CORRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40343
Docket No. MW-40438
10-3-NRAB-00003-080262

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to allow Cross System Production Crew 2 employes J. Ochoa, C. Diaz and E. Mashak the proper travel time and mileage reimbursement for all miles and time incurred in using their personal vehicles for transportation between his designated lodging point and designated assembling work points on August 17, 18, 22, 23 and 24, 2005 (System File C-05-380-041/8-00319-400).

(2) As a consequence of the violation referred to in Part (1) above, Claimant E. Mashak '. . . shall now be reimbursed for the 320 miles at the applicable 40-1/2 cents per mile and 6-3/4 hours of travel time, . . .' Claimant C. Diaz '. . . shall now be reimbursed for the 300 miles at the applicable 40-1/2 cents per mile and 6-3/4 hours of travel time. . . .' and Claimant J. Ochoa '. . . shall now be reimbursed for the 300 miles at the applicable 40-1/2 cents per mile and 6-3/4 hours of travel time. . . ."

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 dispute involves the proper interpretation of Rule 22(3) which provides, in pertinent part:

> "RULE 22 - BEGINNING AND END OF DAY
>
> Time of employes will start and end at designated assembling point. Designated assembling or starting point will be interpreted as follows:
>
> * * *
>
> 3. Employes under the provisions of Rule 35 who are not furnished outfit cars or highway trailers, the assembling point shall be a place such as the Company's railroad station, station headquarters, B&B headquarters, tool house or gang tool cars on a siding in a city or town close to the work site. If that point is in excess of thirty (30) highway miles from nearest suitable, available lodging, then travel time and mileage to and from such lodging will be allowed."

The Claimants were assigned to Cross System Road Crew No. 2 in August 2005 working away from home at various locations in North Dakota. Claimants Ochoa and Diaz (Extra Gang Laborers) lodged at the Corporate Lodging facility in Wahpeton, North Dakota, which the Organization asserted was designated as the nearest suitable lodging available; apparently, Claimant Mashak (an Extra Gang

Assistant Foreman) did not. On August 17, 18, 22, 23, and 24, they worked at Hankinson, North Dakota, which is 32 highway miles from their lodging facility. During the work day on August 24, their location was moved to Mantador, which is 44 miles from their lodging facility. Each of the Claimants filled out expense reports which they submitted on August 31, 2005, including mileage and travel time for each of the claim dates calculated from the Corporate Lodging facility as follows: 64 miles for August 17, 18, 22 and 23, and 76 miles for August 24. The Carrier issued a declination letter for each claim disallowing 60 miles for each day for Claimants Ochoa and Diaz and 64 miles for August 17, 18, 22 and 23 for Claimant Mashak and 72 miles for August 24, 2005, noting "Per supervisor Personal Vehicle mileage deducted for the dates of August 17, 18, 22, 23, and 24." The instant claim seeks reimbursement for the amounts deducted under Rule 22(3) set forth above.

The Organization explains that the Claimants were working on a gang requiring them to live away from home during the workweek, so they were provided lodging in accordance with Rule 35. It argues that under the clear language of Rule 22, once it is established that the nearest suitable available lodging is in excess of 30 miles from their work site, the Claimants are entitled to travel time and mileage for the entire trip to and from their lodging, citing the following precedent for the principal that the Board is to apply the contract as written and not to rewrite it with exceptions that were not included by the parties: Third Division Awards 20345, 20367, 20419, 20711, 20844, 20956, 21061, 21478 and 22748. The Organization points out that accepting the Carrier's argument would require the addition of an exception to Rule 22 that was not negotiated by the parties. It notes that the Carrier's denial of the claim was based solely upon its interpretation of Rule 22, and not upon suppositions made later in the processing on the property about whether the Claimants stayed in the nearest suitable lodging, actually drove their own vehicles to the work site, or worked on the dates in question.

The Carrier contends that the Organization did not meet its burden of proving that the Claimants incurred the expenses claimed for travel or that it violated Rule 22 by denying the excessive reimbursement claims submitted, contending that mere statements do not constitute evidence, and relying upon First Division Award 24300; Third Division Awards 8486, 9788, 10201, 10601, 10637, 19916, 20356, 24052, 30595; Public Law Board No. 1838, Award 40. The Carrier agrees that meaning must be given to the clear cut language of the Agreement and the intention of the parties, and argues that Rule 22 was intended to compensate employees who have to commute to work more than 30 miles per day, and provides

that the first 30 miles each way is not compensable, which explains why 60 miles per day were deducted from the Claimants' expense forms. The Carrier notes that mileage is computed from the nearest, suitable, available lodging, which the Organization failed to establish was the corporate lodging facility in Wahpeton. Additionally, the Carrier asserts that there is no proof that each Claimant drove his own vehicle to the job site daily, positing that Claimant Mashak drove the Company vehicle on these dates. While urging the Board to deny the claim, the Carrier insists that any compensation ordered herein should be reduced to the amount actually incurred under the principle of mitigation of damages.

