NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21126
THIRD DIVISION Docket Number MW-21026

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:

The Carrier should pay to the widow of Sectionman Gerald W. Van Skike the benefits set forth in "Appendix H", namely the sum of $100,000 less any amounts payable under group Policy Contract GA-23000 of the Travelers Insurance Company or any other medical or insurance policy or plan paid for in its entirety by the Carrier (System File 17-3/MW-46 9/18/72).

OPINION OF BOARD: The facts and circumstances contained in this record are essentially the same as those set forth and considered in our Award No. 21125. In that Award, we contemplated the various arguments and defenses of the parties and disposed of same. No purpose is served by detailed repetition in this document. Suffice it to say that the contents of Award No. 21125 are incorporated herein by reference.

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. Paulson
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