

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36526
Docket No. MW-35418
03-3-99-3-308**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern 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 employees assigned to Region Gang RP-11 for work performed preceding and following their regularly assigned hours on June 24, 26 and 27, 1997. (System File T-D-1422-H/MWB 97-12-05AD BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, each Claimant listed within our initial letter of claim* shall now ‘ . . . receive six hours and ten minutes at the one-half rate of pay, for June 24, 26 and 27.’”**

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 claim parallels that which we considered and discussed in Third Division Award 36525 between these same parties. In both disputes the parties disagreed upon payment for "travel time" between the lodging site and the work site. The Organization alleged that the Carrier's straight time payment of time spent traveling violated the Agreement in failing to pay overtime.

In this dispute there are some minor differences in argument, but the fact remains that the Organization failed to support a penalty payment for time spent traveling as applied to Production Gangs as directed from PEB 219. We find no rebuttal that in testimony before PEB 219, the Organization stated that "the unpaid time spent traveling between the lodging site and the work site was travel time" and that it needed to be changed. Clearly, Article XVII of the 1996 Agreement limited unpaid time traveling to no more than 30 minutes each way from the work site. Nowhere has the Organization provided probative evidence that payment at the time and one-half rate for travel was ever paid for travel to System Gangs created by PEB 219. We find no overtime provision in the Agreement referring to travel time. We studied the Awards cited by the Organization and do not find them on point (Third Division Awards 8825, 6683, 18033 and 21917).

Accordingly, for the reasons above as well as those discussed in Award 36525, 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 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 employees 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 employees 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. Incidentally, 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 (Employees’ 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 employees.

Those referred to in paragraphs (a) and (b) are the regularly assigned employees with a fixed headquarters who might be required to leave their home station to perform service elsewhere. Travel time for such employee, during or outside their regular assigned hours is payable at pro rata rate, plus mileage of 9¢ if they drive their own car.

Employees 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 employee'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.

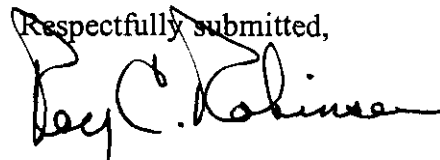
Paragraph (g) covers employees filling relief assignments or performing extra or temporary service. It will be noted in (g)(2) that there is a period of one hour before and after an employee's shift for which no travel time is payable. This simply means, for example, if an employee is working thirty (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)." (Employees' 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 employees 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

Labor Member's Dissent
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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,

A handwritten signature in black ink, appearing to read "Roy C. Robinson". The signature is fluid and cursive, with the first name "Roy" being particularly prominent.

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.

Dissenter 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).

Dissenter's attempt to foist the burden of proof on the Carrier simply fails because Dissenter 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.



Paul. V. Varga



Bjarne R. Henderson



Martin W. Fingerhut



Michael C. Lesnik