Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41636
Docket No. MW-41348
13-3-NRAB-00003-100144

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(
(Union Pacific Railroad Company (former Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier headquartered System Rail Gang 9116 at Englewood Yard in Houston, Texas and failed and refused to afford the employes assigned to System Rail Gang 9116 (A. Hildreth, et al.) the on-line meal and lodging per diem and the weekend travel allowance beginning January 16, 2007 and continuing (System File MW-07-36/1470897 MPR).

(2) As a consequence of the violations referred to in Part (1) above, the employes assigned to System Rail Gang 9116 (A. Hildreth, et al.) at Englewood Yard in Houston, Texas shall now be compensated for their per diem allowance and their respective weekend travel allowance beginning January 16, 2007 and continuing."

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 claim protests the Carrier's January, 2007 bulletin regarding System Rail Gang (SRG) 9116 with fixed headquarters at Englewood Yard in Houston, Texas, and raises the issue of whether the Carrier can bulletin to the system seniority roster a fixed headquarter gang, or whether the Agreement requires that SRGs be assigned as "on-line," with its employees receiving per diem and travel allowance payments. The lengthy record contains evidence with respect to the bargaining history involving the Memoranda of Agreement dealing with SRGs in 1951, 1963 and 1983, and the 1997 Implementing Agreement replacing Agreements on other merged properties, as well as integrating seniority lists covering employees spread over a ten territory jurisdiction, into the April 1, 1975 Missouri Pacific (MP) Agreement, which was updated in the current July 1, 2000 Agreement.

The claim, which was filed on February 6 and amended on March 7, 2007, was initially denied on March 29, 2007. Thereafter, it was appealed on May 16 and again denied on July 11, 2007. It was subsequently appealed after conference on September 24, 2007. After mutual extensions of time granted to the Organization to file the claim with the Board, by letter dated December 14, 2009, the Organization submitted additional evidence in support of its argument that there was a consistent, well known, and binding 50-year past practice supporting the fact that SRGs have always been bulletined as mobile (camp cars/on-line) gangs, and the employees covered by the provisions for lodging and meals (or per diem in lieu of) and weekend travel expense, in the form of two declarations from Southwest Region Vice President Roger Sanchez (representing former SP-E employees) and MP General Chairman Bill Palmer (both involved in the negotiations for the 1997 Implementing Agreement with UP Director of Labor Relations Wayne Naro, where the operation of SRGs under the 1975 MP Agreement was discussed in depth) as well as statements from approximately 47 SRG employees and 62 sample SPG bulletins spanning the time period between 1983 and 2001. The Notice of Intent was filed with the Board on January 28, 2010. The Carrier sent a one page letter responding to the Organization's December 14 evidence on February 8, 2010, which the Organization asserts is untimely and not properly before the Board, relying on Third Division Award 30127.

The Organization argues that the Carrier's decision to headquarter positions on SRG 9116 in Houston, Texas, and deny employees on-line per diem and weekend travel allowance pursuant to Rules 36(b)(1) and (2) and 37(a)(1) and (2) is a clear repudiation of the terms and conditions of employment set forth in the controlling Agreement language and more than 50 years of past practice. It notes that SRGs draw employees from a massive ten state system through a system seniority roster, and that these employees travel over that expanse of territory, far from their homes, installing rail. The Organization points to the language negotiated in each of the National Agreements for the provision of lodging (camp car/motels) and meals or per diem in lieu of such expenses, as represented by Rules 36(b)(1) and (2) (Travel Time - Bunk Cars or Trailers) and 37(a)(1) and (2) (Travel Allowance) under the current 2000 Agreement as representative of benefits negotiated for system gangs working away from home and headquartered on-line, and the meeting of the minds of the parties with respect to providing those benefits.

The Organization, acknowledging that there is no explicit language with respect to headquarters for SRGs in Rule 3 which governs them, relies upon evidence establishing a clear, unambiguous, consistent past practice showing that all SRGs have been bulletined as mobile (camp car/on line) gangs for more than 50 years, with minor more recent exceptions objected to by the Organization and rebulletined by the Carrier, in support of its argument that such a practice creates an unwritten agreement provision that has the same force and effect as a written provision, and is binding on the Carrier, citing Special Board of Adjustment (Truck Panel Fabrication Dispute) (Wallin, 2001) and Consolidated Rail Corp. v. Railway Labor Executives Ass'n, 491 U.S. 299 (1989). It notes that the practice of providing meal, lodging and travels benefits to SRG employees clarifies the intent of the language of the Agreement with respect to whom these benefits were negotiated for. The Organization contends that it makes no sense to bulletin a position with a fixed headquarters to people on the system seniority roster, who may be required to travel thousands of miles to work at that headquarters location, and then deny them any benefits for such travel and work time away from home. It also asserts that the 2000 Agreement updated the 1975 MP Agreement by including items negotiated in the Memoranda in the interim, and did not change any prior practice with respect to the operation of the SPGs, which were not "in conflict" with the Agreement under the language of Rule 58.

