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

Award No. 43365
Docket No. MW-44507
19-3-NRAB-00003-170663

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

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

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 Mr. S. Tabbert for overtime service performed on March 20, 2016 and April 1, 6, 7, 18, 19, 20, and 21, 2016 and continuing (System File G-1615D-302/8-106 DME).

(2) The claim* as presented by First Vice Chairman G. Owen on May 13, 2016 to Division Engineer M. Milewsky shall be allowed as presented because said claim was not disallowed by Division Engineer M. Milewsky in accordance with Rule 33.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant S. Tabbert shall '* be compensated for all hours of overtime, as stated earlier in the claim, at the applicable rate of pay.' (Emphasis in original).**

***The initial letter of claim will be reproduced within our initial submission."**

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 S. Tabbert was assigned as a work equipment mechanic headquartered at Chillicothe, Missouri during the times for which the claim was filed. The Carrier arranged for the Claimant to use a company vehicle to drive between his headquarters and work locations on the dates for which overtime pay is claimed. The time spent driving between the headquarters and the various work locations was outside of the Claimant's regular assigned hours.

The Organization and the Claimant contend the time spent driving the company truck was "work" outside of regular assigned hours and, therefore, must be paid at overtime rates per Rule 15. The Carrier, to the contrary, maintains the time spent driving is "travel" time which is to be paid at straight time rates per Rule 24.

The record in this dispute poses a procedural issue which must be addressed as a threshold matter. The claim dated May 13, 2016 was filed with Carrier's Division Engineer Mark Milewsky. The Division Engineer was the person designated by the Carrier to receive claims. The Carrier timely denied the claim by letter dated June 30, 2016; the denial, however, was signed by Trevor Nelson, who was the Director of Production for the Southern Region. The Organization contends the Carrier committed a fatal error violating Rule 33 when the denial was issued by someone other than the Division Engineer.

Rule 33 reads, in pertinent part, as follows:

"RULE 33 - TIME CLAIMS AND GRIEVANCES

1. **All claims and grievances arising from the application of this Agreement must be presented in writing (via U.S. Mail) or electronically (via e-mail) by, or on behalf of the employee involved, to the Company manager designated to receive same, with copy to the General Chairman, within sixty (60) calendar days from the date of the occurrence on which the claim or grievance is based.**

2. **Should any such claim or grievance be disallowed, the Company shall, within sixty (60) calendar days from the date same is received, notify the party who filed the claim or grievance (the employee or his employee representative) in writing, with copy to the General Chairman, of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances."**

(Underscoring supplied)

As written, Rule 33 does not say the Company's response notification must be issued by the same person with whom the claim was filed. Instead, the clear wording of Rule 33 only requires the response to be timely, state the reasons for disallowance, and be issued by a representative of the Company, with a copy to the General Chairman. According to the record, the Company's response fulfilled these requirements. As a result, the Organization's procedural contention lacks merit and must be rejected.

Turning to the merits, we see that this dispute is not one of first impression. Third Division Award No. 42955 addressed an identical pattern of facts and the same contentions. There, as here, the issue is whether the time spent driving the Company vehicle between the headquarters location was "work" or "travel."

There too, as here, the prior Award dealt with a past practice assertion that

was allegedly not refuted by the Carrier. Arguably, the Carrier's penultimate paragraph in its October 7, 2016 appeal disallowance effectively refuted the assertion. But even if the assertion was not refuted, the assertion suffers from two major shortcomings. First, the record does not establish whether the claimed past practice arose and persisted when a collective bargaining agreement was in effect or if it arose and existed in a non-union environment. It makes a significant difference. Second, the assertion itself does not deal with the critical issue of work versus travel. Therefore, it is neither helpful to the resolution of the instant dispute nor controlling. It reads as follows:

> **"It has always been the past practice that when needing employees to work outside regular hours, to perform service for the company employees are compensated at the overtime rate."**

Prior Award No. 42955 provides a lengthy explanation of its reasoning. It determined that these 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 record before us in this docket does not provide us with a proper basis for ignoring the reasoning of the prior Award or depart from its conclusion. Therefore, we adopt that reasoning and do not attempt to restate it differently.

Given the foregoing discussion, we find the Organization has not satisfied its burden of proof to substantiate the claim. Accordingly, the claim 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 December 2018.