Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40515
Docket No. MW-39478
10-3-NRAB-00003-060290
(06-3-290)

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 August 1, 2001 and continuing through August 31, 2001 when the Carrier required Mobile Welding Gang 719 employee R. Coble to provide his own transportation from his starting point to the work location and then failed and refused to reimburse him for such personal mileage expense and when it failed and refused to compensate him for his time to start and end at his starting point [System File C-01-0020-60/10-01-0443(MW) BNR].

2. As a consequence of the violation referred to in Part (1) above, Claimant R. Coble shall now be reimbursed for seventy-two and six-tenth (72.6) miles at the rate of thirty-four and on-half (34.5) cents per mile for providing the aforesaid personal transportation and he shall be compensated for four (4) hours and thirty-two (32) minutes at his respective time and on-half rate of pay."

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 within the Maintenance of Way and Structures Department as a Welder in the Track and Welding Sub-department. At times relevant to the claim, he was regularly assigned to Welding Gang 719 on District 400. It had been bulletined with the following conditions "Mobile Headquartered Either Motel or Outfit Cars Provided. Rule 38 to Apply." The Carrier assigned gang members to lodge in motels with the Carrier paying the motels directly and paying per diem meal allowances to the mobile gang's members. No outfit cars were provided.

On August 1, 2001, the gang assembled at Red Oak, Iowa, – the starting point of Carrier-provided transportation to the gang's jobs and the closest station to the work location. Because the Carrier required the Claimant to start his work day at the Red Oak depot instead of at the motel, the Claimant traveled from the motel to the depot and back each work day during the period of August 1 through August 31, 2001 inclusive, at his own expense. The Claimant claimed that during this period, in addition to working full eight-hour days, he incurred 72.6 miles of travel and four hours and 32 minutes of travel time. The Carrier declined to pay any of these amounts.

The involved Rules read, in relevant part, as follows:

"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:

* * *

(2) Employes who are provided with outfit cars or highway trailers, the assembling point shall be the tool or material car provided such employes. If a tool or material car is not furnished, or is located away from the outfit cars or highway trailers, the assembling point shall be the location of the outfit cars or highway trailers.

(3) Employes under the provisions of Rule 38 who are not furnished outfit cars or highway trailers, the assembling point shall be the station on the Carrier closest to the work location where meals and lodging are available within a reasonable proximity; however, where the majority of the members of the gang and the supervisor agree, any point may be designated as the assembling point.

* * *

B. When employes are sent away from headquarters and remain away over night, the beginning and ending of day's work shall be at a designated point such as a railroad depot, section headquarters or motel-hotel accommodations at the nearest town where such lodging and meal accommodations are available.

* * *

RULE 38. SECTION I - MOBILE HEADQUARTERS (WITH OR WITHOUT OUTFIT CARS) - LODGING RULES

A. . . . [T]he Company shall provide for employes who . . . live away from home in outfit cars, camps, highway trailers, hotel or motels as follows:

(1) If lodging is furnished by the Company, the outfit cars or other lodging furnished shall include bed . . . and toilet facilities.

* * *

C. If lodging is not furnished by the Company the employe shall be paid a lodging allowance. . . .

* * *

F. If the employes are required to obtain their meals in restaurants or commissaries, each employe shall be paid a meal allowance. . . ."

The Carrier initially argues the Organization failed to meet its burden of proving that Rule 26A(2) applies to this situation and of proving that the Carrier violated any portion of Rule 26, Rule 38 or any other part of the Agreement.

The Carrier rejects the Organization's allegation that Rule 26A (2) applies here. Instead, the Carrier argues that there was no violation because Rule 26A(3) – not Rule 26A(2) – applies and states that employees under Rule 38 who are not furnished outfit cars, have an assembling point which is the station closest to the work location.

The Carrier asserts that even if the Organization made a prima facie showing of a violation of the Agreement, the Carrier's defense is that Rule 26A(3) applies and the evidence shows that the Carrier satisfied all relevant requirements of that Rule. The Rule states that when employees are not furnished outfit cars or highway trailers, the assembling point will be the station closest to the work location – not the lodging site. There is no disagreement between the parties that the Carrier designated the Red Oak, Iowa, station as the assembling point.

