

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40789
Docket No. MW-40562
10-3-NRAB-00003-080207

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 compensate the members of TP 08 for time spent traveling back to their reporting points on January 31 and February 2, 2006 [System File C-06- O020-15/10-06-0147 (MW) [BNR].
- (2) As a consequence of the violations referred to in Part (1) above, the members of TP-08 shall each be compensated for forty-five (45) minutes for January 31, 2006 and two (2) hours for February 2, 2006 at their respective time and one-half rates 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.

This case presents two separate fact patterns relating to the same issue, which is how Carrier forces are to be paid for time spent traveling to and from their work site. This is an issue that the Board has addressed a number of times before, but the instant case presents new factual variations on prior Awards.

TP-08 is a Mobile Track Gang - specifically, a region/system production tie gang. The mobile track gangs can work anywhere throughout the BNSF system. Because their work ranges far and wide, the Carrier arranges for their lodging and transportation to and from specific work sites, and the parties have addressed those topics, and how employees' time is to be compensated in their Agreement. (See Rules 26, 29 and 35.)

In late January and early February 2006, TP-08 was working in and around Somerville, Texas, which is where the gang was lodged. On January 31, 2006, the day's reporting site was Clay, Texas. The gang boarded a Carrier-provided bus, which drove the gang from Somerville northeast to Clay. Clay is approximately 17 miles by road from Somerville. During the course of the day, the gang worked its way further east toward Allen Farm, where it tied up for the day. The bus then transported the gang back to Somerville. The most direct route by road from Allen Farm to Somerville is approximately 28 miles and runs east, then south, then west, bypassing Clay altogether.

Rule 26.C addresses how production crews like TP-08 are to be compensated for their work time and for their traveling time. It states, in relevant part:

“Paid time for production crews that work away from home shall start and end at the reporting site designated by the appropriate supervisor by the end of the previous day. . . .

* * *

Any unpaid time traveling between the carrier-designated lodging site and the work site is restricted to no more than thirty (30) minutes each way at the beginning and end of the work day. . . .”

According to the Carrier, employees were not entitled to travel time for the morning trip from Somerville to Clay, because it took less than 30 minutes. The Organization does not dispute that gang members were not entitled to any travel time for the morning trip. The focus of the Organization's complaint is how employees were compensated for their time at the end of the day.

The bus departed Somerville for Clay at 6:00 A.M. The crew worked until 4:45 P.M. and was paid until then. According to evidence in the record developed on the property, gang members received eight hours pay at their straight time rate for work up to 3:00 P.M., one hour and 45 minutes overtime for work between 3:00 P.M. and 4:45 P.M., and 30 minutes travel time at straight time rates for travel from 4:45 P.M. to 5:15 P.M. According to the Carrier, the travel time compensation is correct pursuant to Rule 29, Overtime, Section J, which provides that travel time is paid at straight time rates:

"J. There shall be no overtime on overtime; neither shall overtime hours paid for, other than hours not in excess of eight (8) paid for at overtime rates on holidays or for changing shifts, be utilized in computing the forty (40) hours per week, nor shall time paid for in the nature or arbitraries or special allowances such as . . . travel time . . . be utilized for this purpose, except when such payments apply during assigned working hours in lieu of pay for such hours. . . ." [Emphasis added.]

The Organization, however, contends that the Carrier violated Rule 26.C, in that it failed to return the gang to its reporting site at Clay and pay overtime for the time it would have taken to return from Allen Farm to Clay, which was 45 minutes. In other words, the Carrier paid travel time from Allen Farm to Somerville (30 minutes at their straight time rates of pay) while the Organization claims that employees should have remained on the clock, which had gone into overtime, while they were returned from Allen Farm to Clay, the reporting site for the day (45 minutes at overtime rates) before being returned to Somerville.

The second half of the complaint relates to how TP-08 was compensated on February 2, 2006. The crew assembled to take the Carrier-provided bus, which turned out to have mechanical problems and could not take the crew to the day's reporting site, which was Allen Farm. The Carrier directed employees to use their own vehicles to drive to Allen Farm. At the end of the day, employees returned from

Allen Farm to Somerville, again using their own vehicles. There is no dispute that the Carrier's bus would have made the trip in one hour. The Carrier compensated employees for nine hours at straight time rates: eight hours regular work and a total of one hour travel time at straight time rates: 30 minutes at the beginning of the work day and 30 minutes at the end of the work day. This calculation subtracts the 30 minutes of unpaid travel time under Rule 26 C from the 60 minutes that the bus would have taken in each direction between Somerville and Allen Farm.

