Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40465
Docket No. MW-39398
10-3-NRAB-00003-060029
(06-3-29)

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(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 and refused to pay mobile gang employe M. Ward the Rule 38, Section II – Week-End Travel Allowance for the weekend of October 13, 2003 in connection with his round trip from Chicago, Illinois to his residence in Abington, Illinois to La Crosse, Wisconsin [System File C-04-T072-3/10-04-0040(MW) BNR].

2. As a consequence of the violation referred to in Part (1) above, Claimant M. Ward shall now receive the travel allowance of one hundred twenty-five dollars ($125.00)."

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 Claimant held seniority in the Track Sub-department. During the 2003 work season, he was assigned to work for several different mobile gangs, which assignment required him to live away from home during the workweek. At the beginning of October 2003, the Claimant was assigned as a Group 5 Machine Operator on Mobile Tie Gang TP-07 working in the Chicago area. He was scheduled to work eight hours per day, Monday through Friday.

At the end of the work day on Friday, October 3, 2003, the Claimant was displaced from his assignment and he performed relief work with the same gang for one additional week. He left his Chicago lodging and traveled home to Abingdon, Illinois, for his Saturday and Sunday rest days. He subsequently reported back to Mobile Tie Gang TP-07, where he worked Monday, October 6 through Friday, October 10.

Starting Monday, October 13, 2003, the Claimant was assigned to Gang RP-02. He reported to Carrier-designated lodging at Lacrosse, Wisconsin. For his weekend rest days, the Claimant traveled 568 miles from Chicago to Abingdon to Lacrosse. The Carrier denied the Claimant's request for a $125.00 travel allowance on the grounds that his change in assignment was a seniority move, and that travel for his weekend rest days involved two one-way trips and did not constitute a "round trip."

Article XIV of the September 26, 1996 National Agreement, Section 1, Paragraph A (Rule 38, Section II A) entitled "Week-End Travel Allowance" includes the following language:

> "At the beginning of the work season employees are required to travel from their homes to the initial reporting location, and at the end of the season they will return home. This location could be hundreds of miles from their residences. During the work season, the Carriers' 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:

. . . 401 to 500 miles $100.00

Additional $25.00 payments for each 100 mile increments."

A claim protesting the Carrier's action was timely filed and progressed on the property in the usual manner up to and including the Carrier's highest designated officer, but without resolution.

In support of its position, the Carrier paraphrased an internal BMWE memo to a former General Chairman. The memo interprets Rule 38 G entitled "Mobile Headquarters (With or Without Outfit Cars) - Lodging - Meals" and provides advice that the Organization should not progress a specific claim. Rule 38 G included the following language both in 1991 and at the time of the 2003 incident which is the subject of the instant dispute:

"The foregoing per diem meal and lodging (if applicable) allowance shall be paid for each day of the calendar week, including rest days and holidays, except that it shall not be payable for work days on which 'the employe is voluntarily absent from service, and it shall not be payable for rest days or holidays if the employe is voluntarily absent from service when work was available to him on the work day preceding or the work day following said rest days or holiday. . . .'"

The February 12, 1991 memo states in part that:

"A careful reading of Rule 38 G reveals that the Carrier's position is correct. There is no language in Rule 38 that allows for the continuance of per diem payments to an employe once his/her position on a gang is abolished. Once an employe is furloughed from a position, the "rights" flowing to that position no longer exist. Hence, whether or not that employe worked on the following Monday would be immaterial. Moreover, it is the intent of Rule 38

> to provide per diem payments to an employe for weekends when the employe is still assigned to the mobile gang. That was not the situation here. Hence, based upon the above, I believe that our position is not supported by the language of the rule."

The Carrier asserts that the 1991 memo should be interpreted to mean that:

> ". . . an employee cannot claim Rule 38 travel expense once he/she leaves the membership of the particular gang – even where the move is involuntary, such as after abolishment of the job and that an employee who voluntarily exercised his seniority to leave one gang on Friday and joined another gang the following Monday, would also be barred from claiming such travel expenses."

The Carrier asserts that the Organization failed to meet its burden of proving that, by denying payment of the travel allowance, the Carrier violated Rule 38, Section II or any other portion of the Agreement. It also reiterates that the writer of the 1991 internal memo effectively admitted that there is no basis for this 2003 claim.