In its November 5, 2001 rejection of the claim, the Carrier stated and argues that past practice has always been to park trucks on property at a depot. "We have been doing this for many years. Some people stay in motels and some drive home so we meet at the depot."

In support, of its position, the Carrier cites the following language in Third Division Award 30154:

> "In this case there is no showing that the location of the motel at Denison was the 'assembling point' for the Extra Gang. On the contrary, the evidence shows that the assembling point was at the job site. The Claimant specifically states in his April 13, 1987 letter that he was told by the foreman to 'meet on the job.' Under these particular circumstances, paying the Claimant for his travel time would be like paying the Claimant for time spent journeying between home and work. . . ."

The Carrier calls the Board's attention to the fact that the Organization has not shown any mileage, other than the total sought, to justify the mileage claim. It asserts that the Organization should be required to provide evidence of this mileage. It reiterates that payment for miles driven by employees in their own vehicles is not compensable for commuting to and from work.

The Organization argues that it met its burden of proof of showing that the Carrier violated Rule 26A (2). It points to the fact that the Claimant was paid per diem meal expenses pursuant to Rule 38F and that, had the Carrier not provided motel lodging, the Claimant would also have received per diem lodging expenses

pursuant to Rule 38C. The Organization's Submission – including its December 5, 2001 letter appealing the claim's declination – argues that Rule 38A defines the word "lodging" to include outfit cars, camps, highway trailers and motels and that "lodging" is not limited to outfit cars. The Organization asserts that because the Claimant was not being paid both Rule 38C and Rule 38F expenses, his starting point should be governed by Rule 26A(2) rather than Rule 26A(3) and the starting point, for purposes of calculating mileage and transit time, should be the location of the lodging – the motel.

The Organization points out that Rule 26A (2) includes the following language:

> "If a tool or material car is . . . located away from the outfit cars . . . the assembling point shall be the location of the outfit cars. . . ."

The Organization argues that this sentence from Rule 26A (2) should be interpreted to mean:

> "If a tool or material car is located away from the Carrier-provided lodging, the assembling point shall be the location of the Carrier-provided lodging."

It was the burden of the Organization to prove that the Carrier's refusal to pay the Claimant mileage and travel time was in violation of the Agreement. For the reasons which follow, the Board concludes that the Organization failed to meet its burden.

In performing its analysis, the Board notes Rule 26A (2) can apply to two fact situations and 26A (3) can apply to two additional situations. The first of the four situations is:

1. <u>Employes are provided with outfit cars or highway trailers</u>. This is not the fact pattern the Board is presented with here.

2. A tool or material car is not furnished, or that car is furnished and is located away from the outfit cars or highway trailers. This also is not the fact pattern the Board is presented with here. However, even if outfit cars or highway trailers were provided, Rule 26A (2) states that the assembling point would be the location of the outfit cars or highway trailers – not at a motel.

3. Employes are not furnished outfit cars or highway trailers. The record contains no evidence of outfit cars or highway trailers. Instead, the Organization admits that motel accommodations were furnished by the Carrier.

4. A majority vote of gang members enter into an agreement with the supervisor. The record is devoid of evidence of such a vote or of any agreement with a supervisor as to designation of an assembling point. This portion of Rule 26A (3) does not apply here.

Of the above four fact situations, the Board takes notice that only the third fits this case. Rule 26A (3) states clearly that in that event, the assembling point will be the station closest to the work location. Rule 26A (3) does not provide for the Carrier-provided motel being designated as the assembling point as the Organization contended. The parties are bound by the Agreement they mutually negotiated. The Board has no authority to change Rule language.

The Board's review of the record shows that the parties agree that the Claimant was staying in a Carrier-provided motel, that the Claimant was instructed to report to the Red Oak depot and that the Claimant traveled from the motel to the depot and back each work day during the period at issue at his own expense.

As the moving party in this Rules case, the Organization bore the initial burden of establishing material facts necessary to make out a prima facie violation of the Agreement. After a thorough review of all evidence and party Submissions, the Board finds no evidence in the record and no Rule requiring that the assembling

point be the Claimant's motel and no evidence of any other violation of the Agreement by the Carrier.

The Board is compelled to deny the claim due to the Organization's failure to meet its burden of proof. Consequently, the Carrier need not state or prove an affirmative defense.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of June 2010.