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

Award No. 42998
Docket No. SG-43500
18-3-NRAB-00003-160165

The Third Division consisted of the regular members and in addition Referee Patricia Bittel when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the' Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of W.B. Cecil, R.L. Darner, T.M. Howerter, C.M. McLaren, F.H. Pecsi and W. Zwit; for Claimants T.M. Howerter and R.L. Darner, 3 hours and 45 minutes each at their respective overtime rates of pay and for Claimants W.B. Cecil, W. Zwit, F. H. Pecsi, and C.M. McLaren 3 hours and 15 minutes each at their respective overtime rates of pay, account Carrier violated the current Signalmen's Agreement, particularly Rules 8, 11, 45, and past practice, when it refused to compensate the Claimants at the overtime rate for attending a mandatory meeting on August 6, 2014, outside of their regularly assigned hours. Carrier's File No. 35-15-0008. General Chairman's File No. 14-041-BNSF-20-C. BRS File Case No. 15264-BNSF."

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 Claimants were instructed to attend a safety meeting on August 6, 2014 from 7:30 A.M. until 10:45 A.M. in Galesburg, Illinois, their headquarter location. Safety meetings are scheduled periodically throughout the year. This particular training session was the August Safety Meeting for all of the Galesburg Signal forces. The Claimants were compensated for their time at the straight time, not the overtime rate.

Rule 8—Basic Day and Starting Time, Section C states:

> **"Where three (3) shifts coupled in continuous service are worked, eight (8) consecutive hours including an allowance of twenty (20) minutes for lunch within the eight (8) hour period on each shift shall constitute a day's work for each shift. The starting time of the first shift shall be governed by paragraph A of this rule and the starting time of each of the other shifts shall be regulated accordingly."**

Rule 11—Calls, Section A states:

> **"An employee notified or called to perform work outside of and not continuous with his regular work period will be paid a minimum of two (2) hours and forty (40) minutes at time and one-half rate and if held on duty in excess of two (2) hours and forty (40) minutes, time and one-half will be allowed on the minute basis, with payment at double time rate for work in excess of sixteen (16) hours of continuous work."**

Rule 45—Rates of Pay, modified by separate agreements in 2007 and 2014, now states:

> **"C. When a monthly-rated employee is called out before or after his usual hours to perform signal work or is engaged in such signal work at the end of his usual working hours (except as otherwise provided in Rule 45), all time will be paid at the overtime rate of pay. When an Electronic Technician or Signal Inspector is utilized outside his usual**

hours in a situation where a Maintainer should have been utilized instead, the Electronic Technician or Signal Inspector will be paid for time spent at the overtime rate with a minimum of 2.7 hours. This does not apply to those situations where both a Technician or Inspector and a Maintainer were jointly called out to correct a problem. Hourly-rated Signalmen required to relieve on monthly rated Signal Maintainer positions will be compensated as provided in Rule 16. * * *

J. When a signal maintainer or assistant signal maintainer (when assigned to a signal maintainer) is used off his assigned territory during the assigned hours of his work week, when instructed by proper authority will be allowed 1/2 time his hourly rate in addition to his regular straight time hourly or monthly rate for the time consumed off his assigned territory, time to be continuous from the time he leaves the limits of his assignment until he again re-enters his assigned territory; except, that in instances such as ice, sleet, and snow storms, tornadoes, hurricanes, fire and earthquakes where the signal system is interrupted at any point which requires the services of additional signal employees, the adjoining signal maintainers may be used without payment of the 1 1/2 time penalty referred to herein during the time their services are used in restoring the signal system to safe and proper working order.

L. Where a maintenance employee's territory is confined to a terminal and maintainers are assigned on more than one shift, if an employee is called for service outside his usual working hours, it will be considered as working off his assigned territory in the application of paragraph J."

The Organization filed a grievance for the Claimants requesting overtime compensation in addition to the straight time received for attendance at the safety meeting on August 6, 2014, asserting BNSF violated Rule 8C, Rule 11A, various provisions in Rule 45, and past practice by denying the Claimants compensation at the overtime rate.