The Carrier further argues that if an employee's trip to and from home for rest days does not start and end at the same geographic work location, it is not a "round trip." The Carrier asserts that Rule 38 limits payments to round trips with two exceptions.

The Carrier points to Article XIV of the 1996 National Agreement which provides for a one-way travel allowance to the "initial reporting location" at the beginning of the work season and for a one-way travel allowance to the employee's home "at the end of the season." The Carrier asserts that the Claimant does not fit into either of these limited exceptions urges that the claim be denied as without merit.

The Organization points to the Carrier's written admission that it refused to pay the weekend travel allowance to the Claimant and asserts that such admission meets the Organization's burden to make out a prima facie violation of the Agreement.

The Organization asserts that the 1991 BMWE memo is irrelevant to this dispute. It points out that the 1991 memo pre-dated the 1996 National Agreement and dealt with the former Rule 38 G from the September 1981 Agreement. It points out that the memo addresses weekend per diem meal and lodging allowances, not travel expenses or weekend travel allowances when going to and from rest days. The Organization points out that weekend travel allowances did not exist at the time the memo was authored.

The Organization further argues that by submitting no evidence other than a document irrelevant to the issue in this specific dispute, the Carrier failed to present competent evidence in its defense to rebut the allegation and evidence submitted on the Claimant's behalf.

The Organization points out that there is no disagreement between the parties that the Carrier assigned the Claimant to one gang during one week and to another gang for the next week. The Organization contends that its position is supported by a plain reading of Rule 38, Section II A and by past practice. It argues that as a matter of contract language, the trip from work lodging to home and from home to work lodging is a "round trip" as contemplated by Rule 38.

The Organization emphasizes that Rule 38 acknowledges that, during the work season, the Carrier's assignments may place employees hundreds of miles away from home at the end of each workweek. It maintains that during each season, employees are frequently subject to gang transfers, either through displacements or re-bulletining of gangs and that the Rule was negotiated to provide two-way travel allowances throughout the work season and one-way travel allowances at the beginning and end of the work season.

The Organization directs the Board's attention to Third Division Award 38009 between the parties involving five similar claims in which the claimants were not paid a weekend travel allowance. In one situation, the claimant ended his workweek at Willmar, Minnesota, drove 355 miles to his home in Tuttle, North Dakota, for his rest days and then traveled 115 miles to Valley City, North Dakota, to work a new mobile gang assignment. In sustaining the requested allowances, the Board stated in part:

"The Carrier states that the compensation under Article XIV is stated as a 'round trip' under clearly enunciated conditions of the season start-up and end. The Carrier denied payment based on the fact that in the exercise of seniority the Claimant made two one-way trips and that is not compensated under article XIV. . . .

In line with the meaning of Article XIV, what is persuasive to the Board is that the intent of this Article is clear. . . . It was the intent of the parties to provide a travel allowance benefit to employees who through their work with System Regional Gangs found themselves during the work season far away from home. The travel allowance was intended for all employees who travel between their homes and various changing work locations at the start and end of workweeks. Those changed locations could develop for reasons of Carrier changes or seniority as negotiated language does not specify.

Accordingly, although there is support in prior payments, the language itself has no limiting condition as to seniority or other condition. Those who negotiated this language could easily have utilized such terminology on seniority changes, giving benefits only under express limited conditions. They did not do so. These are traveling employees and continue to be traveling employees after the exercise of their seniority to another System Regional Gang."

The Board finds adequate evidence in the record to determine that the Organization met its burden of showing that the Carrier denied payment for travel between work and home for rest days in violation of Article XIV of the September 26, 1996 National Agreement, Section 1, Paragraph A. The Board relies on the reasoning in Third Division Award 38009, cited above, which we find persuasive. The Carrier's reliance on the 1991 BMWE internal correspondence fails for reasons stated by the Organization. Its reliance on the lack of a "round trip" is rejected for the reasons stated in Award 38009.

The Board concludes that between Friday, October 10 and Monday October 13, 2003, the Claimant engaged in a round trip between work and home as contemplated by the Agreement and that he is entitled to be paid the $125.00 travel allowance pursuant to Article XIV.

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 14th day of May 2010.