NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21125
THIRD DIVISION Docket Number MW-21031

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

Because of the injuries sustained on January 4, 1972, the Carrier should pay to Messrs. R. G. Almaguer and S. C. Artiaga the benefits set forth in Article V B(3) of "Appendix H"(System File 17-3/MW-46 5/17/72).

OPINION OF BOARD: At about 12:15 a.m., on January 4, 1972, the Galesburg Roadmaster, Jacobs, called Foreman Almaguer and advised him to report to work for overtime service in the Galesburg Terminal. Almaguer contacted Sectionmen Artiaga and VanSkike. All three men were proceeding to work in Artiaga's automobile when it was involved in an accident which resulted in injury to Almaguer and Artiaga, and the death of VanSkike.

This docket concerns the claims of Almaguer and Artiaga. The claim on behalf of VanSkike is before this Board in Docket MW-21026, Award No. 21126.

Rule 30.C specifies that:

> "...the time of an employe who is called after release from duty to report for work will begin at the time called..."

There is no question, based upon the above-cited rule, that Claimants were on the Carrier's payroll at the time of the accident. Article V A of the so-called "off-track vehicle agreement" between the parties provides that:

> "This Article is intended to cover accidents involving employes covered by this Agreement while such employes are riding in, boarding, or alighting from off track vehicles authorized by the Carrier and are
>
> (1) deadheading under orders or
>
> (2) being transported at Carrier expense."

The "Exclusions" of Paragraph D include:

> "(6) While an employe is commuting to and/or from his residence or place of business."

Carrier has attached to its Submission various documents which relate to civil litigation in this matter. The Organization objects to the inclusion of those documents because they do not constitute a part of the handling of the matter on the property. While the documents are background information and of interest to a better understanding of the circumstances which led to the claim, it is questionable that, in the strict sense, they constitute a part of the precise handling on the property, as that concept has developed before this Board. However, a consideration of the Court related documentation does not alter our final disposition of the dispute, and accordingly, for our purposes in this particular case, we have considered all of the documents in the docket.

As Carrier properly notes, we may not limit our review of the dispute solely to the question of "exclusions", but rather, we must assure that Claimants have presented evidence to support their conclusion that all basic elements for liability under the rule are established.

In this regard, Carrier concedes that there was an accident which involved employes covered by the Agreement, and that the employes were riding in an off-track vehicle. But, the Carrier disputes that the use of a private automobile was "authorized" or that Claimants were deadheading under orders or being transported at Carrier expense. Accordingly, Carrier concludes that Claimants were merely "commuting" from their residence, and that coverage is consequently excluded under the Agreement.

The record is rather clear that the employes were never reimbursed for travel expense when using their private vehicles in circumstances such as presented here. Although the Organization suggests that, nonetheless, under this record the Board could conclude that there was a transportation at Carrier expense, we do not find it necessary to explore that concept. Under the rule, it is not necessary to find a "deadheading under orders" and a transportation at Carrier expense. Our disposition of the "deadheading" question renders further exploration of the "transportation at Carrier expense" argument unnecessary.

At Page 30 of its Submission to this Board, Carrier concedes that the rule:

> "...creates a certain degree of ambiguity as to precisely what must be 'authorized by the Carrier'..."

Moreover, the Carrier concedes that the rule does not mandate a specific, direct statement of precise authority to operate a certain designated vehicle. Rather, it is recognized that "authority" can reasonably be inferred

from statements and actions. We agree with Carrier that the record does not show that its agents had specifically authorized the use of Artiaga"s 1969 Volkswagen Squareback on the day in question. But that omission is not fatal to the Claimants' case.

Whatever may have been the Claimants' normal mode of transportation concerning regular duty hours is not particularly relevant to this dispute. However, based upon the "under pay" concepts of Rule 30.C, we feel that knowledge on the part of the Carrier of Claimants' normal practices when called for the type of overtime here in issue is quite important to the question of "authority." The record is singularly clear that the two Claimants here, and the individual involved in Award No. 21126, when called for overtime, always used a personal vehicle of one of the three to journey the 15 or 16 miles from their residences to the Galesburg Terminal. There was no Carrier passenger or freight train service reasonably available at the times of the calls - and no indication of reasonable availability of other types of public transportation at hours such as involved here. If the Claimants had not employed the means of private vehicles, it is questionable that they would have been able to respond to overtime calls in normal circumstances, and rather obvious that they could not have responded on the night in question.

Of equal significance is the Carrier's knowledge of these factors. The rather extensive records before us fails to include any statements from Roadmaster Jacobs - who called the crew on January 4, 1972 - or from other Carrier Officials who might customarily perform similar functions. Thus, we must draw all inferences reasonably concluded from the evidence, and find that Carrier knew, or reasonably should have known, that there was an absence of Carrier (or public) transportation and that the employes would drive private vehicles to report for overtime work. Armed with that knowledge, Carrier placed Rule 30.C into operation - and thus, placed the men under pay. It is reasonable to conclude that not only did the Carrier "authorize" the employes to utilize private transportation, but, in fact, under all of the circumstances, they "encouraged" it - as the only reasonably available means to facilitate the reporting to perform productive work, and to minimize undue expenditures of money for the "unproductive" time consumed in reporting to the work sites.