The Organization contends that in lieu of one hour at straight times rates, the Claimants should have received two hours at overtime rates: one hour each way, calculated at overtime rates because the employees had already worked eight hours at their straight time rates. According to the Organization, the Carrier is required to provide transportation between the lodging site and the reporting site. Because of mechanical problems with the Carrier-provided bus, the employees were required by the Carrier to use their personal vehicles to get to and from the reporting site. If the employees were driving company vehicles between the lodging site and the reporting site, they would be paid overtime, and it is no different when they are required to drive their own vehicles at the direction of the Carrier. (The Claimants were compensated mileage for use of the personal vehicles, so that is not part of this claim.)

We turn now to the Board's analysis.

The Carrier made a threshold procedural objection that the claim submitted to the Board is materially different from the claim as it was originally submitted and developed on the property. It submitted Awards in support of the proposition that the Board "routinely dismisses claims framed for arbitration materially different than the dispute that was handled between the parties on the property." (See Third Division Award 35963.) Specifically, in its initial claim the Organization alleged violations of Rules 1, 29, and 35 of the Agreement, while the Submission to the Board alleged that the Carrier "violated the Agreement when it failed and refused to compensate the members of TP 08 for time spent traveling back to their reporting points."

The key word here is "materially." The Board dismisses claims that are materially different from what was handled on the property, because a material change means that the parties did not have a fair and effective opportunity to discuss and attempt resolution of the real dispute at issue. In this case, it is true that the language used by the Organization in its Submission is somewhat different from the way the original claim was phrased. However, the Board carefully examined the

record of discussions on the property, and it is clear that the Carrier knew what the Organization's complaints were and the parties engaged in meaningful discussions about the dispute from the beginning. The difference between the original complaint and the case as submitted to the Board is semantic, not material. An otherwise arbitrable complaint should not be dismissed because of inartful drafting that did not affect the parties' opportunities to take advantage of the dispute resolution procedure at the lower levels. Accordingly, the Board will consider the substance of the complaint, taking one date at a time.

January 31, 2006

Rule 26 C states: "Paid time for production crews that work away from home shall start and end at the reporting site designated by the appropriate supervisor by the end of the previous day. . . ." Among the Awards submitted to the Board by the parties, the reasoning and analysis in Award 1 from Public Law Board No. 6781, which addressed similar language in a contract between the Organization and another carrier, is instructive and persuasive.

At the end of the day on January 31, 2006, the Carrier transported the employees on TP-08 directly from Allen Farm back to Somerville without backtracking to Clay, the reporting site. It made geographic sense to transport the crew that way, and the Carrier paid the employees for travel time according to how it transported them. But Rule 26.C is clear in stating that "paid time . . . shall start and end at the reporting site. . . ." (Emphasis added) There is no provision in the Agreement for more than one reporting site per day, and the Agreement states that employees shall be paid for their time to begin and end at the reporting site. This is an important point, because the parties have had a bargaining relationship for decades and are sophisticated bargainers. It is in the nature of track work that a crew will work its way from one location to another over the course of a day, so the fact that the gang started in Clay and ended at Allen Farm, six miles away, was nothing out of the ordinary. One would expect that if the parties had wanted to address travel time for crews that start in one location and end in another, they would have done so. Instead, the Agreement explicitly provides that production crews will start and end each day at a single pre-designated location, and that their "paid time" will "start and end at the reporting site." The Carrier agreed to pay production crews like TP-08 from the time they arrive at the reporting site until the time they report back there at the end of their workday.

Here, the Carrier elected to transport the crew directly from Allen Farm, where they had completed the day's actual track work, back to Somerville, the lodging site. From the maps submitted at the arbitration, it appears that that decision made sense from a transportation perspective: the hypotenuse of a triangle is shorter than the sum of its two sides - not to mention the state and location of the roads in the area. The Carrier can transport employees by the most direct route if it wants. However, that transportation decision does not relieve the Carrier of its obligation to compensate its employees pursuant to the terms of the negotiated Agreement. The Agreement requires that "paid time" for production crews continue until they report back to the day's reporting site, Clay. The Organization estimated that it would have taken 45 minutes for the bus to transport crew members from Allen Farm to Clay, and the Carrier did not dispute that estimate. Under Rule 26.C, crew members on TP-08 were entitled to be paid as part of their regular workday for the 45 minutes that it would have taken to transport them from Allen Farm to Clay. Payroll records establish that that 45 minutes would have been at overtime rates, and the crew members of TP-08 who were paid for travel time at the end of the day on January 31, 2006, are entitled to be paid 45 minutes at their respective overtime rates.

