Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36525
Docket No. MW-35409
03-3-99-3-287

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northen Santa Fe Railway (former Burlington
(Northern 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 pay the employes assigned to System Tie Gang TP02 for work performed preceding and following their regularly assigned hours beginning January 20 through February 28, 1997 (System File C-97-0020-14/MWA 97-05-27AA BNR).

(2) As a consequence of the violation referred to in Part (1) above, each Claimant shall now ' . . . be paid 20 hours at one-half the regular hourly rate for their respective positions during the claim period of January 20, 1997 through and including February 28, 1997. ***'"

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.

This is a contract interpretation based upon undisputed core facts. The parties agree that the Claimants were assigned to a System Tie Gang working between Las Cruces and Albuquerque, New Mexico. On numerous dates between January 20 and February 28, 1997, these employees traveled from the Carrier designated lodging site to the work site. That time of travel varied, but in each instance, the Carrier deducted the first and last consecutive 30 minutes each way to and from the work site and thereafter compensated the employees. There is no dispute that the Claimants were due compensation. The dispute at bar is over the amount of compensation due the Claimants. The Carrier compensated each employee at their straight time rates of pay for all time over the eight hour work day, less the 30 minutes each way to and from their work site and lodging site. The Organization maintains that the proper compensation is at the overtime rate of pay.

The basis of the Organization's position on the property was contract language and past practice. The Organization points to Rules 25, 29 and Article XVII of the September 26, 1996 National Agreement. Specific to each the language holds as follows:

"Rule 25 (Basic Day)

Except as otherwise provided in this agreement, eight (8) hours exclusive of the meal period shall constitute a day.

Rule 29 (Overtime)

A. Except as otherwise provided in this Agreement, time worked preceding or following and continuous with a regularly assigned eight (8) hour work period shall be computed on the actual minute basis and paid for at time and one-half rate, . . .

Article XVII (Work Site Reporting)

Article VIII-Work site Reporting of the Imposed Agreement is amended to restrict any unpaid time traveling between the carrier designated lodging site and the work site to no more that (sic) thirty (30) minutes each way at the beginning and end of the work day."

The Organization holds as a starting point that the language is clear. The employees who traveled to and from their designated job site and as per Article XVII were properly denied payment for the first and last 30 minutes. However, as is also clear, the employees worked a basic eight-hour day (Rule 25) and for all other time should have been paid at the time and one-half rate of pay (Rule 29).

Additionally, the Organization maintains that there is ample precedent on this property for the payment of overtime. It holds that any time spent traveling between assembling points and work sites after the eight-hour work day has always been paid for at the overtime rate. This can be seen by clearly settled disputes on payment and in particular Third Division Award 8825 which sustained a nearly identical dispute on a predecessor property. Not only does the Organization argue that past practice and Award precedent support its position for overtime payment, but it maintains that the Carrier's defense based on Rule 35 is inapplicable. Rule 35 is shown to be inapplicable even by the Carrier's own letters of interpretation from BN Vice President DeButts.

The Carrier maintains that it properly paid the Claimants at the straight time rate of pay for their travel time to and from the work site. As for the Organization's positions, the Carrier notes that Rule 25 refers only to time worked and does not apply to time traveled. The Carrier argues that this is equally true of Rule 29, which provides for overtime for time worked and is not applicable to travel time to or from a work site. It further notes that Rule 29 provides for exceptions to overtime payment and one exception is Rule 35. The Carrier argues that "Rule 35 clearly provides that Travel Time will be paid at the straight time rate." The Carrier maintains that Article XVII did not create a penalty rate of pay for time spent traveling each way beyond the 30 minutes coming and going to the work site from the lodging site, but did amend Article VIII of the 1991 Imposed Agreement by changing what had been "previously unpaid time spent traveling . . . to no more than thirty minutes each way at the beginning and end of the work day." The Carrier certainly does not support the past practice argument of the Organization.

