Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40218
Docket No. MW-38653
09-3-NRAB-00003-0050039
(05-3-39)

The Third Division consisted of the regular members and in addition Referee Brian Clauss 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 Agreement was violated when the Carrier failed to compensate Mr. L. Murray in accordance with Rule 35 for travel time from Whitefish, Montana to Ritzville, Washington on September 20, 2003 (System File S-P-1073-0/11-04-0064 BNR).

(2) As a consequence of the violation referred to in Part (1) above, the Carrier shall be required to compensate Claimant L. Murray for six (6) hours at his respective straight time rate of pay as specifically stipulated within Rule 35 of the Agreement."

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 maintains that the Carrier violated the Agreement when it failed to properly pay the Claimant for travel time when the mobile gang changed headquarters. The Carrier contends that the Claimant received a travel allowance and is not entitled to travel time.

On November 21, 2003, the Organization filed a claim "on behalf of L. Murry who was assigned to the Mobile gang RP-12 for a violation . . . on Sept. 20, 2003." The Organization claimed the following:

> "The Carrier violated the current agreement when it failed to reimburse Claimant, for the proper travel time incurred on September 20, 2003. On that date the Carrier changed the designated lodging site from Whitefish, MT to Ritzville, WA. The Carrier failed to pay Claimant anything for the move; Carrier's trucks took 6 hours to make the trip. Claimant is entitled to six (6) hours at his straight pay.
>
> By referral, rules including, but not limited to 1, 2, 5, 35 and the current rate of pay are made part of this letter. Rule 35 E, first paragraph, requires the Carrier to pay employees for the amount of travel time computed at straight time rates from one work point to another, which the Carrier provided conveyance took, regardless of how any employes actually travel from one work point to another."

The Carrier responded in a December 29, 2004 letter that provided, in relevant part:

> "First, Carrier must take exception to this claim filing being out of time limits . . .
>
> Second, the Carrier takes exception to this claim filing as the burden of proof of an allegation for an agreement violation of Rules 1, 2, 5 and 35 lies solely with the Organization regardless of the information available to the Carrier. In this case, the Organization has failed in that obligation and claim should be withdrawn.

Third, the Carrier takes exception to the following of the Claimant employee identified as Louis Murry not being given a matching employee ID for verification. The Carrier's records indicate 2 employees with L. Murry for names and different employee IDs therefore the Organization has failed to provide the requisite information for Carrier to properly investigate what is alleged.

Without waiving any of the above objections, the Carrier will proceed further as to the validity of this claim.

Investigation into the alleged violation finds Carrier cannot investigate the claim as filed with Claimant name Louis Murry with no ID number being given.

Your request that Claimant receive 6 hours of additional straight time at his current rate of pay for travel is excessive and without merit."

The Organization filed an appeal in a letter dated February 24, 2004 that provided, in part:

"We cannot accept the decision . . . and are therefore appealing this claim to you for review and consideration. . . .

First, Ms. Johnson is in error to suggest our initial claim is 'out of time under Rule 42A. . . .'

The failure of the Company to pay the claimant's travel time appears to [be] a continuation of what is now a growing pattern that includes a long list of examples of the Carrier's outright refusal to live up to the intent of the mutual agreement and pay the employee that to which he is entitled. There can be no dispute the work location was in fact moved from Whitefish to Ritzville. That move would, pursuant to the clear agreement provisions, entitle the claimant to the hours claimed. Now, in the instant claim, the Company refused to pay [Claimant] that to which he is entitled as an

employee who made a move from one tie-up point to another. This is in violation of the clear language of our mutual agreement.

We do not believe there will be any dispute as to the essential facts, at least none have been identified. That is, [Claimant] was required to change work location from Whitefish, Montana to Ritzville, Washington following his work day on September 20, 2003. Claimant was not paid any travel time compensation for this change. The 'transportation provided' did take six (6) hours claimed to make the trip. The facts and the position of the Organization are as expressed in the initial claim, which is incorporated herein by reference.

First, let us state that Claimant Murray's name was misspelled on the initial claim . . .

Gang RP-12 was created as a District Gang under the terms of our Agreement. Accordingly, it operates only on Seniority District and only district employees are entitled to bid to the gang. When it was established it was established with mobile headquarters, lodging provided by the Carrier, pursuant to Rules 38 and 35. Both of those rules has as their origin 'National Board Award 298.'

It is undisputed that RP – 12 [C]laimant Murray was required to move between Carrier designated work locations as cited in the initial claim. It is also undisputed that the Carrier failed to and continues to refuse to compensate claimant for the travel time involved in the change of work locations.

Rule 35E is a clear and unambiguous provision that states, in pertinent part:

> 'Each employee furnished means of transportation by the Company will be paid the amount of travel time computed at straight time rate from one work point to another which the conveyance on which transportation made available by the

> Company would take regardless of how any employee actually travels from work point to another.'