The parties to said dispute were given due notice of hearing thereon. Failing to resolve the matter, the Organization referred this dispute to the National Railroad Adjustment Board ("NRAB") for arbitration. This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The Carrier maintains it acted in compliance with existing arbitral precedent: the Claimants were instructed to compensate themselves for their time at the straight time rate using a specific formal training pay code because this type of safety meeting is mutually beneficial to the employee and has been determined to not be "work" or "service" as it is defined in collective bargaining agreements. In its view, the Organization cannot meet the steep burden of proving a mutually agreed upon past practice that overwrites clear language and arbitral precedent.

The Carrier asserts that numerous Boards have reviewed this very issue and determined that the collective bargaining agreement does not provide for overtime where safety meetings or classes are concerned. As lead cases on this point it cites Third Division Awards 20323, 7577, 31103, 30047 and 4250.

The Carrier points out that Rules 45J and 45L only apply to Maintainers, while the claim is for non-Maintainers as well; Claimants Howerter and Zwit were Electronic Technicians, not Maintainers. It references Referee Benn's Award 35457 where an applicable principle of contract interpretation was recognized: to state one thing excludes another. It further faults the Organization's evidence of past practice for lacking a single, verified example of overtime being paid for class attendance.

The Organization argues that the cited rules as well as past practice require BNSF to compensate the Claimants for work or service outside of their regular hours and on rest days at the overtime rate of pay.

The Organization notes that employees have to apply safety to the job while on duty. It reasons that practicing safety and learning about safety are one and the same, and should be paid as such. As it reads the Agreement, any work outside of normal working hours must be paid at the time and one-half rate-of-pay, and involuntary attendance at a meeting is no exception. It notes that Rule 11 A provides for no exception to its terms, not for meetings of any kind, not for traveling, not for service of any description. In its view, the Carrier's position is inconsistent because it is paying for attendance at job safety meetings when it does not consider this "work." It points to the numerous, consistent statements it submitted from employees establishing a past practice that is binding on the Carrier.

The Board is not at all in agreement with the Carrier that the language of the Agreement is "clear" on this point. In Third Division Award 20323, which involved

the request for overtime while attending Rules Instruction Classes, the Board stated:

> **"The Board does not mean to suggest that the issue in dispute is so clear of resolution that reasonable minds might not differ in determining the appropriate application of the Agreement to the facts presented in this dispute."**

There is no provision in the Agreement addressing meetings. The "mutuality of benefit" doctrine is nowhere to be found in the contract language and was introduced by way of arbitration. That said, there is a strong preference in contract interpretation for contract interpretations that are consistent with applicable precedent because this provides the parties with guidance in interpretation and predictability in their relationship. The cases cited by the Carrier establish a long standing line of consistent interpretations supporting the conclusion that meetings of mutual benefit to employee and Carrier are not subject to Rule 11.

Assuming for the sake of argument that the mutuality of benefit analysis should apply here, the Board has searched the record for factual evidence supporting a finding of mutual benefit. The meeting has been described as a "safety meeting," however this label is entirely insufficient to establish mutuality of benefit. For example, in Award 31103, the employees were required to attend a Red Cross class on first aid adult CPR. Clearly in that instance, the Carrier benefitted by having employees who could provide first responder type care to each other, while the employees benefitted from being able to provide such care to family, friends or even strangers if needed. They learned a skill which could have use and benefit outside the workplace and which would continue to have value even if the employment relationship with the Carrier ended.

Under the mutuality of benefit analysis, the burden of establishing mutuality would fall to the Carrier. It cannot be said in this case that the Carrier has provided evidence that the content of the meeting in question was mutually beneficial. No agenda, PowerPoint, hand out or other information regarding the content of the "safety meeting" was put into evidence. The Carrier's case relies solely on an assumption that because it was titled a "safety meeting," the items discussed were of mutual benefit to Carrier and employee. However, as the Board has pointed out, simply saying a meeting is a "safety meeting" is inadequate; the Board has no

factual basis upon which to conclude that the meeting did indeed provide a mutuality of benefit to both employee and Carrier.

Hence, even if the Board were to accept the mutuality of benefit analysis in this case, the evidence nonetheless fails to establish the requisite mutuality. Insofar as the meeting was mandatory and without proven mutuality of benefit, we find that time spent in attendance constituted time "worked," rendering affected the Claimants eligible for overtime.

The claim is granted in part. The Carrier will provide Claimants with additional compensation consistent with the findings herein. The Carrier will be credited for compensation already made.

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 29th day of March 2018.