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

Award No. 42902
Docket No. MW-43681
18-3-NRAB-00003-160466

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division – (IBT Rail Conference**
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(BNSF Railway Company (Former Burlington Northern (Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier failed to comply with Appendix H [Mediation Agreement A-8853 Dated February 10, 1971, Article V: (Amended September 26, 1996)] following the injury and death sustained by Mr. C. Guerrero (Organization's File C-15-A040-38/10-16-0155 BNR).

(2) As a consequence of the above-stated violation '… in accordance with Appendix H of the September 1, 1982, Agreement as updated in December 2002, the family of Mr. Celso Guerrero receive all benefits as outlined in Appendix H.'"

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.

On February 1, 2015 the Claimant, while driving to work in his private vehicle, crashed into a snow plow and did not survive the accident. The Claimant was "under pay" at the overtime rate after having been told following the completion of his Saturday, January 31, 2015 shift that he was to report for work at 0700 hours on February 1. A subsequent claim by the Organization on behalf of Mr. Guerrero's estate for accidental death benefits arising from the parties' Off-Track Vehicle (OTV) Benefits Agreement was denied by the Carrier. After the claim was progressed on the property without resolution, it was referred to the National Railroad Adjustment Board for arbitration.

The Organization insists that the Carrier's refusal to provide Appendix H benefits to Mr. Guerrero's estate violates the Agreement. He was killed in an accident while operating his personal vehicle "under pay" on the way to his work site. The exclusion contained in section (d)(6) does not apply as Third Division Awards 21125 and 21126, both on-property awards, have stated. In Award 21125, reaffirmed in Award 21126, the Board determined that "… when an hourly rated employee is 'on the payroll,' we do not feel that he is 'commuting' in the accepted sense of the word …" These awards should be considered controlling precedent because Mr. Guerrero's case presents the same fact pattern and involves the same rules. The September 26, 1996 amendments to Appendix H do not affect the application of Awards 21125 and 21126, nor did the parties' lack of agreement to include commuting as a covered condition. That lack of agreement did not invalidate the prior awards or the instant claim.

The Carrier asserts that the OTV Agreement excludes "commuting from personal residence" from coverage; thus, the claim must be denied. While Mr. Guerrero was in a "covered condition" and "under pay" under the OTV Agreement, he was making the 38 mile commute to Galesburg, IL, thus triggering the exclusion set forth in Appendix H of the Mediation Agreement. Traditional rules of contract construction, including the use of "fair and plain" reading, should be applied. As noted by Referee Dana E. Eischen in Public Law Board 6786, Award 1, "clear and unambiguous language best signifies the parties' intentions and should end a referee's inquiry into the meaning of the language." The relevant language in Appendix H is plain and unambiguous and the Organization has not argued otherwise in the on-property handling of this dispute. Instead, the Organization relies on 1976 awards based on a previous, now defunct Agreement. That the "plain

words" approach eclipses an equity approach finds support in awards arising from the railroad and other industries. If the Board sustains the claim, the above-noted exclusion would be nullified.

The Carrier further notes that the Organization must prove the claim by a preponderance of the evidence. The Organization's contention that the commuting exclusion does not apply is based on two "specious" Third Division Awards, 22125 and 22126. The emphasis on Mr. Guerrero's receipt of premium pay is a diversion. No work was being performed at the time. Overtime pay applied because Mr. Guerrero was instructed to report on February 1, 2015 after the completion of his January 31 shift, with the instruction untimely. The above-noted Third Division awards are "misplaced and misleading" because they are based on the 1971 OTV Agreement rather than the rethought, renegotiated and rewritten 1996 OTV Agreement, which followed the two Third Division awards by 28 years. The renegotiated 1996 language should serve to nullify any precedential value attached to the earlier two awards. The two awards involved three operators involved in an accident that injured two and killed one while driving to work. The applicable 1971 OTV Agreement covered employees "deadheading under orders" or "being transported at carrier expense." Neutral Referee Sickles reasoned that an employee "under pay" could not be commuting, but his reasoning "remains in ways opaque, and even lacking in terms of consistency." "Deadheading," found in the 1971 Agreement is non-existent in the 1996 Agreement, as is "transported at Carrier expense." The Organization's contention that the commuting exclusion applies only when an employee is not "under pay" is a "logical absurdity" that is "nonsensical." The two Third Division Awards no longer apply. In the on-property correspondence the Carrier took pains to distinguish the two 1976 awards. The Organization has never rebutted the Carrier's contentions. A reading of the parties' proposals to Presidential Emergency Board (PEB) 229, the PEB's final report and the parties' subsequent negotiated language provides "sufficient evidence" of the intent to retain the commuting exclusion. Third Division Award 22103 (1978) involved the claim of an "extra agent operator killed while commuting from his Selma, AL home to his work site in Jackson, AL. The Claimant was receiving deadhead pay and mileage for the round trip. Referee Eischen found that the commuting exclusion in the 1971 OTV Agreement applied. While the Claimant was "under pay," the plain language of the 1971 OTV Agreement could not be ignored. This Board should deny the claim.