Rule 35E above states quite clearly that employees will be paid the amount of travel time from one work point to another based upon the length of time the Carrier-provided transportation consumes in travelling such trip. The rule also states that the employees are entitled to such time, regardless of how the employee actually travels.

Rule 35E has, as its foundation, Board Award 298, which in addressing this issue, in Section 1, C(1) stated, quite clearly,

> 'Time spent in travelling from one work point to another outside of regularly assigned hours or on a rest day or holiday shall be paid for at the straight time rate.'

There is no legitimate reason why this claim should not be paid."

In a letter dated April 22, 2004, the Carrier stated, in part:

"The Organization alleges the Carrier violated the Agreement on September 20, 2003 when claimant was not compensated for travel time from Whitefish, Montana to Ritzville, Washington.

The Organization has submitted an overreaching claim alleging that the Carrier violated Rule 35(e) of the Agreement by failing to compensate the claimant for travel from one location to another. As Ms. Johnson stated in her declination of this claim, the Organization's claim is without merit because the claimant was compensated for travel from one location to another (Whitefish, Montana to Home to Ritzville, Washington) in the form of the weekend travel allowance.

The Claimant did not travel from Whitefish, MT to Ritzville, WA on Saturday, September 20, 2003, they traveled home and that travel is compensated under the auspice of the weekend travel agreement,

not Rule 35(e) of the Labor Agreement. Any employee that actually travelled between Whitefish MT and Ritzville WA over the weekend would have been paid for the travel. Payment of travel time from Whitefish to Ritzville would result in a duplicative payment and the Agreement did not contemplate such a windfall payment.

Rule 35(f) further supports the Carrier on why this claim is invalid, as the Organization is alleging the Claimant would be paid travel to their home and work location. Rule 35(f) states:

> 'Employees will not be allowed time while traveling in the exercise of seniority, or between their homes and designated assembling point, or for other personal reasons.'

The damages claimed are excessive. Claimant was compensated $225.00 in weekend travel allowance . . . and is not entitled to travel time for the same period of time."

Following an October 20, 2004 conference on the claim, the Organization sent a letter to the Carrier, which provided, in part:

> "The facts of this claim are not in dispute. This claim centers upon the Carrier's refusal to pay Claimant travel time as is set forth in Rule 35 E when Carrier designated lodging facilities were changed from Whitefish, Montana to Ritzville, Washington, on September 20, 2003. That date was the assigned rest day for Claimant, when he was not actually at work. There is no dispute that the Gang to which Claimant was assigned, RP-12, was a mobile gang with mobile lodging facilities provided by the Carrier in the form of hotel rooms. There is no dispute that the transportation provided by the Carrier took six hours to complete the trip.
>
> The Organization rejects your description of the payment sought under the provisions of Rule E as a 'windfall.' To quote from your letter of April 22, 2004, you state:

'Payment of travel time from Whitefish to Ritzville would result in a duplicative payment and the Agreement did not contemplate such a windfall payment.'

The Claimant, the Organization are not seeking a windfall payment. The Claimant, the Organization only seek a benefit that was negotiated and agreed upon. In the preceding quotation, you seem to suggest that the benefits of Rule 35 were not negotiated. Those provisions, those benefits were the result of repeated negotiation culminating in the Award of SBA 928. The benefits sought in this claim are the result of those negotiations and subsequent interpretation that specifically address the circumstances at hand in this claim. If the Carrier desires to alter those provisions, those benefits, the Carrier is legally required to do so through negotiation . . . [citations to Rule 35D and Rule 35E omitted]

Rule 35 E is actually a two part provision, with Paragraph 1 being the applicable provision in the instant claim. Rule 35 E Paragraph 1 is clear, specific and lacks any ambiguous language whatsoever. That paragraph states that if the Carrier provides transportation from one work [point] to another, the employees on such gang '. . . will be paid the amount of travel time computed at straight time from one work point to another which the conveyance on which transportation made available by the Company would take regardless of how any employe actually travels from one work point to another.'

Paragraph 2 addresses employes not furnished a means of transportation, a subject not in dispute in the instant case. The Carrier did provide a bus and/or trucks for the employes, if they chose to use such transportation. That was an option the Claimant elected to forego.

The language of Rule 35 E (paragraph 1) is so clear that the Organization finds it difficult to believe that the Carrier can actually misread the clear language, Rather, it appears that the Carrier is attempting to alter that clear language by unilateral imposition.

