Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40468
Docket No. MW-39406
10-3-NRAB-00003-060056
(06-3-56)

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 on February 10, 2004 when the Carrier recouped overtime pay issued to Mr. J. Huffman for his overtime hours on December 15, 2003 [System File C-04-O020-16/10-04-0169(MW) BNR].

2. As a consequence of the violation referred to in Part (1) above, Claimant J. Huffman shall now '. . . receive back the adjustment that was taken from his paycheck of nineteen dollars and eight-one cents ($19.81) as settlement of this claim."

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 Carrier assigned the Claimant to report on December 15, 2003 for one-day of safety training at his normal starting time at another work location at Council Bluffs, Iowa. To comply, the Claimant reported first to his regular headquarters point and then traveled to the training location. At the end of training, the Claimant had to return to his regular headquarters point before going home. Round trip travel time between his headquarters and the training location totaled two hours. The Claimant requested and was paid for two hours at the time and one-half rate. On January 26, 2004, the Carrier mailed the Claimant a notice denying his request, and recalculating his pay to two hours at the straight time rate and reducing the Claimant's next check by the difference of $19.81.

Documentary evidence submitted by the Organization to the Carrier consisted of more than 600 pages of on-property letters from employees, many of whom stated that anytime they were directed by the Carrier to leave their assigned headquarters assembly point prior to (or returning to that headquarters point after) an assigned eight-hour training period they were always paid overtime. Many of these letters stated that the practice on the property had been to pay overtime in this situation. In addition to the $19.81 pay reduction notice, the Carrier submitted a one-page email from Timekeeping Supervisor H. Ashley stating:

> "On 12/15/2003, employee reported PC 06 (School) from 7:30-1600, he also entered PC 12 (overtime) from 6:30-7:30 and 16:00-17:00, showing a work reason of (Safety items/issues - all). We based our decision that this was overtime for school because he claimed school that day. We would not have followed up or received anything from the field because the details are in the time reported file. Employee probably was informed to report to another location for school and would have been compensated straight time travel. . . ."

In rejecting the overtime claim, the Carrier stated that the Claimant was entitled only to straight time pay for travel to training and that neither the travel nor the training were designated as work.

The Agreement provides in relevant parts:

RULE 26. STARTING POINT

A. Time of employes will start and end at designated assembling point. Designated assembling or starting point will be interpreted as follows:

(1) Section forces - Tool House.

* * *

RULE 29. OVERTIME

A. . . . time worked preceding or following and continuous with a regularly assigned eight (8) hour work period shall be . . . paid for at time and one-half rate, . . . computed from starting time of employe's regular shift.

* * *

J. There shall be no overtime on overtime; . . . overtime hours paid for [shall not] be utilized in computing the forty (40) hours per week, nor shall time paid for . . . travel . . . be utilized for this purpose, except when such payments apply during assigned working hours in lieu of pay for such hours, or where such time is now included under existing rules in computations leading to overtime.

* * *

RULE 35A. TRAVEL TIME

Employes . . . will be allowed straight time . . . traveling as passengers by . . . public conveyance by the direction of the Company, during or outside of regular work period. . . .

* * *

RULE 42A TIME LIMIT ON CLAIMS

> All claims or grievances must be presented in writing . . . within sixty (60) days from the date of the occurrence on which the claim or grievance is based. . . ."

The 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. During the processing of the claim, the Organization submitted employee letters describing the Carrier's practice. In a letter stamped "Received" by the BMWE on March 18, 2003, B. Brickle wrote:

> ". . . I have come to realize that the Carrier's past practice on paying their employees for safety meeting[s] is consistent at all the locations I have worked. Whenever the Carrier requested us to leave our headquartered point prior to the start of our regular shift to attend these meetings, we were always paid at the overtime rate of pay. They would also pay us overtime if we returned to our headquartered point after the end of our assigned day."

On July 5, 2003, A. D. Anderson wrote that he started as a Carrier employee on July 4, 1979 and that:

> ". . . On every occasion that our gang has went to work before our starting time, it has been paid as overtime. This includes going to meetings or training."