The Organization also relies upon the statements of Palmer and Sanchez concerning discussions that took place during the negotiations for the Implementing

Agreement with respect to the operation of SRGs under the MP Agreement, and statements made by Naro that SRGs were mobile gangs provided with meals and lodging or per diem in lieu thereof, to further prove the mutual understanding of the parties during negotiations with respect to this issue. Again relying on the declaration of Palmer, the Organization sets forth what occurred as a result of its objection to the Carrier's attempt to establish a headquartered system gang in Houston in 2005, where Union President Simpson led a delegation of officials to meet with Naro, resulting in the Carrier's abolishment of the SRG positions and the subsequent re-bulletining of the position to local Division forces, as evidence that it objected to any attempt on the Carrier's part to change the long-standing past practice of bulletining SRGs as mobile gangs. It asserts that the record supports the payment of the Rule 36 and 37 contractual benefits to the employees of SRG 9116, who were denied any compensation for meals, lodging or travel expense, due solely to the Carrier's impermissible and unprecedented bulletining of these positions with fixed headquarters in Houston, Texas.

The Carrier contends that the Organization failed to meet its burden of proving a violation of the Agreement in this case, noting that there is no Agreement support for paying the Claimants on-line expenses when they were assigned to a position with a permanent headquarters. It first points out that this dispute is governed by the 2000 National Agreement which, according to Rule 58, supersedes all rules, practices and working conditions in conflict therewith. . ," asserting that any provisions from the 1951, 1963 and 1983 Memoranda, and the 1975 MP Agreement not incorporated in the 2000 Agreement have no force and effect. The Carrier notes that the parties specifically negotiated in Rule 5, governing System Bridge gangs, that the positions were to be bulletined exclusively on-line, but, despite the fact that the same experienced negotiators were involved, no similar restriction is contained in Rule 3 governing SRGs.

The Carrier also argues that the Organization failed to establish an exclusive, system-wide past practice of bulletining SRGs only as on-line gangs, giving examples of three recent cases where fixed headquarters were established for positions open to bid to system seniority roster employees. It notes that the Claimants voluntarily bid and accepted positions on SRG 9116 knowing it was headquartered in Houston, Texas, and without the on-line expenses they seek through this claim, and asserts that the record is devoid of any specific information that they incurred any such expenses. The Carrier states that there is no restriction in the 2000 Agreement on its management prerogative to use its forces as it deems

most beneficial to the efficient operation of its business, or to establish headquartered gangs open for bid to employees on the system seniority roster, as it did in this case. The Carrier notes that, since the filing of the instant claim, the parties have negotiated a separate agreement effective January 1, 2011, providing that system and zone gangs are to be headquartered as "on line" gangs. It contends that such agreement would not have been necessary if the 2000 Agreement had contained such a provision covering SRGs, as alleged by the Organization.

A careful review of the record evidence convinces the Board that the Organization met its burden of proving an established past practice of bulletining SRGs as "on-line" gangs. The declaration of Palmer, bulletins and statements of SRG employees spanning decades, statements made during negotiations for the Implementing Agreement, as well as the absence of any indication by the Carrier during negotiations for the 2000 Agreement that it intended to change such practice, all support the conclusion that the Carrier understood that the practice of SRGs operating as mobile gangs entitled to the meals, lodging (or per diem) and travel allowances applicable to employees working on-line continued into the current Agreement unchanged. This is also seen by the undisputed continuation of this practice for at least five years after the 2000 Agreement took effect. Under such circumstances, the Board is unable to accept the Carrier' position that Rule 58 did away with this practice solely because language concerning the headquarters of SRGs was not specifically negotiated into Rule 3. The binding past practice was just that, a long-established practice that became an unwritten term of the Agreement, in the absence of specific language to the contrary. See, Consolidated Rail Corp. v. Railway Labor Executives Ass'n, supra; Special Board of Adjustment (Truck Panel Fabrication Dispute), supra.

