Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37845
Docket No. MW-37268
06-3-02-3-197

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former Burlington
(Northern 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 properly compensate Mr. J. E. Lockie for the dates of June 1, 7, 12, 13, 15, 16, 26, 28, and 29, 2000 and when it failed to afford him a meal period or provide a meal on said dates (System File B-M-809-F/11-00-0606 BNR).

(2) The Carrier violated the Agreement when it failed and refused to properly compensate Mr. J. E. Lockie for the dates of July 5, 6, 10, 11, 19, 25, 27, 28, and 31, 2000 and when it failed to afford him a meal period or provide a meal on said dates (System File B-M-810-F/11-00-0607).

(3) As a consequence of the violation referred to in Part (1) above, Claimant J. E. Lockie shall now '...receive an additional thirty (30) minutes pay, at his overtime rate for each claimed date, and we further request that Claimant receive $15.00 for each claimed date as remuneration for the second meal that is to be provided by the Carrier.

(4) As a consequence of the violation referred to in Part (2) above, Claimant J. E. Lockie shall now '... receive an additional thirty (30) minutes pay, at his overtime rate for each clairred (sic)

date, and we further request that Claimant receive $134.05 as remuneration for the second meal that is to be provided by the Carrier.'"

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.

On the claim dates, the Claimant was assigned to a mobile tie gang and worked three or more hours of overtime each day. The Organization contends that the Claimant was entitled to a second meal period in accordance with Article VI, Section 3 of the Imposed Agreement, which provides:

> "Employees required to render more than (3) hours overtime service continuous with their regular assignment shall be accorded an additional meal period, the meal to be provided by the carrier. Subsequent meal periods, with meals provided by the carrier, shall be allowed at intervals of not more than six (6) hours computed from the end of the last meal period."

It is the Organization's position that the foregoing language is plain and unambiguous and should be applied as written. The Carrier's denial of the claim is based on its contention that because the Claimant worked overtime both before and after his assignment, his overtime service was not "continuous" with his regular assignment as contemplated under the Rule.

Before addressing the merits of the case, however, there are several preliminary matters that demand our attention. First, the Carrier argued in its

Submission that the Board lacks jurisdiction to hear the instant claim. The Carrier contended that the Imposed Agreement provides for its own dispute resolution mechanism to resolve issues concerning the application or interpretation of the Imposed Agreement. Therefore, the claim belongs in another forum.

While we recognize that substantive challenges to our jurisdiction may be raised at any time, and may be entertained even if they are advanced for the first time before the Board, we find lacking here an adequate record upon which to make a finding that the Carrier's jurisdictional challenge has merit. The Carrier cited a paragraph from the Imposed Agreement that references an interpretation committee, but the complete Imposed Agreement was not included in the record. In order to overcome the presumption of arbitrability, the Carrier was obligated to provide sufficient information to enable the Board to assess the jurisdictional challenge in its proper context. The Carrier failed in this regard. We therefore deny the substantive arbitrability objection.

Next, the Carrier asserted that the claim was untimely filed. The Board rejects that argument. The Claimant was notified of the Carrier's refusal to provide payment on July 28 and the claim was filed on September 6, 2000, well within the 60-day time frame specified in the Agreement.

As a final preliminary matter, we note that the Carrier raised certain arguments with respect to national negotiations and the intentions of the parties in those negotiations with respect to the issue herein. This evidence was not raised during the handling of this claim on the property. As such, it must be considered new evidence and new argument that may not be considered by the Board.

Turning to the merits, the Board's focus is on the provision of the Imposed Agreement that addresses meal provisions. Where the language of a disputed section of an agreement is plain and unambiguous, the Board need not resort to technical Rules of construction. The straightforward meaning of the language speaks for itself. This is true even though the results are harsh or contrary to the original expectations of one of the parties.

In the instant case, we conclude that the Agreement contains clear language regarding the preconditions for an additional meal period. In order to receive an additional meal period, employees are required ". . . to render more than three hours overtime service continuous with their regular assignment. . . ." If the

Carrier's interpretation were adopted, the provision would require employees to perform three hours of overtime consecutively after their regular assignment. The parties did not agree upon that language and the Board may not alter the Agreement. The Claimant worked overtime both before and after his regular assignment. His overtime service was continuous with his regular assignment in that the overtime and the regular work assignment constituted an uninterrupted or continuous period of time. The Carrier violated the terms of the Agreement when it refused to pay the Claimant for the additional meal.

On the property, the Carrier correctly argued that Article VI, Section 3 states that overtime must be more than three hours before an additional meal period is paid. It would appear that on several of the claim dates, the Claimant worked only a total of three hours overtime and, therefore, he would not be eligible for the additional meal period. The parties are directed to conduct a joint check of the records to determine on which of the claim dates the Claimant's overtime exceeded three hours. He shall then be compensated in accordance with paragraphs three and four of the statement of claim for those dates.

AWARD

Claim sustained in accordance with the Findings.

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 August 2006.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 37845, DOCKET MW-37268
(Referee Kenis)

In Third Division Award 35576 (Kenis) the Board said:

> "...The Organization relies on the phrase 'for each day worked' as the basis for concluding that the Claimants are entitled to the per diem stipend. However, while that phrase may appear to be definite and clear when read as an isolated part, it takes on a different meaning when read, ***as we must***, in the context of Rule A-11B as a whole." (Emphasis added)

A root problem with Award 37845 is that the Board read the language "...more that three (3) hours overtime service continuous with their regular assignment..." out of context. In the context of Article VI – Meal Period, the parties and the PEB neutrals that imposed this rule could not possibly have meant to include overtime worked prior to the first meal period in the time required to qualify for an additional meal period under Section 3. As the language in the entire Article makes clear, the time to qualify for the second meal period does not begin to toll until the employees end their first meal period. In Award 15, PLB No. 4081, the Board held:

> "It is a fundamental rule of agreement interpretation that words are to be given their common and ordinary meaning. Accordingly, the Organization makes an appealing argument that the use of the word 'proportionally' signifies the parties' intended a more fixed and definite amount than would result from the Carrier's interpretation of the rule. However, such is not the exclusive meaning of the term 'proportionally.' Moreover, it is an equally fundamental rule of agreement interpretation that although words are to be given their common and ordinary meaning such meaning is to be derived from the context in which the words are used."

In ***Elkouri & Elkouri***, the authors state on page 462,

> "The Restatement (Second) of Contracts comments:
>
> > 'Meaning is inevitably dependant on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing simply affects the paragraph....Where the whole can be read to give significance to each part, that reading is preferred....'
>
> ...In the years that followed, the concept that the disputed portions, 'must be read in light of the entire agreement' has received widespread acceptance."

The Board overlooks the language of Section 1- Regular Meal Period, which specifically excludes time worked before starting time in determining meal period. The Board's language renders the term "additional meal period" meaningless.

At minimum, the Board should have included limiting language in its Award because it specifically excludes argument "with respect to national negotiations and the intention of the parties." The record is incomplete and the Organization was unable to provide prior precedent. The Article took effect July 29, 1991. This is the first known instance that anyone claimed that overtime before work earned an

additional meal period after normal assigned hours. The limited record should have restrained the Board from being so doctrinaire in its analysis. The Award is palpably erroneous.

John P. Lange

Martin W. Fingerhut

Blaine R. Henderson

Michael C. Lesnik