VII was intended to alter other compensation rules, such as Rule 23, that requires that travel time be counted as work time when employees perform some service while traveling.
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> Moreover, if Article VII can be considered as modifying Rule 12(a), then Carrier could have employees traveling to and from the work site do all sorts of work, like flag, move the car or trailer to or from the track, supervise, and handle tools (including heavy jacks, welders, etc.) without payment, if the activity occurred during the 'free time' developed in Article VII. This would produce an absurd application, a result that needs to be avoided. In this record it is the conclusion of this Board that Article VII did not modify the requirements of Rule 23. Under that Rule travel time is to be counted as work time if any of the service listed in the Rule are completed." (Underscoring in original)

From the above, it is clear that Arbitrator Fletcher correctly followed the precedent established by Arbitrator Blackwell in rejecting the Carrier's contentions that Rule 23(c) did not apply to "personal tools". From there on, however, Arbitrator Fletcher tackled and REJECTED the Carrier's contention that Article VII and Letter No. 13 excused it from payments required under Rule 23(c). Arbitrator Fletcher determined correctly that there was no need to reconcile Rule 23 with Article VII or Letter No. 13 because Rule 23(c) dealt with compensation for time worked, not merely travel time. For this arbitrator at this late juncture to assail the findings of Awards 91 and 98 is unconscionable, especially in light of the fact that the Carrier Member's only response to the findings of Awards 91 and 98 was the notation "I dissent".

The second problem with this award is the fact that it incorrectly determined that:

> "*** no Machine Operator Claimant in this case maintains that he performed services or 'handled tools' without pay while traveling to his work site. Claimants were not asked to use implements or devices to perform work en route, but to carry light tools to work with their safety equipment. To apply Award 91 to the situation complained of here would be to stretch that Award to its breaking point. ***"

Once again, this arbitrator evidences his misunderstanding of this dispute. The basis of these claims, as was the case in the earlier disputes decided by Awards 37, 91 and 98 of SBA No. 1016, was that

the Claimants were not properly compensated via Rule 23(c) for handling tools to and from their vehicles each workday. Obviously, Arbitrators Blackwell and Fletcher both interpreted the clear and unambiguous language of Rule 23(c) to apply to precisely the type of situations involved in the instant disputes. There is plainly no justification for the determination that the application of Award 91 of SBA No. 1016 to the instant disputes would have been a "stretch". In fact, there could be no better candidate for the application of *stare decisis*.

Finally, another problem with this award is that even if you follow and accept its faulty logic, those Claimants who were working as the senior foremen on the gangs on the dates involved here would still have been entitled to compensation for time spent traveling to and from the work site each day under the terms of Letter No. 13. Said Letter specifically stipulates that:

> "During our discussions it was agreed that the free travel time provisions which are set forth in Article VII do not apply to the senior foremen of the production unit and do not apply to drivers transporting production units to the work site from the camp car/lodging facility and from the work site to the camp car/lodging facility. ***"

Apparently, this arbitrator became so enamored and bent on implementing his own brand of industrial justice that he failed even to follow his own reasoning.

From the above, it is clear that this award is so mangled and twisted that it cannot be considered as valid precedent in any other case. For the above reasons, I dissent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member