Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39645
Docket No. MW-37888
09-3-NRAB-00003-030296
(03-3-296)

The Third Division consisted of the regular members and in addition Referee Susan R. Brown 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. P. G. Hust for the dates of June 19, 21, 22, July 11, 13 and 14, 2000 and when it withheld payment for the second meal period in connection with the aforesaid dates (System File T-D-2184-W/11-01-0013 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant P. G. Hust shall now '. . . receive an additional thirty (30) minutes pay, at his overtime rate for each claimed date, and we further request that Claimant receive reimbursement in the amount of $59.31 and $62.78, as taken away, 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.

The Organization, in its initial claim, asserted that the Claimant worked "three or more hours" overtime on three of the dates in question, three and one-half hours overtime on two days, and four hours overtime on one day. The overtime in question on each of these days was worked partially prior to and contiguous with the Claimant's regular shift and partially following and contiguous with his regular shift. The employee was not afforded an additional meal period on these days. These facts have not been disputed by the Carrier.

The Organization claims that the Claimant should be paid pursuant to Article VI, Section 3 of the 1991 Imposed Agreement, which provides:

> "Employees required to render more than three (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."

The Carrier asserts that this provision requires that an employee work more than three hours overtime following his regular shift before an additional meal period is granted.

The Board addressed this identical issue in Third Division Award 37845, issued on August 1, 2006. Referee Ann S. Kenis wrote in pertinent part:

> "[W]e 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 Carrier urges the Board to deny the claim on several grounds. First, it contends that the Board does not have jurisdiction regarding this matter; the proper forum for this sort of dispute is the Interpretation Committee set up by the Imposed Agreement itself. Although this argument was not raised on the property, the Board has previously ruled that procedural objections may be raised at any time. Second, the claim is time barred; any oral agreement reached with a Field Gang Supervisor regarding an extension has no standing. Third, the word "continuous" in Section 3 refers to the overtime itself and some hours worked before and some hours worked after a regular shift is not "continuous" overtime. The trouble has arisen because the Agreement was written and imposed by arbitrators who do not work on the property and do not understand the day-to-day functioning of the railroad.

Turning first to the question of whether this claim is time-barred, the Board concludes that it is not. Based on the evidence before us, we conclude that the Carrier's assertion of a Rule 42 violation is not proved.

Further, we conclude that the Board is the proper forum for this claim. Although the Imposed Agreement set up a mechanism for resolving "disputes arising over the application or interpretation of this Agreement," that was 17 years ago. There is no evidence in the record that the parties continue to comply with the provision that requires them to set up a joint labor-management committee to address such matters and appoint a standing neutral to resolve all remaining disputes; in fact, there is evidence to the contrary. A joint failure to comply with this language may indicate a mutual understanding that such disputes would be sent to the Board. In any event, it cannot be used to deprive an individual claimant of his right to be heard.

Finally, the Carrier asks the Board to reverse its decision in Third Division Award 37845 because, it contends, that Board did not take into account that the language at issue was imposed rather than negotiated and that the members of the Emergency Board who imposed it did not fully understand the day-to-day operations of the railroad or the parties' mutual use of certain language and practices. We consider this request in light of two widely-observed principles: that arbitration Awards should be final and binding in order to encourage stable labor relations and its corollary that prior arbitration Awards should be overturned or reversed not when

a later Board or Referee might have ruled differently in the first instance, but only where there is clear error in the first Award.

The Carrier argues that the word "continuous" in Section 3 refers to the overtime itself; Referee Kenis reads that word to refer to the employee's regular assignment. The Board disagrees with the grammatical analysis set forth by the Carrier. Referee Kenis's interpretation follows the language quite precisely; no clear error is apparent.

Moreover, we conclude that the decision reached in Award 37845 is the correct one; to adopt the Carrier's position would require adding words and concepts that do not appear in the language, i.e., that the overtime must be worked following a regular shift in order to be eligible for an additional meal period. A straightforward reading of the language establishes that the word "continuous" is attached to the phrase "with their regular assignment;" if the intention were to have it modify "overtime," the phrase would have been "continuous overtime." When contract language is clear, extraneous evidence such as past practice and bargaining history – or in this case party testimony – is not pertinent. The Carrier argues that the earlier Award was too "literal" but clear language is the sine qua non of contract interpretation. Nor are we persuaded by the Carrier's assertion that this reading renders meaningless Section 1 of Article VI, which addresses the regular meal period.

The Carrier's interpretation of this provision would require the Carrier to provide two meal breaks to an employee who worked twelve hours only if all four hours of overtime were scheduled to follow his regular shift, but permit the Carrier to avoid providing a second break by scheduling the employee's overtime entirely before his regular shift or some before and some after. Such an unusual unbalanced provision of benefits to employees working the same number of hours may not be inferred by an arbitrator; it must be clearly spelled out.

It is undisputed that an employee must work more than three hours overtime before an additional meal period is paid. The record is not clear whether this occurred on three of the six claim dates cited by the Organization. The parties are directed to conduct a joint check of the Carrier's records to determine on which of the claim dates his overtime exceeded three hours. He shall then be compensated for time and meals for those dates in accordance with the stated claims.

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 22nd day of April 2009.