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

Award No. 42955
Docket No. MW-43840
18-3-NRAB-00003-160509

The Third Division consisted of the regular members and in addition Referee Sean J. Rogers when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division – (IBT Rail Conference
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(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

"(1) The Agreement was violated when the Carrier refused to properly compensate Mr. M. Bulman for work performed outside his regularly scheduled hours on April 6, 2016 and continuing (System File B-1515D-202/8-0040 DME).

(2) As a consequence of the violation referred to Part (1) above, Claimant M. Bulman must now be compensated at his respective overtime rate for all hours he was improperly compensated at the straight time rate for work he performed outside of his regularly scheduled hours beginning on April 6, 2015 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.

Claimant M. Bulman has established and holds seniority within the Carrier's Maintenance of Way Department as a work equipment mechanic headquartered in Waseca, Minnesota.

On April 6, 2015, the Carrier instructed the Claimant that he would no longer be paid at the overtime rate for travel time outside of his regularly assigned hours. Instead, the Carrier paid him at the straight time rate for this travel time. The time for which the Claimant seeks compensation at the overtime rate is travel time to and from his work location and his headquarters. There are indications that the Claimant may have been paid at the overtime rated previously, but the record lacks details.

On April 20, 2015, the Organization filed this claim seeking the overtime pay for travel outside of his regularly assigned hours.

On July 20, 2015, the Carrier denied the claim. The parties attempted to resolve the dispute on the property pursuant to the collective agreement. On September 21, 2015, a conference of the claim failed to produce settlement.

The gravamen of the dispute concerns which collective agreement Rule controls the Claimant's rate of pay for the performance of work and related travel in a company vehicle. The Organization maintains Rule 15 – Overtime controls and the Carrier maintains Rule 24 – Meals, Lodging and Travel Expense Reimbursement controls.

"Rule 15 – Overtime states, in pertinent part,

> **2. Overtime will be paid for time worked in excess of regularly scheduled hours which is usually eight (8) hours/workday or forty (40) hours in a workweek (unless alternate work arrangements are in place). Overtime pay is based on actual hours worked. Time off on sick leave, or any leave of absence, will not be considered hours worked for purposes of determining eligibility for overtime pay.**
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> **3. Employes required to physically report for work, when not continuous with the regular work period, will be allowed four (4) hours pay at the overtime rate. If held on duty in excess of four (4) hours, overtime will be on actual minute basis."**

"Rule 24 – Meals, Lodging and Travel Expense Reimbursement states, in pertinent part:

1. Employes will be eligible for expenses when require to stay away from their headquarters point overnight or, if non-headquartered when required to stay away from their residence."

TYPE OF POSITION	MEALS	LODGING	MILES	TRAVEL TIME
HEADQUARTERED	$25/DAY	COMPANY ARRANGED AND PAID	IRS RATE FOR FIRST 200 MILES $0.20/MILE THEREAFTER	STRAIGHT TIME ON MINUTE BASIS, IF REQUIRED TO TRAVEL OTHER THAN DURING ASSIGNED HOURS
NON-HEADQUARTERED	$25/DAY	COMPANY ARRANGED AND PAID	IRS RATE FOR FIRST 200 MILES $0.20/MILE THEREAFTER	NO TRAVEL TIME
TRAINING	$25/DAY	COMPANY ARRANGED AND PAID	IRS RATE FOR FIRST 200 MILES $0.20/MILE THEREAFTER	STRAIGHT TIME ON MINUTE BASIS, IF REQUIRED TO TRAVEL OTHER THAN DURING ASSIGNED HOURS

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5. Travel Time

a. A headquartered employe required to be away from his headquarters point for multiple days will be entitled to travel time at the straight time rate for the first and last day of the workcycle, if such travel is authorized to be done outside of the employe's regular shift. Travel time will be computed on a minute basis from the headquarters to the work location.

b.

The Organization asserts that the clear terms of Rule 15 of the collective agreement establish that an employe working outside his regularly scheduled hours is to be paid at the overtime rate and not the straight time rate which applies only to time worked during regularly scheduled hours. The Organization also asserts that the record establishes the parties' unrebutted long-standing practice of overtime pay for performing regular duties outside and employe's regular hours. The Organization argues that its statement, made during the on property handling, that there is a past practice to pay for travel time was not denied by the Carrier and so, must be accepted as accurate.

The Organization argues the Carrier's assertion that Rule 24 applies to the Claimant's travel time is specious and arbitrary. The Organization argues that the Claimant is a traveling mechanic and traveling to work sites is a major part of his regular work assignments.

The Organization concludes that Rule 24 is inapplicable. The Organization argues that Rule 24 does not raise any ambiguity about the applicability of Rule 15 to the facts. The Organization maintains, based on the parties' past practice and the clear language of Rule 15, that overtime time pay for time worked outside scheduled hours is required.

For these reasons, the Organization states it is entitled to the full remedy requested.

The Carrier asserts that the facts in this dispute involve travel time commuting from a headquarters point to a work location and travel time in a company vehicle commuting from a hotel to a work location in a company vehicle. Based on Rule 24, the Carrier asserts that no violation of the collective agreement has occurred. The Carrier argues that the Claimant was properly compensated under Rule 24 with straight time pay for his travel time and he is not due additional compensation. The Carrier maintains that the collective agreement clearly addresses the manner and amounts of employe pay while performing service and traveling.