The Board views this as a troubling case because it is generally disconcerting to take issue with the work of a prior Board or referee. Yet, in order to fully explain this Board's rationale for denying the claim, we have little or no choice. In the broadest sense, we find the dissenting opinion to Awards 21125 and 22126 (really, one award replicated) more cogently reasoned than the award itself.

Award 21125 finds that Mr. VanSkike was authorized to travel from his residence to his work site in his privately-owned vehicle because the "Carrier knew, or reasonably should have known, that there was an absence of Carrier (or public) transportation and that the employees would drive private vehicles to report for overtime work." We differ, reasoning that it is a very tenuous step at best to equate managerial knowledge of what is most likely to happen to authorization. We agree with the dissenting opinion that "This finding was based on a whole chain of inferences leading to the "authorized" conclusion that was tenuous in the extreme."

The Board is also troubled by Award 21125's consideration of the terms "deadheading" and "commuting." Award 21125 notes that definitions of deadheading found in other Awards "are of little assistance." However, the earlier Board did not set out a definition of deadheading, thus, this Board cannot see what relationship was contemplated between the two terms. Our understanding of "deadheading" is travel from one point to another on the railroad, although not necessarily by rail, in order to be in place to carry out an assignment. But even if deadheading were to include travel from home to work, there is no cogent explanation of why that excludes commute, defined as "travel to and from one's daily work."[1] The dissenting opinion states that the facts of the earlier case show "travel from home to the headquarters point." This sort of travel is not deadheading. Moreover, in Third Division Award 22103, that Board considered a claim for Loss of Life Benefits where the deceased employee had claimed deadhead pay, mileage and subsistence pay for days and nights away from home. The deceased was killed in a head-on collision that was not his fault while driving his personal vehicle from his residence to his work site. This 1978 Award denying the claim, obviously rendered while "deadheading under orders," includes the following:

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[1] The Oxford American Desk Dictionary and Thesaurus, 2d, ed, Berkley Books, 2001, p. 152.

> **"Based on the forgoing facts there is no question that the "commuting" exception of Section d(6) applies to this claim even if arguendo it could be established that the Employe was traveling under "covered conditions." But at the time of his death [the Claimant] was commuting from his residence to his assigned place of business in order to complete his six-day assignment. He would not have been authorized to make that trip or deadhead under orders until the end of the workday on June 21, 1975. The language of the Rule is plain and it must be applied as written, notwithstanding the tragic and emotional circumstances which always surround its invocation. The plain language of the contract requires the denial of this claim."**

While the above quotation comes from an Award that occurred on a different property, it is nonetheless compelling.

In addition, the Board rejects the contention that the September 26, 1996 amendments to Appendix H do not affect the application of Awards 22125 and 21126. A careful reading of Award 21125 makes obvious that the phrase "deadheading under orders" was a crucial consideration—crucial enough to eclipse the (d)(6) commuting exclusion. When Mr. Guerrero lost his life on the way from his residence to the job site, "deadheading under orders" was no longer a part of Appendix H, but the commuting exception remained despite Organization attempts to have it removed. The Board finds no value or even insight in speculating how the earlier Board would have responded to the current Appendix, but surely there would have to be a different analysis. The 1996 amendment to Appendix H destroys the precedent value of Awards 21125 and 21126. As with Third Division Award 22103, the plain language of the commuting exclusion dictates the denial of the claim.

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 14th day of February 2018.