Despite the Organization's emphasis on Rules, practice and arbitral precedent, each is sublimated by the fundamental issue of the applicability to System Gangs. The various general Rules are not Rules that were propagated or supported by precedent in their applicability to these facts. The Board must note that there is no probative evidence of record that the past practice was the payment of overtime for travel in these instances. We find no payment records, letters from employees or any rebuttal from the

Organization to the Carrier's position that prior to 1991, this had been "previously unpaid time spent traveling...." The Board read the Awards cited by the Organization and in particular, Third Division Award 8825, but it was not an Award dealing with the specific contract provisions at bar. Despite the lack of probative evidence for overtime, the Organization further asserts before this Board that Rule 35 lacks any applicability and points to the May 10, 1971 DeButts letter. We do not agree. The only provision of the Agreement that refers to the payment of travel time is Rule 35. Also, Rule 29 on Overtime, clearly states that overtime is paid "except as otherwise provided in this Agreement...." Rule 35(e) is the exception and appears applicable herein. Rule 35 states throughout that travel time is computed at the straight-time rate of pay for numerous situations. We can find no instance presented by the Organization to support its burden that the proper application has recently been or currently is at the overtime rate for time spent traveling.

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 April 2003.

CORRECTED

LABOR MEMBER'S DISSENT
TO
AWARD 36525, DOCKET MW-35409
AND
AWARD 36526, DOCKET MW-35418
(Referee Zusman)

The above-referenced awards involved nearly identical disputes over the proper amount of compensation system gang employes were entitled to receive for work performed preceding and following their regularly assigned hours on various dates in January, February and June, 1997. These dockets were denied on the erroneous basis that the involved employes were not entitled to compensation at the time and one-half rate in accordance with Rule 35. As cited by the Majority:

> "*** The Carrier argues that 'Rule 35 clearly provides that Travel Time will be paid at the straight time rate.' ***"

The Majority held:

> "*** Despite the lack of probative evidence for overtime, the Organization further asserts before this Board that Rule 35 lacks any applicability and points to the May 10, 1971 DeButts letter. We do not agree. The only provision of the Agreement that refers to the payment of travel time is Rule 35. Also, Rule 29 on Overtime, clearly states that overtime is paid 'except as otherwise provided in t his Agreement....' Rule 35(e) is the exception and appears applicable herein. Rule 35 states throughout that travel time is computed at the straight-time rate of pay for numerous situations. ***"

The Majority, finding that Rule 35 was applicable is absolutely wrong and nothing in the record served to establish that any of the provisions of Rule 35 were applicable to these disputes. Therein lies the fallacy in the Majority reasoning. Incidently, it was the Carrier that raised the alleged applicability of Rule 35 to these disputes, not the Organization. Hence, in accordance with arbitral precedent so well established as to preclude the necessity of award citation, the burden was on the CARRIER to satisfy its burden of proving application of that provision.

Without fully regurgitating the Organization's position, it is important to understand that the Organization proved during the handling on the property that neither of the instant disputes fit the criteria of Rule 35. This was clear by a plain reading of the rule AND support therefore was presented in the form of a written letter dated May 10, 1971, from former Vice President, Labor Relations DeButts (Employes' Exhibit "D"). In that document former Vice President, Labor Relations DeButts clearly and unequivocally explained that the "travel time" provisions of Rule 35 do not in any manner apply to the type of situation that existed in the instant claims. Mr. DeButts explained the Carrier's interpretation of Rule 35 as follows:

> "Rule 35 - Travel Time, is also taken from Arbitration Award 298. Included in the coverage of this travel time rule are three separate categories of employes.
>
> Those referred to in paragraphs (a) and (b) are the regularly assigned employes with a fixed headquarters who might be required to leave their home station to perform service elsewhere. Travel time for such employe, during or outside their regular assigned hours is payable at pro rata rate, plus mileage of 9¢ if they drive their own car.
>
> Employes referred to in paragraphs (c), (d) and (e) are those ordinarily headquartered in outfit cars, and they will be paid pro rata rate when traveling from one work point to another, i.e., when their outfit cars are moved.
>
> Paragraphs (d) and (e) provide for free transportation and/or mileage allowance of 9¢ a mile for use of an employe's personal automobile, plus travel time, in traveling from the headquarters point to another point, and return, or from one point to another.
>
> Paragraph (f) provides that no travel time will be allowed while traveling in the exercise of seniority, or between home and designated assembly points, or for other personal reasons.
>
> Paragraph (g) covers employes filling relief assignments or performing extra or temporary service. It will be noted in (g)(2) that there is a period of one hour before and after an employe's shift for which no travel time is payable. This simply means, for example, if an employe is working thirty (30) miles from his headquarters point and driving his own automobile between such points, he will not receive any travel time pay, but he will be allowed the 9¢ a mile provided for in paragraph (b)." (Employes' Exhibit "D")