A careful review of the record convinces the Board that Rule 22(3) is clear and unambiguous, and that its language is susceptible only to the interpretation urged by the Organization. First, Rule 22 is entitled "Beginning and End of Day" and defines where employees' designated assembling point is for starting and ending purposes. For employees such as the Claimants who are working away from home under Rule 35 and are not furnished outfit cars or highways trailers, their assembling point is defined as a designated place close to the work site, which on the claim dates was Hankinson. Second, for such employees, Rule 22(3) provides that if their designated assembling point or work place is located "in excess of thirty (30) highway miles from the nearest suitable, available lodging, then travel time and mileage to and from such lodging will be allowed." It does not state, as the Carrier contends, that the travel and mileage allowance is only to be paid for miles and time expended over the 30 mile threshold. Rather, it makes clear that once it is established that the distance between the lodging and work site exceeds 30 miles (which is a condition precedent to entitlement in this provision), then "travel time and mileage to and from such lodging will be allowed." This language clearly exhibits the intention to have travel time and mileage allowed for the entire distance between the lodging and the work site. Third, Rule 35 is the reimbursement provision for Travel Time and Expense for employees required to live away from home throughout their workweek. Rule 35(c) discusses reimbursement for travel expenses incurred by use of a personal vehicle from one work point to another, which is not the issue in this case. Rule 22 is a negotiated provision for compensation for additional time and expense associated with being required to travel distances the parties deemed to be greater than normal to the work site from the nearest suitable lodging. While it says nothing about the use of a personal vehicle, the reimbursement form submitted has the mileage and amount columns under the heading "Personal Vehicles."

Thus, in order to be successful for travel time, it is incumbent on the Organization to show that the Claimants were working under the provisions of Rule 35, were not furnished outfit cars or trailers in which to reside, and that the nearest suitable, available lodging to the assembling point is in excess of 30 miles. In addition, it must show that they used their personal vehicles to obtain the mileage benefit. Under the wording of this provision, the Organization need not establish that the employees actually stayed in that lodging, as was the case with Claimant Mashuk, only that the claim for travel time and mileage is calculated from such lodging. In this case, Claimants Ochoa and Diaz stayed in the corporate lodging facility the Organization asserted was 32 highway miles from the work site on August 17, 18, 22 and 23, and 44 miles from the changed work location on August 24.

This claim was initiated in November 2005. During the claim processing, the Organization asserted that the nearest suitable lodging to Hankinson was in Wahpeton, and that the Carrier's lodging policy required them to reside at the corporate lodging facility because nothing closer was provided by the Carrier. The first two denials were based upon the Carrier's understanding that Rule 22 gave it the first 30 miles each way free. In its July 2006 denial the Carrier raised the possibility that each Claimant did not drive his own vehicle, and that if he was not actually driving, the submission of a mileage expense would be fraudulent. It was not until December 13, 2007, at the Labor Relations level, that the Carrier first stated that the Claimants were not obliged to use the corporate lodging facility and were not entitled to mileage from it if there was suitable lodging closer, alleging that there were many motels in the area and some that were nearer than the corporate lodging facility. Nothing specific was furnished in this regard. The Carrier also asserted that the Organization had failed to establish that the Claimants had used their own cars and asserted that they could have ridden together in a Company vehicle, which it alleged Mashak drove.

As noted above, Rule 22(3) does not require that the Organization establish that the Claimants actually stayed in the nearest suitable lodging. Because there does not appear to be a dispute that Wahpeton was the closest location to the work site with suitable available lodging, and that there was a corporate lodging facility in Wahpeton which, if used, would reduce lodging costs for Carrier, once the Organization claimed that corporate policy designated such lodging as the one to be used by the Claimants in the area and that it was located 32 miles from the work site, it was incumbent upon the Carrier to prove, rather than merely assert, that its

corporate policy did not require employees to use that facility where it was provided in the area closest to the work site, and that specific motels in the same town were suitable and available and more than two miles closer to the work site for purposes of calculating entitlements under Rule 22(3). While the Organization bears the burden of proving a violation of Rule 22 in this case, the Carrier cannot belatedly contest every fact asserted (which it has the records to verify or dispute) without providing some proof of the validity of its assertions. Further, the declination letters and adjustment of the expense claims submitted do not support the Carrier's position. The records reveal that the Carrier did not deny entitlement to any monies at all based upon the assertion that the lodging facility was less than 30 miles from the work site or that Claimants Ochoa and Diaz did not drive their own vehicles to the work site. Rather, it reduced the amount paid by 60 miles each day for Claimants Ochoa and Diaz based upon its interpretation of Rule 22(3). Further, it denied any entitlement to mileage for Claimant Mashak on August 17, 18, 22 and 23, and reduced his mileage claim from 76 to four on August 24. If the denial of money to Mashak was based upon the allegation that he drove a Company vehicle or did not stay at the lodging facility, there is no basis in the record for allowing reimbursement for four miles on August 24, and there is no proof that he was assigned and drove a Company vehicle on the claim dates. Similarly, if the Carrier had evidence that Ochoa and Diaz did not drive their own vehicles from the lodging facility to the work site, it would have denied entitlement to any reimbursement for mileage submitted by these Claimants on their expense vouchers, rather than just reducing the amounts owed to them.

Under all of these circumstances, we conclude that the Organization met its burden of proving that the prerequisites for entitlement to travel time and mileage contained in Rule 22(3) were met with respect to the Claimants on the claim dates. All Claimants are entitled to travel time and mileage, because the Carrier failed to support its allegation that the claims are excessive and that the mitigation of damages principle applies to the facts of this case.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of March 2010.