In a letter stamped "Received" by the BMWE on August 18, 2003, M. D. Baker (seniority date July 12, 1973) wrote:

> "On numerous times I have had to travel to meetings (Safety & Book of Rules) and I have gotten paid time and one half, overtime. The policy has been previously, if you traveled before or after assigned starting times you were paid overtime."

In a statement dated August 19, 2003, R. L. Almaguer, a 32-year Carrier employee writes:

> "I have attended hundreds of safety meetings, rules test[s] and training seminars. The majority of these meetings were held away from my headquarters and required starting before my regular starting time and getting back late to my headquarters. In all cases I was paid overtime to and from my regular starting place with the approval of my supervisors. . . . I have worked for approximately 15 different supervisors and this policy of paying overtime outside of regular hours to attend meetings was consistent with every one of them."

The Carrier initially argues that references to Rule 26 should be rejected by the Board because they were added by the Organization as amendments to its original claim filing. It asserts that, in any case, Rule 26 does not address travel to training or at what rate it should be paid.

As to substantive issues, the Carrier asserts that the Organization failed to meet its burden of proving that paying straight time violated Rules 29 or 45 or any other provision of the Agreement.

The Carrier denies the Organization's claim that the Claimant worked eight hours and thereafter worked two additional hours by traveling for a total of ten hours of work for which Rule 29A requires overtime pay at the time and one-half rate. Instead, it argues that the Claimant trained for eight hours (for which he was paid at the straight time rate) and then traveled two hours to and from the training, for which Rule 35 permits travel payment at the straight time rate. The Carrier argues that training is not work and that travel to training is not work, so straight time should be paid, rather than overtime. It cites the following language in Third Division Award 20323:

> "In Award 10808 (Moore), it was noted that there are exceptions to time consumed by an employee when directed by the Carrier as being considered 'work' or 'service.' One of those exceptions was held to be where the circumstance contains a mutuality of interest. The Award concluded, 'Awards have held that classes on operating

rules and safety rules are such exceptions.' See also, Award 11048 (Dolnick), 15630 (McGovern), Fourth Division Award 2385 and 2390 (Seidenberg), 7631 (Smith) 11567 (Sempliner) and Public Law Board 194, Awards 24 and 25."

The Carrier argues that this matter is controlled by on-property Public Law Board No. 4768, Award 23 in which the Claimant traveled by public transportation to and from a two-week long training session conducted on a Monday-to-Friday schedule. The Carrier argues that the Organization should be bound by its successful argument in that dispute that Rule 35A requires the Carrier to pay straight time for the Claimant's travel to training.

The Carrier denies the Organization's assertion that time spent traveling from eight hours of training regarding Safety Rules and Carrier safety policies constitutes overtime and denies that paying overtime for travel is the Carrier's past practice. It points out that Rule 29J states that travel outside of the regular assigned shift is to be paid at the straight time rate.

The Carrier further contends further that Rule 35A provides that time traveling by public conveyance at the Carrier's direction, during or outside a regular work period will be paid as straight time.

The Organization argues that the eight training hours are work at straight time and that after those eight hours, the Carrier must pay the Claimant at the time and one-half rate for the two hours of travel. The Organization asserts that it made a prima facie case that the Carrier violated the Agreement when it provided written notification to the Claimant reducing his pay to straight time for travel from the claimed overtime. It argues that the burden then shifted to the Carrier which failed to provide probative evidence to support an affirmative defense.

The Organization disputes the Carrier's interpretation that Rule 29J states that travel outside of the regular assigned shift is paid at the straight time rate. Instead, it asserts that Rule 29J merely stands for the proposition that if and when the Carrier pays overtime for whatever reason, those overtime hours cannot be added to regular work hours in order to determine whether the employee is entitled to additional overtime for working more than 40 hours. In other words, the Carrier

is not required to pay overtime on overtime. The Organization's position is that Rule 29J does not support the Carrier's position in this dispute.

The Organization asserts that the instant claim is supported by Rule 29A, which states that work before or after eight hours of regular work is paid as overtime. It maintains that the Claimant's attending eight hours of training and his traveling two hours to and from his headquarters are both work; therefore, in its view, the two hours beyond the first eight hours should be paid at the time and one-half rate.