Carrier denies that the employes were "deadheading under orders." While it is questionable that said defense was raised, in those terms, while this matter was the subject of specific handling on the property, it was raised in Award No. 21126. In addition, that argument is directly related to the properly raised defense of "commuting" so as to be properly before us. The Carrier freely concedes that there have been very few Awards which have dealt with a definition of the term "deadheading." We have considered the few that were cited, but find that they are of little assistance. It may be that certain

of the Awards used the term in a restrictive sense and spoke in terms of "points on the railroad." But, as we have considered those Awards, they did not focus upon an issue such as this, and we feel that their conclusions are rather neutral to our consideration.

We have noted Carrier's statement, at Page 37 of its Submission, that the word "deadheading" "... is not used anywhere in the BN-BMWE Agreement, except in the Off-Track Vehicle Article." We obviously cannot subscribe, however, to its next stated conclusion that such a concept /deadheading/ "... manifestly does not exist in this contract or in this context." In point of fact, because the term is not modified elsewhere in the Agreement, we would appear to have a wider latitude in applying it to a given set of circumstances.

In defining the term, it is important to recognize the purpose of the Article in question. It is to cover accidents to employes riding in "off-track vehicles." Obviously then, the parties did not intend a limited definition dealing solely with transportation via rail. The existence of Rule 30.C leads us to conclude that the Claimants fell within the contemplation of the rule. Had they not been under pay, then other considerations - such as the exclusionary language - would be of paramount importance. But, as of the time of the calls, the employes were on the active payroll of Carrier - at premium rates - and were traveling at the authority of Carrier. Surely, various concepts of agency were in existence as a result of the call-in, and agency concepts may not be limited solely to Carrier-owned property. Not only do we fin that they were deadheading, but, based upon our discussion of "authority", discussed above, we feel that they were "under orders."

Carrier suggests that the application of Rule 30.C is not material to a resolution of this dispute, and notes that an employe may be under pay concerning all of the exclusions. We do not read the rule as being so easily defined. It may be that an employe is under pay while riding in an off-track vehicle, authorized by Carrier, but be excluded from coverage because of Paragraph D(4). At the same time, an employe might not be under pay, but still be covered because he is being transported at Carrier expense. In short, we do not feel that we reach the exclusion of Paragraph D(6) because the asserted exclusion concerning "commuting" has been disposed of by our findings regarding "deadheading." As noted, but for Rule 30.C, we might be inclined to agree that the employes were not entitled to recovery. But, simply stated, when an hourly rated employe is "on the payroll", we do not feel that he is "commuting" in the accepted sense of the word. Nor do we feel that we are in conflict with the cited IRS considerations. Rule 30.C converts this dispute into quite another matter than a personal choice of location of private residence.

The claim seeks benefits set forth in Article V B(3) of "Appendix H." We read the claim as seeking only benefits to which they are entitled under their individual circumstances.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1976.

DISSENT OF CARRIER MEMBERS

to

AWARD 21125 DOCKET MW-21031 and AWARD 21126 DOCKET MS-21026

(Referee Sickles)

The majority in this case found Rule 30 (c) to be determinative of the result on every material issue. Such extensive reliance on that single provision was, in the final analysis, misplaced. Such a narrow focus led the majority to substitute a chain of questionable inferences for an affirmative showing, to overlook the most obvious source of precedent in defining a key term, and to brush aside logic, and even dictionary definitions, in defining another key term.

The majority found that the use of Mr. Artiaga's 1969 Volkswagen was "authorized by the carrier." This finding was based on a whole chain of inferences: the claimant's normal mode of transportation when called for overtime work, and the Carrier's supposed knowledge of same; the length of the journey which they would have to undertake, and the Carrier's supposed knowledge of same; the non-availability of train service, and the Carrier's supposed knowledge of same; the non-availability of alternative forms of public transportation, and the Carrier's supposed knowledge of same. All of these inferences, taken together, were cumulated, and culminated, in the holding that:

> the Carrier knew, or reasonably should have known ... that the employes would drive private vehicles to report for overtime work.

The result was a "showing" on the "authorized by the carrier" condition, that was tenuous in the extreme.

The majority's holding that the claimants were "deadheading under orders" is grounded on the very existence of Rule 30 (c), and the resulting fact that the claimants were under pay while on their journey. But, in so holding, certain pertinent factors are either glossed over, or entirely ignored.

