Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38967
Docket No. MW-37319
08-3-NRAB-00003-020340
(02-3-340)

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Soo Line Railroad Company (former Chicago,
( Milwaukee, St. Paul and Pacific 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 reimburse Special Machine Operator T. D. Brown for his actual lodging expenses while working as a special machine operator on Production Crew 2 during the months of October, 1999 and November, 1999 (System Files C-02-00-110L-02/8-00319-369 and C-03-00-110L-03/8-00319-370 CMP).

(2) The Agreement was violated when the Carrier failed and refused to reimburse Special Machine Operator R. L. Christian for his actual lodging expense while working as a special machine operator on Production Crew 2 during the month of November, 1999 (System File C-01-00-110L-01/8-00319-368 CMP).

(3) As a consequence of the violation referred to in Part (1) above, Claimant T. D. Brown shall receive sixty-nine dollars and sixty cents ($69.60) for reimbursement of lodging expense during the month of October 1999 and he shall receive three hundred forty-eight dollars and sixty cents ($348.60) for reimbursement of lodging expense during the month of November 1999.

(4) As a consequence of the violation referred to in Part (2) above, Claimant R. L. Christian shall now receive three hundred fifty-four dollars and eighty-five cents ($354.85) for reimbursement of lodging expense during the month of November 1999."

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.

The instant dispute has its focus in the meaning of the word "reasonable" as it pertains to lodging expenses for the two Claimants. Any impression that the dispute might be a simple one is dispelled by the voluminous Submissions of the parties and the extensive evidentiary record they generated. The parties granted each other several time limit extensions to accommodate jousting on the property for nearly two and one-half years before submitting the dispute to the Board. Even then, after rejecting the Organization's offer of a further time limit extension, the Carrier attempted to add to the record after the Organization filed its Notice of Intent. The timing of the Carrier's final letter has led us to disregard it as we must.

The dispute arose from a Memorandum of Agreement (MOA) dated March 14, 1991. The MOA read, in pertinent part, as follows:

> "It is hereby agreed that the Carrier will allow reimbursement for actual reasonable cost of meals and lodging for special machine operators assigned to special machines by bulleting on the condition

> that the employee will remain with the position throughout the season.
>
> * * *
>
> Incumbents of such positions, who are entitled to lodging reimbursement, may elect a $12.00 travel allowance for each workday he would have otherwise been entitled to lodging reimbursement." (Emphasis added.)

Although the MOA predated the claims by more than eight years, no Awards were presented to show that the same issue had arisen before. Thus, the case before us is one of first impression. However, the absence of prior claims will later be seen to have some relevance to the resolution of the instant dispute.

It is undisputed that Claimants T. D. Brown and R. L. Christian were Special Machine Operators covered by the MOA and had been since its inception. After careful review of the record and the parties' Submissions, we find the following facts to have been established by the record based on either unrefuted assertions or unrebutted documentary evidence. In the initial years of application of the MOA, the Carrier did not provide lodging as a matter of consistent policy. Employees, such as the Claimants, were expected to use good judgment in selecting lodging facilities appropriate to their roving work locations. They paid their lodging expenses out of their own pockets and submitted reimbursement claims along with supporting receipts and were reimbursed in due course. Thus, in the early days of the MOA, employees had some discretion to choose their lodging facilities. If they happened to be working close enough to their home locations, they claimed the $12.00 daily travel allowance instead.

On April 10, 1992, the Carrier issued a System Notice to covered employees to notify them that it had begun using the services of Corporate Lodging Consultants (CLC) to secure lodging for them at less costly rates negotiated by the consultants. Significant to this dispute, the notice contained the following sentences:

> "In the very near future engineering department employees will have the <u>option</u> of utilizing the services of Corporate Lodging Consultants to secure lodging necessary in the performance of duties and for which they are entitled to reimbursement in accordance with

schedule rules. This is not, in any way, intended to supersede or amend the collective bargaining agreement but is merely an option that is being made available on a trial basis.

Employees will be issued an identification card which will allow them to elect to utilize these services and for authorization purposes which must be presented upon check-in at the designated lodging facility." (Emphasis added.)

More than 100 pages of past reimbursement claims showed that Claimant Brown stayed in other than Carrier provided lodging during 1995 through mid-1999 approximately 80 percent of his overnight stays. It is unrefuted that he was reimbursed nonetheless.