In addition to Rule 29A, the Organization asserts that this claim is supported by the Carrier's consistent, unwavering past practice of nearly three decades duration. As evidence to support its position, the Organization's calls the Board's attention to the unrebutted on-property employee letters stating that the Carrier always paid overtime for each instance where employees were directed by the Carrier to leave and return to their assigned headquarters when attending eight-hour training periods.

As to Public Law Board No. 4768, Award 23 cited by the Carrier, the Organization distinguishes those facts from the instant case. It argues that in Award 23, PLB 4768 sustained the claim for time reviewing class material after the employee returned to his hotel. The Organization points out that in Award 23, the employee traveled on a rest day to school, his work location changed and he was required to report to a new starting point. Travel time was payable to get the employee to the new starting point. In the instant case, by contrast, there was no change in work locations and the Claimant had the same starting point and the same ending point. He performed his job as the Carrier directed. The Organization argues that Award 23 does not govern this dispute.

The Board carefully studied the record and the parties' arguments with the following conclusions. The Carrier accurately states that Rule 26 does not address travel to training. It does not state whether travel is, or is not, entitled to be paid at the overtime rate. As a result, we need not address the Carrier's objection to the Organization's amendment of its claim to include references to Rule 26.

The Carrier argues that some of the 600 pages of employee statements do not address whether the situations described involved travel to a training class, or if the

claimant was paid overtime. However, many of the statements do directly address these issues and indicate the Carrier's past practice of paying overtime for travel to and from Carrier required training. Notwithstanding the Carrier's assertions to the contrary, the Board concludes that those statements are probative evidence and are relevant to the issue in this matter.

The Carrier's written notice to the Claimant advising him of a pay reduction and its email from the Timekeeping Supervisor are evidence and do address the issue of what it was willing to pay the Claimant. But contrary to the Carrier's assertion, these exhibits do not provide evidence as to how pay was historically applied to travel or training classes, nor do they shed light on whether any of the Rules cited by the parties do or do not support the Carrier's position.

The Organization introduced written statements from long-time employees indicating a divergence of the Carrier's current action regarding the Claimant from its past practice regarding multiple employees. With assistance from the Carrier's notice reducing the Claimant's pay and the Timekeeper Supervisor's email, the Organization made a prima facie case for violation of the Agreement. This shifted the burden to the Carrier.

Contrary to the Carrier's assertion, the Board concludes that a party is not bound by its arguments in another arbitration matter where the fact pattern differs from current case before it. Instead, parties are bound by prior Awards in similar cases regardless of the arguments of the parties in those cases. The fact that the Organization in Award 23 did not seek time-and-one-half pay for transportation of that Claimant in a "public conveyance" to and from a two-week training session does not proscribe the Organization in this case from seeking overtime pay for travel time on non-public transportation following eight hours of training on a single day.

Once the Organization successfully established a prima facie case for a violation, the Carrier argued in its defense that Rules 29 and 35 applied in this fact situation. Rule 29 entitled "Overtime" does mention the phrase "travel time" as the Carrier asserts. However, that Rule is intended to prohibit overtime from being paid on overtime – a situation not at issue here.

The Board further concludes that Rule 35A indicates that travel time is paid at straight time if both of two conditions are met – if the employee is traveling as a passenger in a public conveyance and if the employee is traveling at the Company's direction. In Award 23, a public conveyance transported the claimant. In the instant case, the Organization stated that the Claimant traveled at the Company's direction, however, besides asserting that the Claimant was not operating a company vehicle, the Carrier presented no evidence to prove that the Claimant was transported "by passenger train or other public conveyance" as the Rule contemplates. Without this evidence, the Board is unable to apply Rule 35A.

After reviewing all record evidence, the Board concludes that in this instance, the Organization met its burden to provide probative evidence to shift that burden to the Carrier. The Board's review of the record shows an absence of any probative evidence from the Carrier to effectively rebut the Organization's case. Accordingly, the claim will 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 14th day of May 2010.