A plain reading of the above clearly establishes the error in the Carrier's contention that the Claimants were entitled to only straight time pay in accordance with Rule 35. Obviously, Rule 35(a) and (b) could not apply since the Claimants were not assigned to fixed headquarter gangs that were required to leave their home station to perform service elsewhere. Moreover, they were not governed by sections (c), (d) or (e), since the travel was not in connection with the moving of outfit cars. In addition, section (f) could not be applicable since these instances did not involve the exercise of seniority or moves between an employes home and designated assembly point. Section (g) could not apply since none of the Claimants were filling a relief assignment or performing extra work. Lastly, it must be noted that former Vice President DeButts is the highest designated Carrier officer authorized to interpret the Agreement. It is apparent that the Majority

erred when, although it recognized that, "Rule 35 states throughout that travel time is computed as the straight-time rate of pay for numerous situations.", it decided to create a new provision for the rule. This Majority clearly exceeded its authority when it ignored the time honored principle of contract construction that provides that when a contract provision contains inclusions/exclusions, no others will be entertained. This Board is not charged with the responsibility of rewriting the terms of the Agreement, however, that is exactly what occurred here. For the above reasons, I respectfully dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member

Carrier Members' Response
to
Labor Member's Dissent
to
Award 36525, 36526 (Docket MW-35409, MW-35418)
Referee Zusman

As is specifically noted at page 2 of Award 36525, these disputes concerned the compensation to be provided the System Gangs after the 30 minutes of travel time to/from the work site. The Organization argued for the overtime rate while the Carrier argued a specific contract provision in conjunction with Article VIII of the 1992 Imposed Agreement as modified by Article XVII of the 1996 National Agreement was applicable.

Dissentor asserts that Rule 35 has no application to these disputes even though it is the only rule in the contract between the parties that deals specifically with travel time.

Pursuant to the Creation of System Gangs as a result of the 1992 Imposed Agreement, employees on such gangs were not paid for travel time. Such a fact was clearly noted in Contract Interpretation Committee (CIC) Decision No. 22 and was acknowledged by the Organization in its argument to PEB 229:

> "PEB 219 intended no limitation upon unpaid travel time
> For employees assigned to these production crews"
> (Griffin testimony at p. 369 of PEB 229 proceedings)

In the presentation made by this Organization to PEB 229, it was noted that:

> "...employees assigned to away-from-home-lodging board in most cases the company-provided bus and ride on their nickel till they get to the work site and they ride in an unpaid fashion no matter how long it takes." (Griffin testimony at p. 363 of PEB 229 proceedings) (emphasis added).

Nothing was provided by the Organization that would indicate anything different on this Carrier. Nothing in the way of on-property precedent was put in evidence to support the Organization. There is no evidence in the Dissent that the conclusion made in Award 36525, that:

> "... there is no probative evidence of record that the past practice was the payment of overtime for travel in these instances"

is in error because of contravailing evidence. There is absolutely nothing in the records to support the Organization's argument. Since there was no payment of overtime prior to the 1996 National Agreement, the simple question becomes how does the language of Article XVII of the 1996 National Agreement, the only change in travel time applicable to production gangs, change to an entitlement to the overtime rate. The answer is it does not and the Organization did not show otherwise.

The May 10, 1971 Vice President DeButts letter was speaking about the initial result of the merger creating Burlington Northern Railroad in 1970 and the application of the continuation of the interpretation of SBA 298. That is clear on its face. It obviously did not and could not comment upon the 1982 contract revision which is the current contract nor deal with the question of the System Gangs provided in the 1992 Imposed Agreement. The Organization, before the Board, and in its Dissent is arguing apples and oranges. As the Board noted correctly

> **"We can find no instance presented by the Organization to support its burden that the proper application has recently been or currently is at the overtime rate for time spent traveling" (page 4 of Award 36525).**

Dissentor's attempt to foist the burden of proof on the Carrier simply fails because Dissentor has not shown that evidence supporting its argument was ignored by this Board. Both the historical record and the specific record in these cases supports the decision rendered.

P V Varga
Paul. V. Varga

Bjarne R. Henderson
Bjarne R. Henderson

Martin Fingerhut
Martin W. Fingerhut

Michael C. Lesnik
Michael C. Lesnik