In June 1999, the reimbursement claims in evidence show that a new claim form went into use. The earliest is dated June 2, 1999 and contains a column for lodging entitled, "CLC non-reimb." All of Claimant Brown's forms thereafter (there were ten of them) until the form he submitted on August 20, 1999, which was for the nights of July 12-20, 1999, claimed reimbursement for staying at other than CLC facilities. There is no dispute that his claims were nevertheless honored and paid by the Carrier. What the claim forms do not show, however, is whether a CLC facility was available at the particular work location.

The next claim form, also submitted on August 20, 1999, showed both CLC and one non-CLC facility. Thereafter, only CLC facilities appear on his claim forms until the one he submitted on November 2, 1999, which is the form that initiated the instant dispute. The form covers the month of October 1999. It shows that he stayed in CLC facilities for the first 11 overnights that month. The final five of the 11 overnights took place in Wisconsin Dells. It is undisputed that the cost for the CLC facility at Wisconsin Dells was $26.75 per night. However, for the last three overnights he spent at Wisconsin Dells he stayed in a non-CLC motel at a cost of $49.95 per night. The Carrier official who reviewed the claim form cut back on the amount of the claim for all in excess of $26.75 per night. The reduction totaled the $69.60 sought by Claimant Brown's initial claim.

Claimant Brown was notified of the reduction in his October claim. Unfortunately, the notification was not issued by the Carrier until December 28,

1999. By this date, Claimant Brown had already stayed in non-CLC facilities in November and had submitted his reimbursement claim for that month. When it was similarly cut back, his second claim was filed seeking $348.60.

The evidence surrounding the claim of Claimant Christian is similar but less extensive. That evidence demonstrates the same fact pattern. He seeks $354.85 for the month of November.

The Carrier's position is that the CLC rate of $26.75 is reasonable, that both Claimants were instructed to use CLC facilities whenever available and were issued CLC identification cards to enable them to do so. Accordingly, if they elected to stay elsewhere at a higher cost, they are not entitled to be reimbursed for the excess.

The Organization's position is that the employees were always allowed to select lodging facilities within reason, that the facilities selected here were reasonable within the meaning of the MOA, that the employees were never informed that they were required to stay in CLC facilities when available, and, finally, that there is a binding past practice demonstrating that the employees have some degree of discretion in choosing their lodging facilities as long as they meet a test of reasonableness. Both Claimants submitted multiple signed statements describing why they stayed where they did. The first of these statements, however, were written nearly two years after the fact. As a result, they were vague, general, and lacked detail about the dates in question.

After thorough review of the record, we find that both parties have merit to a portion of their positions; other portions of their positions lack merit. Accordingly, we make these findings: Assuming the CLC lodging facility is suitable, in terms of cleanliness, safety, restfulness, and similar characteristics of the accommodations, the rate for the lodging is presumptively reasonable within the meaning of the MOA. The record, however, does not demonstrate that the employees were effectively notified of the requirement to stay in CLC lodging when available until after the instant reimbursement claims were disapproved.

In regard to the notification finding, we recognize that the record contains competing signed statements about the timing and content of the notification. According to the affirmative assertions of the Claimants' statements, they were not so informed that CLC facilities were a ". . . requirement . . ." until after the dispute

arose. Although the statement of a Carrier official contends that the Claimants were so informed, the statement is not specific about the timing of the notification; it cannot be read to have predated the dispute without the Board having to indulge in an impermissible degree of speculation and conjecture.

In addition to the notification finding, we also recognize that the April 10, 1992 System Notice informed employees that CLC lodging was an option and that employes could elect to use it. Our review of the record does not reveal any other successfully proven pre-dispute form of notification that would have operated to inform the Claimants that the use of CLC facilities was a requirement for purposes of determining the reasonable amount for lodging expense reimbursement. Finally, as noted previously, the pre-dispute reimbursement claims in evidence are replete with examples of the Claimants staying in non-CLC lodging facilities with higher costs without reductions of their claims.

Given the foregoing findings, we will sustain the claims for the amounts sought for the reason that the employees were never notified that the CLC lodging rate would set the standard for determining reasonable actual cost for purposes of the MOA until after their reimbursement claims were submitted. Because of this failure of proper notification, the Claimants were entitled to be reimbursed as they had been prior to October 1999.

## 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 29th day of February 2008.