With respect to the requested remedy, as noted by the Carrier, the parties have negotiated a subsequent Agreement setting forth, in writing, that system and zone gangs are to be headquartered "on-line" effective January 1, 2011. While this fact alone does not negate the validity of the past practice previously in existence that forms the basis for a finding of a violation of the Agreement in this case, it does bring an end to any potential liability. The Rule 36(b) per diem allowance is to help defray expenses for lodging and meals of on-line employees working away from home, and the Rule 37 travel allowance is compensation for miles actually traveled to return home at the end of each workweek. These provisions should have been applied to the Claimants while they were working on SRG 9116. Because the record does not contain any information concerning whether any expenses or travel were

actually incurred by the employees on SRG 9116 encompassed within the claim, the matter is remanded to the parties for a joint record check with respect to the amount of expenses and travel incurred by the Claimants while working on SRG 9116 and the duration. The Claimants shall be compensated accordingly.

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 24th day of April 2013.

SERIAL NO. 413

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 41636

DOCKET NO. MW-41348

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes
(Division - IBT Rail Conference

NAME OF CARRIER: (Union Pacific Railroad Company (former
(Missouri Pacific Railroad)

Third Division Award 41636, which was adopted on April 24, 2013, was transmitted to the parties on May 1, 2013. The Board found that the Organization met its burden of proving an established past practice of bulletining System Rail Gangs (SRG's) as "on-line" gangs. The Board sustained the claim in accordance with the findings, and held as follows:

> "With respect to the requested remedy, as noted by the Carrier, the parties have negotiated a subsequent Agreement setting forth, in writing, that system and zone gangs are to be headquartered 'on-line' effective January 1, 2011. While this fact alone does not negate the validity of the past practice previously in existence that forms the basis for a finding of a violation of the Agreement in this case, it does bring an end to any potential liability. The Rule 36(b) per diem allowance is to help defray expenses for lodging and meals of on-line employees working away from home, and the Rule 37 travel allowance is compensation for miles actually traveled to return home at the end of each workweek. These provisions should have been applied to the Claimants while they were working on SRG 9116. Because the record does not contain any information concerning whether any expenses or travel were actually incurred by the employees on SRG 9116 encompassed within the claim, the matter is remanded to the parties for a joint record check with respect to the amount of expenses and travel incurred by the

Claimants while working on SRG 9116 and the duration. The Claimants shall be compensated accordingly."

The remedial dispute that has arisen – as set forth in the Organization's September 27, 2013 Request for Interpretation – concerns whether the Organization must establish that individually named Claimants actually incurred expenses in order to be eligible to receive the Rule 36(b) per diem allowance for the time they worked on SRG 9116 between January 16 and October 23, 2007, as well as whether they actually traveled more than 100 miles at the end of each work period in order to be eligible for travel allowance under Rule 37(a).

There is no dispute that, despite the direction of the Board remanding the matter to the parties for a joint record check "with respect to the amount of expenses and travel incurred by the Claimants while working on SRG 9116 and the duration," no such check occurred. Neither was there any written communication between the parties after the Organization submitted to the Carrier on July 1, 2013 a list of employees it asserted worked on SRG 9116, and their corresponding entitlements. It appears that any communication was verbal, and that, as a result, while the Carrier took issue with some of the entries on the list, no clear individual dispute of asserted facts formed the basis for the Carrier's delay in making (or refusal to make) the requested payments.

The Organization's position with respect to Rule 36(b) is that at the time of the violation in 2007, all on-line gang members were entitled to be paid $57.00 per day as a per diem allowance regardless of the actual expenses incurred, so there is no need for the Claimants to establish what, if any, expenses they incurred during the time period they worked on SRG 9116. It argues that had the Carrier not violated the Agreement by headquartering an SRG other than "on-line," the Claimants would have been entitled to all benefits received by an on-line gang, including per diem allowance. The Organization notes that the Carrier never argued to the contrary on the property, and relied solely upon its right to headquarter the gang as it did. It also points out that the Carrier could have limited its liability by changing the headquarters and rebulletining the gang once the Organization took issue with it, but the Carrier chose not to do so. With respect to the Rule 37(a) travel allowance, the Organization contends that all Claimants living

more than 50 miles from the work site would qualify for the round trip amounts agreed to, and that it would be unreasonable for the Carrier to ask them to prove that they actually made specific trips after their work periods while on SRG 9116 more than seven years ago before being eligible for the negotiated travel allowance.