That is not the end of the analysis for January 31, 2006, however. The Carrier paid crew members 30 minutes of travel time at their straight time rates for the trip from Allen Farm to Somerville. The Organization's contention here is that the crew should have been transported back to Clay before being taken "off the clock," and it was right. But if the employees had been transported to Clay and then back to Somerville, they would not have been entitled to any travel time, because the trip between Somerville and Clay took less than 30 minutes. The crew received no travel time pay for the morning trip from Somerville to Clay, and it would not have been entitled any travel time pay for the return trip at the end of the day. In calculating the remedy for members of TP-08, they are entitled to 45 minutes of overtime pay less 30 minutes of straight time pay (the travel time they got for the trip between Allen Farm and Somerville that they would not have been entitled to had they been transported to Clay, then back to Somerville).

February 2, 2006

Regarding February 2, 2006, the Organization bases its position on the fact that the employees were directed by the Carrier to drive to their work site using their personal vehicles after it became clear that mechanical problems meant that the Company-provided bus would not be able to provide transportation to the work site.

According to the Organization, because using their personal vehicles was a benefit to the Carrier, that use should be treated and paid like any other Carrier-directed operation. Or, as the Organization stated it, "If employees were driving company vehicles they would be paid overtime and it is no different when required to drive their own vehicles at the direction of the Carrier."

Rule 35, Travel Time, Paragraph E, addresses how employees should be compensated for travel time according to what form of transportation is involved:

"E. 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.

Each employee who is not 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. . . ."

Rule 35 E speaks directly to this situation: employees who are not provided transportation by the Company "will be paid the amount of travel time computed at straight time rate. . . ." This interpretation is supported by Rule 26 C, which states: "Paid time for production crews that work away from home shall start and end at the reporting site designated by the appropriate supervisor at the end of the previous day, provided the reporting is accessible by automobile and has adequate off-highway parking. . . ." TP-08 is a production crew that works away from home; paid time for crew members starts at the reporting site, not when they leave the lodging site to drive to the reporting site. Rule 26 C anticipates that employees may have to drive their personal vehicles by requiring that the reporting site be highway accessible and have adequate parking off the highway. The Organization contends that the employees should be paid the same as if they had been ordered to drive Company vehicles at the Carrier's direction. But that is not an equivalent situation: employees who are driving Company vehicles in the Organization's example are transporting equipment to the work site and are working as they do so. Employees who are transporting themselves in their personal vehicles to their reporting location so they can start their work day are not providing a service to the Carrier in the same way. Rule 35 E and Rule 26 C together provide that employees who drive their personal vehicles to their reporting

locations - whether voluntarily or at the Carrier's direction - are entitled to travel time under normal conditions: that is, the first 30 minutes in each direction is unpaid. That is how crew members were paid here. The Carrier paid members of TP-08 one hour travel time at their respective straight time rates. The estimated bus time between Allen Farm and Somerville was one hour. Subtracting 30 minutes each way from that time, the two trips to and from Allen Farm yield a total of 60 minutes compensable travel time. The Carrier's calculation for February 2, 2006, was correct, and this portion of the claim is denied.

The Carrier also complained that the Organization failed to adequately identify the Claimants. Given the size of the crew, it was not feasible for the Organization to identify the Claimants individually. The individuals who are entitled to a remedy are any crew members who were paid for working to the end of the day on January 31, 2006, and were paid travel time between Allen Farm and Somerville. They are the individuals whose paid day should have started and ended at Clay, not started at Clay and ended at Allen Farm. No crew member who did not work on January 31, 2006, or who left before the end of the day is entitled to a remedy. The Carrier should have records sufficient to determine who should be paid. The February 2, 2006, claim having been denied, there is no remedy due to members of the TP-08 production crew for that day.

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 15th day of December 2010.