Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42230
Docket No. MW-42039
15-3-NRAB-00003-120416

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

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(Union Pacific 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 properly compensate System Gang 8513 employes D. Abel, M. Lindsey, M. Seed and P. Baldwin for their mandatory attendance gang meeting on their rest days of May 2 and 3, 2011 (System File RC-1135U-452/1556085).

(2) As a consequence of the violation referred to in Part (1) above, Claimants D. Abel, M. Lindsey, M. Seed and P. Baldwin shall now each '. . . be compensated an additional ten (10) hours of straight time at their respective rates of pay for the overtime worked, by attending the Start Up Meetings on May 2-3, 2011. Payment shall be in addition to any compensation they may have already received.'"

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 facts in this case are not seriously in dispute. The Claimants were assigned to System Gang No. 8513, which was working a T-2 Alternate Schedule in and around Elko, Nevada. Under a T-2 Alternate Schedule, employees take all of their rest days at the beginning of the month, and then work a compressed schedule at the end of the month.[1] The Claimants began their rest days for May 2011 on May 1.

System gangs have start-up meetings at the beginning of the season every year. The purpose of the meetings is to prepare for the season ahead: to set out the gang's plan of work for the year; to bring employees up to speed on new Rules, policies and regulations and review old ones; perform health screenings; and similar preparation for the gang's work in the coming months. Start-up meetings are mandatory; employees have no option whether to attend.

System Gang No. 8513's start-up meeting was scheduled for May 2 and 3, 2011, which were rest days for the four Claimants. They attended the meeting and were paid ten hours a day at the straight time rate for each of the two days of the meeting. The Organization filed this claim seeking overtime payment for the Claimants for attending the start-up meeting on their rest days. According to the Organization, Rules 35(c) and (e) and Rule 40(d) mandate overtime to be paid for work performed on an employee's rest day.

The Carrier contends that overtime is not payable for attendance at "mutually beneficial" training sessions. Prior Awards have determined that attendance at a mutually beneficial training class is not "work or service" to which overtime rates apply. The annual start-up meetings are training classes, and attendance at the start-up meetings should not be considered "work" for purposes of determining whether overtime rates should apply. The Organization failed to carry its burden of proof to establish that attendance at start-up meetings is "work," and the claim should be denied.

---

1 The T-1 Alternate Schedule reverses this pattern, with work days at the beginning of the month and rest days at the end of the month.

There is no significant dispute about the facts of what happened; this is purely a case of contract interpretation. So that is where the Board must start its analysis. Rule 35 addresses "Overtime Service," while Rule 40 makes provisions for "Alternate Work Periods." Rule 35 reads, in relevant part, as follows:

> **"RULE 35 – OVERTIME SERVICE**
>
> **(a) COMPUTATION – Time worked preceding or following and continuous with the regular eight (8) hour assignment will be computed on an actual minute basis and paid for at time and one-half rate with double time applying after sixteen (16) hours of continuous service, until relieved from service and afforded an opportunity for eight (8) or more hours off duty.**
>
> *** * ***
>
> **(c) CALLS – Employees notified or called to perform services not continuous with regular work assignment, on rest days, or on one of the designated holidays, will be paid a minimum of three (3) hours at the time and one-half rate for three (3) hours of service or less. If the service for which called extends beyond the minimum of three (3) hours, employees will be paid at the overtime rates, as specified in subsection (a) of this rule until relieved from service and afforded an opportunity for eight (8) or more hours off duty. In the application of this paragraph, the starting time will commence as of the time they report at their regular assembly point.**
>
> *** * ***
>
> **(e) INAPPLICABLE - Work in excess of forty (40) straight time hours in any work week will be paid for at one and one-half times the basic straight time rate except where such work is performed by an employee due to moving from one assignment to another, or to or from an extra or furloughed list, or where the rest days are being accumulated. Employees worked more than five (5) days in a work week will be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work weeks, except where such work is performed by an employee due to moving from**

> **one assignment to another, or to or from an extra or furloughed list, or where days off are being accumulated. There will be no overtime on overtime; neither will overtime hours paid for other than hours not in excess of eight (8) hours paid for at overtime rates on holidays or for changing shifts be utilized in computing the forty (40) hours per week, nor will time paid for in the nature of arbitraries or special allowances such as attending court, deadheading, travel time, etc., 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 40 expressly applies the rest day and overtime provisions of the rest of the Agreement to employees working an alternate schedule:

> **"RULE 40 – ALTERNATIVE WORK PERIODS**
>
> **(d) Rules in effect covering payment for service performed on rest days will apply to those accumulated rest days provided within this rule.**
>
> **(e) Except for any distributed hours provided for in paragraph (c), time worked prior to or after the assigned daily hours will be paid at the overtime rate in accordance with the overtime provisions of the Agreement."**

The Organization has the burden of proof in a case of contract interpretation, and the Carrier contends that the Organization has not met its burden to establish that attendance at a mandatory start-up meeting on an employee's rest day is "work" as that term in intended in the Parties' Agreement.

Rule 35(c), "Calls," is applicable to this case, where the Claimants were called in from their rest days to attend the mandatory start-up meeting. The specific language of Rule 35(c) states that "employees notified or called to perform services" on their rest days are entitled to a minimum call-out pay of three hours at time and one-half their regular rate. If "the service for which called" extends more than three hours, the employee is entitled to overtime pay for the time worked. This would apply

to the Claimants if they were "called to perform services." Is attendance at a mandatory start-up meeting the performance of services or working?