The fact of the matter is that the Off-Track Vehicle Agreement was initially negotiated with the Brotherhood of Railroad Trainmen, and was drafted in the terms and contexts applicable to that craft. There, "deadheading under orders" is a commonly understood term, and something that most any trainman does, whether by rail, bus or private auto, with at least reasonable frequency.

The Off-Track Vehicle Agreement which resulted was brought over into the non-operating craft context without variance. Not one word was changed. As a consequence, some of the language fits less than congruously into its new contractual context.

Although purporting to the contrary, the Award does not define the term "deadheading under orders" in the Maintenance of Way context. Rather, it simply holds that these claimants were "deadheading under orders." This utilitarian "definition" succeeds in eliding the fact that, at least in the original contractual context, the travel here was not "deadheading under orders." It was not travel, by private auto, bus, or otherwise, from one point on the railroad (the headquarters) to another (the work site). That sort of travel is "deadheading." See Award No. 8 of Public Law Board No. 1202, UTU-E v.CNW (Blackwell), Award 1818 of Special Board of Adjustment No. 235, UTU v CNWT (Cluster), Award No. 1 of Public Law Board No. 546 UTU v PC (Bailer), and Third Division Award 8571, ORCB v Pullman (Sempliner). Correspondingly, this was travel from home to the headquarters point. This sort of travel is not deadheading. See First Division Award 12785, BLFE v DMIR (decided without referee assistance), Third Division Award 15831, TCEU v DMIR (Ives), Award 39 of Public Law Board No. 59, BLE v EJE (Boyd).

That the claimants were under pay while engaged in this journey, does not transform the travel into something it otherwise is not. In the operating crafts, an employe can be receiving held-away-from-home-terminal payments while making the journey from his home (or the suitable lodging) to the train yard. However, that travel has repeatedly been held not to constitute deadheading. See Award No. 8 of Public Law Board No. 1440, UTU v. BN (Brown), Award 202 of Special Board of Adjustment No. 562, UTU v CNW (Boyd) and First Division Award 22879, BLE v. BN (Dolnick).

The concept of deadheading is more than a little alien to the non-operating craft context. In that situation, it would seem most appropriate to draw on the principles that have been elucidated, over time, in the context where "deadheading" has vitality. To take the paucity of contractual provisions on a subject as a license to "have a wider latitude in applying it" is a novel approach, to say the least. But, by finding that the condition applies without even defining it, the Award takes just such latitude.

Another serious error committed by the majority relates to their conclusion that "Had they not been under pay, then other considerations - such as the exclusionary language - would be of paramount importance."

The fact that employes are under pay is wholly irrelevant to the issue regarding the application of the exclusionary language. Assuming arguendo, the majority convincingly established that claimants were covered by Article V, Paragraph (a), i.e., they were employes covered by the Agreement who were riding in vehicles authorized by Carrier and were either deadheading under orders, or being transported at Carrier expense, then you determine if they were covered by any of the exclusions. For example, an employe deadheading under pay in an authorized vehicle who is intoxicated, is excluded from coverage under Paragraph (d) (4); or the same employe under the same circumstances engaged in a speed contest is excluded under Paragraph (d) (5), or the same employe under the same circumstances who is commuting is excluded under Paragraph (d) (6).

The majority's holding that when he is deadheading under pay he is not commuting, completely wipes out the exception under such circumstances. If deadheading under pay or being transported at Carrier expense would not be commuting then there was no need for the exception to the general rule. In short, the majority finds that when the general rule is applicable, one of the exceptions will not apply.

The majority completely ignored the cardinal rule of contract construction that meaning should be given to all parts of the contract so they are consistent, harmonious and sensible and that various sections of an agreement are to be construed together and the language of isolated provisions must be considered in connection with other pertinent provisions of the contract. Award 18379 (O'Brien).

It is true the majority conceded Paragrph (d) (4) might exclude the claimants from coverage under the facts of this case and we can surmise that the same concession would be applicable to (d) (5) but if so, then why the statement "we do not feel that we reach the exclusion of Paragraph (d) (6) because the asserted exclusion concerning 'commuting' has been disposed of by our findings regarding deadheading."

The purpose of the exclusions was to carve out exceptions where the employes would otherwise be covered by the general rule. The majority's conclusions in this case that they do not reach the exceptions because the general rule is applicable, emasculates the Agreement and makes a mockery of the interpretive processes. In other cases, the majority exercising the same license of authorship, could quite logically expunge other exceptions until eventually there are none remaining. It is pointless for Carriers to make agreements specifically preserving some benefits if those benefits are diluted by interpretation.

To paraphrase Third Division Award 21064, BRS v LN (Sickles), if the parties had intended to limit the "commuting" exclusion to cases where the employes were not under pay, it was incumbent upon the Petitioner to submit evidence to support such a conclusion. Here, the record is bereft of such evidence!

For these reasons, and in view of the potential implications of these holdings, we must respectfully dissent.

G. M. Youhn

W. F. Euker

P. C. Carter

G. L. Naylor

J. E. Mason