Regarding the Organization's assertion of a past practice of overtime pay for travel time, the Carrier states the Organization failed to show anything to support the practice of paying overtime for Employes to travel to and from a work location in a company vehicle.

The Carrier concludes that it is incumbent upon the Organization to prove a violation of the collective agreement and it has not. The Carrier argues that the Organization has not met its burden of proof and requests that the claim be denied.

As stated above, the Board finds that the facts are undisputed. The parties' dispute concerns which Rule, Rule 15 or 24, is to be applied to the facts.

The Board's analysis of the appeal starts with the Organization's argument there is a past practice to apply Rule 15 to these facts and pay the overtime rate for employe travel time in a company vehicle to and from a work location.

Past practice evidence tends to show a consistent prior course of conduct not covered by the collective agreement. The past practice must be clear and consistent, endure over a reasonable time, and be the accepted conduct in the workplace.

The Organization only asserts the past practice to pay overtime pay for this travel time. However, the assertion is not without support evidentiary support. The Organization argues that since it made this statement without Carrier challenge, the statement is accurate. The Organization maintains thereby it has proven the past practice.

However, the assertion of a past practice is not like a statement of fact on a claim's underlying factual events involving time, place a circumstance, or put another way the people, the things that they did and the times that they did them, leading up to the claim. A past practice assertion is a legal conclusion that must be supported by evidence to prevail. The Organization has provided no relevant or material evidence to support its past practice claim. The mere statement of the existence of a past practice is insufficient to prove a consistent prior course of conduct exists on the property. For this reason, the Board finds the Organization's assertion of a past practice is without merit.

Turning to the Board's interpretation the collective agreement and the determination of which Rule, Rule 15 or 24, is applicable to the facts. To resolve this appeal, the Board must ascertain and then enforce the intent of the parties based on the language of the Rules in dispute as regard their applicability to the undisputed facts.

It is a fundamental canon of contract interpretation that the language of each article must be read in concert with other related articles of the collective agreement.

Rule 15 and 24 are clearly related articles. Each Rule defines when and how much Employes are paid for actual hours worked, under Rule 15, and for travel time during other than assigned work hours, under Rule 24. When read together, Rule 15 establishes the general requirement that Employes must be paid, "[o]vertime pay is based on actual hours worked," while Rule 24 establishes specific requirement regarding straight time pay for travel time "other than during assigned hours" and then only to the employe's headquarters point or training. Read together, there is no conflict or ambiguity in the language of the Rules.

A second well established fundamental canon of contract construction states that specific contract terms govern general contract terms. This canon is based on the solid principle that parties to an agreement knew what they were doing when the negotiated the language and they intended that the language of a general contract term was to be modified and clarified and limited by the related language of a specific term.

The plain language of Rule 15 sets down a general rule on overtime pay while the plain language of Rule 24 sets down a specific rule on pay for travel time in "other than during assigned hours." For this reason, Rule 24 clarifies and limits the application of Rule 15 as regards the pay rate for travel time.

A third well established canon of contract construction states contract terms are to be read reasonably in concert so as to give all terms meaning.

Under the Organization's interpretation of Rule 15, all employe travel time in a company vehicle is actual work and must be compensated at the overtime rate without regard to the Rue 24 straight time pay limitation on employe travel "other than during assigned hours." This interpretation would render the Rule 24 terms meaningless. However, the Carrier's interpretation of the Rules gives meaning and applicability to both. For this reason, the Carrier interpretation reflects the intent of the parties.

For all these reasons, the Board finds that the parties intended that Rule 24 govern employe travel time in a company vehicle during other than during assigned hours and the parties intended as well that such travel time is to be paid at the straight time rate.

The Organization's appeal must be denied.

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.

LABOR MEMBER'S DISSENT
TO
AWARD 42955, DOCKET MW-43840
AWARD 42956, DOCKET MW-43841
(Referee Sean Rogers)

In this instance, the Majority erred in its finding that Rule 24 governed the employes driving a company vehicle as part of their regular assignment. Rule 24 specifically deals with "Meals, Lodging and Travel Expense Reimbursement" as evidence by the title of said rule. This rule contemplates reimbursement for expenses related to traveling. In this situation, the Claimant was required to work as part of his regular assignment. More specifically, the Claimant was required to drive a company vehicle outside of his regularly assigned hours, which was clearly work, more specifically, the performance of overtime. Rule 15 provides that work performed outside of regularly assigned hours shall be compensated at the overtime rate. As further evidence that the Claimant was on duty and working, the Organization presented a charge letter and Carrier work rules which establish that employe was in fact working and not simply traveling as contemplated by Rule 24. A virtually identical situation was address by Referee Dana Eischen in Award 1 of Public Law Board No. 6786 wherein the Board held that employes were entitled to overtime compensation for time spent traveling in connection with their assigned daily hours. Said award was cited as Employes' Exhibit "B" within the Organization's submission and was heavily relied upon during the oral hearing. The Majority's failure to address the applicability of said award was improper.

The Majority also held that there was no evidence of a practice of paying employes overtime for the work claimed herein. It should be noted that the Organization provided a statement from Mr. M. Bulman establishing that the Carrier historically paid overtime and unilaterally stopped doing so. The Carrier never refuted the statement. Accordingly, the accepted practice was an unrefuted fact and should have been applied by this Board as to the application of Rule 15. The Board's failure to accept this unrefuted past practice renders this award palpably erroneous.

Therefore, I respectfully dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member