The Board concludes that it is, for several reasons. First, the Claimants had no option about attending the start-up meeting when called to do so. Most people would consider going to any employer-mandated meeting to be work: the Carrier required them to give up two of their rest days to attend it. The start-up meetings are designed to "get the ball rolling" on the next season's work. There is some training that occurs, as well as health examinations, but the start-up meeting is also where the Carrier briefs employees on what the season's work plan looks like. It is more in the nature of a briefing than pure training. The Carrier would not view employees' preparation for a day's work – collecting tools and equipment, attending a briefing on the tasks and assignments of the day, etc. – to be anything other than "work." The start-up meeting is similar, but conducted at a higher level, directed at an entire season's plan of work, not a single day's work. When the Carrier mandates that employees attend a start-up meeting, employees who attend are "at work" in every sense of the phrase. The Carrier based its position on the concept that attendance at training was "mutually beneficial" and, therefore, did not meet the requirement of "work or service" implicit in the Parties'Agreement. The Carrier's position, however, derives from specific language in a different collective bargaining agreement with a different Union – the Brotherhood of Railroad Signalmen. Rule 11 of that Agreement provides that time spent in training will be paid at straight time rates even if it takes place outside of an employee's regular assignment. Based on that language, the Board has held that time spent in start-up meetings does not qualify for overtime rates for BRS-represented employees. Those decisions are not pertinent here, and the principle of stare decisis argued by the Carrier is inapposite: stare decisis applies to prior decisions decided by the Board between the same two parties, not the Carrier and a different Union with a different collective bargaining agreement.

Moreover, Rule 35 sets forth express exceptions to employees' overtime entitlement, in Rule 35(e). There is no language indicating that attendance at mandatory employer meetings or training sessions on one's rest day is one of the exceptions to overtime. Rule 35(e) lists several exceptions to overtime. The Parties have had a collective bargaining relationship for many years and are sophisticated bargainers. Had they intended to exclude start-up meetings from being paid at overtime rates, they would surely have included language to that effect in Rule 35(e).

Under Rule 40, employees who work alternate schedules are entitled to the same rest day provisions and overtime benefits as employees working a traditional schedule (with exceptions that are not pertinent here). The Claimants were on their rest days when they were called in to attend a mandatory gang start-up meeting on May 2 and 3, 2011. The meeting lasted two days, ten hours a day. Under Rule 35(c), the Claimants were entitled to be paid overtime for a callout lasting more than three hours.

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 17th day of November 2015.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 42230 - DOCKET MW-42039

(Referee Andria S. Knapp)

The Majority's rationale in this case is flawed. The question at issue in this case was whether an employee's attendance at a "start-up" meeting on a rest day constitutes the performance of "service" and entitles the employee to compensation at the overtime rate of pay. The Majority held that attendance at a "start-up" meeting constitutes "work" and, therefore, employees are due the overtime rate of pay if such attendance is on a rest day.

The Majority first looked to what occurs at the start-up meetings. The Majority recognized that employees are given Rules training and health examinations during such meetings, both of which are mutually beneficial for the employee to obtain. Though the Majority recognized that these events occur at start-up meetings, it held that the start-up meetings are simply extended job briefings. While plans for the year are discussed, the purpose of the meetings is to prepare the employees for the work season ahead. The training and examinations they complete enable them to work not only on the positions they are currently assigned to, but also on any position to which their seniority entitles them. Thus, the time spent completing these tasks was mutually beneficial.

The Majority next looked to the language of Rule 35(e). The Majority pointed to the listing of exemptions from overtime within Rule 35(e). The Majority failed to recognize, however, that the list is not exhaustive, as evidenced by the utilization of the term "etc." The skilled negotiators recognized that they would not be able to compile a comprehensive list and thus, left it open. Because the Rule is ambiguous, to satisfy its burden of proof, the Organization would have needed evidence of a past practice, which was absent from the on-property record. The Organization failed to prove that overtime was required to be paid to the Claimants pursuant to the Parties' Agreement.

For these reasons, the Award is palpably erroneous, does not constitute precedent and should not change the previously agreed upon procedures. In light of this palpably erroneous finding, we dissent.

Katherine N. Novak *Michael C. Lesnik*

Katherine N. Novak **Michael C. Lesnik**

November 17, 2015

LABOR MEMBER'S RESPONSE TO
CARRIER MEMBER'S DISSENT
TO
THIRD DIVISION AWARD 42230, DOCKET MW-42039
(Referee Andria S. Knapp)

In this case, the Majority correctly applied the Agreement and determined that employes are entitled compensation at their overtime rates when they are required to attend mandatory "start-up" meeting on their rest days. The Carrier member's dissent focuses on the assertion that the "start-up" meeting was mutually beneficial so the Claimants should not be compensated at their overtime rates. This argument was presented to the Board and correctly rejected by the Majority. Specifically, the Majority noted that the Carrier's position derives from specific language in the Carrier's agreement with a different Organization, which provides that time spent in training would be paid at straight time rate. The Majority issued a well reasoned award based on the fact that the Agreement involved herein does not have similar language regarding compensating employes straight time for training. Accordingly, the Majority correctly determined the Carrier's position was in error and held that the employes are entitled to be compensated at their overtime rate pursuant to Rule 35.

Respectfully submitted,

Zachary C. Voegel
Labor Member