> The Carrier is asserting that the move occurred during week-end rest when the Claimant did not actually travel from Point A (Whitefish) to Point B (Ritzville), but rather traveled from Point A (Whitefish) to Point C (Claimant's place of residence) and only then to Point B (Ritzville). The Carrier asserted during conference that because Claimant failed to travel directly from Point A to Point B, Claimant was not entitled to the travel time as claimed. The Organization conceded that the Claimant did indeed travel as asserted by the Carrier, from Point A to Point C and then to Point B [Citations to SBA 298 Interpretation 9, 20, and 18 omitted]
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> Interpretations 9, 10 and 18 are directly on point to the case at hand . . . The issue has already been decided decades ago. The Carrier is obligated to pay the time as it was claimed. . . .
>
> Claimant was not travelling in exercise of seniority, nor was the time claimed for any travel between Claimant's residence and designated assembling points. The claimed time is for the time Carrier conveyance took in making the change in Carrier designated assembling points. As the claimed time is for neither time between Claimant's home and Carrier designated assembly point, nor for travel resulting from an exercise of seniority, Rule 35 F would not be applicable in this case."

The question before the Board involves travel on an off day while assigned to a mobile crew that moves headquarters. At issue is the effect that the Claimant's trip home on his off days had upon the travel time payment under Rule 35 E. Had the Claimant not gone home, he would be entitled to the pay for travel time. However, he went home. The Organization maintains that the trip home had no effect upon the travel time payment and points to the question and answer found in the Award of Arbitration Board No. 298. The Carrier counters that the Organization's reliance is misplaced given the 1996 Agreement. The Carrier continues that, under Award 298, duplicate payments are prohibited. The Claimant got a travel payment to go home and should not also get a travel time payment.

Rule 35 E provides in relevant part:

> "Each employee furnished means of transportation by the Company will be paid the amount of travel time computed at straight time rate from one work point to another which the conveyance on which transportation made available by the Company would take regardless of how any employee actually travels from one work point to another."

The Carrier and the Organization agree that Rule 35 is based upon Special Board of Adjustment No. 298. SBA No. 298 Interpretation No. 9 states:

> "Question: Employees are working in a gang at point 'A.' The work point is changed from 'A' to 'B' outside of work hours or on a rest day or holiday while employees are not actually at work. Employees are not required by the carrier to ride in the camp cars and elect to travel from 'A' to 'B' in their own automobiles. May Carrier avoid payment of travel from 'A' to 'B' under I-C-1?
>
> Answer: See paragraph 2 of the memorandum of Board conference of September 30, 1967, which reads as follows: 'Under the provisions of Section I-C-1, each man will be paid the amount of travel time from one point to another which the conveyance offered by the carrier would take regardless of how any man actually travels from one point to the other.'"

Interpretation No. 10 states:

> "Question: Carrier moves the work point from 'A' to 'B' while the employee has gone home on a holiday or rest day. Employee left work point 'A' but returns to work point 'B' after having gone home. May carrier avoid payment of travel time from 'A' to 'B' because employee traveled from 'A' to 'C' to 'B' rather than going straight to 'B' before going home at 'C'?
>
> Answer: No. See paragraph 2 of the memorandum of Board conference of September 30, 1967, which reads as follows: 'Under

> the provisions of Section I-C-1, each man will be paid the amount of travel time from one point to another which the conveyance offered by the carrier would take regardless of how any man actually travels from one point to the other.'"

The Carrier asserts that the Weekend Travel Allowance was the only proper payment. Article XIV of the 1996 Agreement provides in part:

> "At the beginning of the work season employees are required to travel from their homes to the initial reporting location . . . During the work season the carrier's service may place them hundreds of miles away from home at the end of each work week. Accordingly, the carriers will pay each employee a minimum travel allowance as follows for all miles actually traveled by the most direct highway route for each round trip."

The Board carefully reviewed the evidence. The Carrier argues that Interpretations 9 and 10 of Board No. 298 do not apply because they were issued prior to the 1996 National Agreement. The Carrier continues that Third Division Award 37163 is instructive. It found that the specific example used in the question and answer to Board 298 did not apply. However, the Carrier also argues that Board 298 prohibits duplication of benefits.

Third Division Award 37163 does not stand for the proposition that the question and answer portion of Board 298 are irrelevant to the inquiry. Rather, Award 37163 deals with the specific issue of whether a certain question about one day vacations was asked and answered. The Board held that the question was not asked. However, as shown above, the question at issue here was asked in Interpretation 10 in the question and answer to Board 298. The answer indicates that the Claimant should have been paid the six hours travel time.

The Carrier argues that Rule 35 was amended by Section 1 (a) of Article XIV of the 1996 National Agreement because it deals with pay between work points. Because Board 298 prohibits duplication of payments, the Claimants cannot be paid both for travel time under Rule 35 E and also for travel allowance.

The Organization produced more than 100 statements from employees who received both the travel allowance and the travel payment after the 1996 Agreement. Even if we were to adopt the Carrier's argument, that duplication of benefits is not allowed, the Board must find for the Organization. Rule 35E's provision deals with the amount of time paid to an employee when headquarters are moved while the employee is not working. The travel allowance of Article XIV deals with a mileage payment when the employee travels home and then to the new mobile headquarters - travel which is allowed under Rule 35E. The two provisions are not a duplication of benefits. Accordingly, the claim must be sustained.

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 21st day of December 2009.