The Carrier initially argues that this interpretation request is premature because the parties never made a joint check of the records – as directed by the Board – in order to ascertain which Claimants are eligible for what benefits. The Carrier points out that it never refused to pay those employees who met the contractual criteria by incurring meal and lodging expenses, and not voluntarily absenting themselves, as well as those who actually made the round trip of more than 100 miles home after each work period while working on the gang. The Carrier contends that inasmuch as the Board's remedy calls for ascertaining "the amount of expenses and travel incurred by the Claimants," and the claim was sustained in accordance with the findings, it is reasonable to interpret the Award as ordering compensation to those Claimants who actually paid for meals and lodging while working on the gang, to help defray the cost of those expenses. It also contends that travel allowance is paid only for actual travel incurred, and notes that submitting a claim for such allowance without making the trip would be grounds for discipline. The Carrier asserts that the Organization never provided any proof to support the listed entitlements for the employees, and, in fact, it noted discrepancies in the duration some listed Claimants worked on SRG 9116, calling into question the accuracy of the list. The Carrier acknowledged that it is willing to work with the Organization to devise an accurate list of SRG 9116 members, and to consider evidence submitted regarding their entitlement to per diem and travel allowance.

In Award 41636 the Board found that the provisions of Rules 36(b) and 37(a) "should have been applied to the Claimants while they were working on SRG 9116." In explaining the purpose of each of the provisions - per diem allowance is to help defray expenses for lodging and meals of on-line employees working away from home, and travel allowance is compensation for miles actually traveled to return home at the end of each workweek - the Board was merely setting forth what is stated clearly in the Rules themselves with regard to their purpose. It was not intended to limit the Carrier's liability in a manner that was not supported by the parties' practice. There appears to be no dispute between the parties that members

of on-line headquartered gangs in 2007 would have been eligible to receive a per diem allowance without proof of actual expenses, as long as they did not voluntarily absent themselves under the provisions of Rule 36(b)(2). The remedy directed in Award 41636 was not intended to vary that practice. Thus, the joint check of records directed was to (1) verify the identity of the Claimants, (2) their duration on the gang, and (3) whether they were voluntarily absent in such a manner so as to disqualify themselves from such per diem allowance. Although the Claimants bid on the gang knowing that it was headquartered in Houston, Texas, that fact alone is insufficient to vary the parties' practice with respect to the payment of per diem allowance to "on-line" gangs at the time of this dispute. Because SRG 9116 should have been headquartered "on-line," given the passage of time, it would be unreasonable to expect the Claimants to be able to prove actual expenses before being found eligible to receive the per diem allowance.

With respect to the Rule 37(a) travel allowance, there is no dispute that such provision directly ties payment of the agreed amounts to "miles actually traveled by the most direct highway route," and that the Carrier's obligation is to compensate for actual trips taken by the Claimants. The issue that has arisen is who bears the burden of establishing that each individual Claimant living the required distance from the work site actually made the trips claimed at the end of each work period occurring more than seven years ago. A quick look at the list submitted by the Organization indicates an acknowledgement that not all Claimants qualify for the Rule 37 allowance. As noted above, after the delay occasioned, in part, by the failure of the Carrier to timely set forth in writing its objections to the claimed amounts submitted by the Organization, it would be an unreasonable interpretation of a make-whole remedy to deny coverage to employees who cannot now submit proof of travel for this ongoing period in 2007. While it may be fraudulent for employees to submit a request for travel allowance while working on an on-line gang when no actual travel took place, that is a very different situation from employees receiving compensation as part of a make-whole remedy for the Carrier's violation of the Agreement. Thus, the joint record check again directed herein is to verify (1) the home addresses of the Claimants and round trip distances between the work site and such addresses, (2) the duration eligible Claimants worked on SRG 9116, and (3) the work schedule of the gang during that period. Those meeting the mileage criteria listed in Rule 37(a) are to be compensated accordingly.

The parties are directed to conduct a joint record check within 60 days of the date this Interpretation is transmitted to the parties, unless otherwise agreed to by the parties, in order to ascertain the accuracy of the list submitted by the Organization on July 1, 2013, and to make adjustments to that list, and the amounts owing, according to the facts established by the records. Once the Claimants are properly identified, and their duration on SRG 9116 is established, they are to be paid their per diem and travel allowances as prescribed in Rules 36(b) and 37(a), as clarified above.

Referee Margo R. Newman who sat with the Division as a neutral member when Award 41636 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of March 2015.