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

Award No. 43913
Docket No. SG-45203
20-3-NRAB-00003-180640

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Northeast Illinois Regional Commuter Railroad (Corporation (METRA)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Northeast Illinois Regional Commuter Railroad Corp. (METRA):

Claim on behalf of R.M. Monty, for $34.08 in meal reimbursements, account Carrier violated the current Signalmen's Agreement, particularly Rules 9 and 15, when on April 7, 2016, Carrier arbitrarily denied the Claimant's expense report for the meal expenses he incurred while performing overtime service on March 9–12, 2016. Carrier's File No. 11-18-988. General Chairman's File No. 13-MW-16. BRS File Case No. 15976-NIRC. NMB Code No. 95."

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.

At the time of the incidents that gave rise to this dispute, the Claimant was assigned to a Signal Foreman position in the Carrier's Milwaukee District. This dispute concerns the Carrier's denial of the Claimant's expense report for his meal expense incurred on March 9 to 12, 2016, while performing overtime service.

On the dates at issue, the Claimant performed overtime service outside of his regular assigned working hours. He submitted an expense report seeking reimbursement in the amount of $34.08 for the meal expenses he incurred while working the overtime. The Carrier denied the expense report on April 7, 2016, because there was no evidence that Claimant had been provided an initial meal period when he worked planned overtime on March 9 to 12, 2016.

The Organization filed a claim on June 3, 2016, asking the Carrier to compensate the Claimant for $9.15 on March 9, 2016; $6.49 on March 10, 2016; $7.13 on March 11, 2016; and $11.31 on March 12, 2016. The Carrier denied the claim on July 29, 2016. The parties were unable to resolve the claim on-property and it is now properly before this Board for final adjudication.

The Organization contends that the Carrier violated Rules 9 and 15 of the current Signalmen's Agreement when it arbitrarily denied the Claimant's expense report and failed to reimburse him for meal expenses incurred while performing overtime work. The Organization contends that the Claimant is entitled to reimbursement of his meal expenses, because he was "called" for service when the Carrier asked him to perform overtime services on March 9 to 12, 2016.

The Organization contends that it has demonstrated that the historical practice on the property is to reimburse employees for meal expenses while performing overtime work. The Organization contends that it submitted numerous statements from employees in support of this practice. The Organization contends that the Carrier very recently changed the long-standing practice.

The Carrier contends that the Organization failed to meet its burden of proof in the instant claim. The Carrier contends that the collective bargaining agreement does not provide for meal reimbursement when an employee is working planned overtime, but has not yet observed an initial meal period. The Carrier contends that the

Organization failed to prove that the Claimant was working incidental, rather than planned, overtime. The Carrier contends that the Organization asserted that planned overtime is considered a "call" for the first time just before submitting this matter to this Board and failed to make that argument during the on-property handling.

The Carrier contends that before a subsequent meal period as specified in Rule 9 must be provided, the employee must have observed an initial meal period as provided for in Rule 8. As a result, the Carrier contends that the Claimant did not meet the criteria in Rule 9 because he had not observed an initial meal period and was not asked to work more than two hours after his assigned overtime.

The Carrier contends that the Organization failed to provide any evidence of the alleged past practice during the on-property handling. The Carrier contends that if erroneous payments were made or approved by local supervisors, this action does not constitute a recognized "past practice."

Both parties argue that clear and unambiguous language in the collective bargaining agreement supports their position. The cited provisions are Rules 8 and 9:

"RULE 8. MEAL PERIODS.

(a) Signal gang employees shall be assigned a meal period of not less than twenty (20) minutes nor more than one hour which shall be regularly established between the end of the fourth and the beginning of the sixth hour after starting work, with preference to be given to establishing a twenty (20) minute meal period. When assigned a twenty (20) minute meal period, it shall be without reduction in pay during the regular eight (8) consecutive hour work period. The assigned meal period shall be uniform within the gang. If the established meal period, or any part thereof, is not afforded, it shall be paid for at the overtime rate and a twenty (20) minute period in which to eat shall be afforded, with pay, at the first opportunity.

(b) Other than signal gang employees with eight (8) consecutive hours of work, shall be allowed twenty (20) minutes in which to eat, without reduction in pay, between the ending of the fourth hour

and beginning of the sixth hour after starting work. Meals will be taken at or near the work assignment.

RULE 9. SUBSEQUENT MEAL PERIODS.

(a) Employees will not be required to work more than two (2) hours after and continuous with their regular work period without a second meal period. The meal periods subsequent to the second meal period shall be intervals of four (4) hours.

(b) Employees called to perform service outside of their regular assigned working hours will not be required to perform such service for more than four (4) hours without a meal period. Subsequent meal periods shall be allowed at intervals of four (4) hours.

(c) The meal periods provided for in this rule shall not exceed thirty (30) minutes; shall be paid for by the Carrier; and shall not terminate the continuous work period; the employee shall be reimbursed for actual necessary expenses for such meals, supported by receipts, if the meals are not furnished by the Carrier."

When the language of the parties' agreement is clear and unambiguous, this Board need look no further than the negotiated language agreed to by the parties to resolve their dispute. It is only appropriate to consider past practice or other interpretative aids when the provision is ambiguous. Here, the parties disagree as to the meaning of "called" in Rule 9, part (b), to wit, "Employees called to perform service outside of their regular assigned working hours will not be required to perform such service for more than four (4) hours without a meal period."

The Organization argues that the term, "called," is commonly used in the railroad industry to mean contacting an employee for service and that an employee is "called" to work overtime even when the work is planned. It points out that Rule 9 does not distinguish between planned and unplanned overtime and provides no basis on which to conclude that "called" only refers to unplanned, and not scheduled overtime service. It argues that the parties have used "called" when referring to scheduled overtime, such as in Rule 15 of the Agreement, which provides for the order for

maintainers to be "called" for "planned overtime work or service to be performed on rest days."

In its submission, the Carrier took exception to the Organization's belated argument which was raised only two (2) weeks prior to the Organization docketing this case with the Board. The Carrier addressed the Organization's argument in its submission that one is "called" to perform service only when that overtime is not planned or scheduled. It contends that the parties only intended for the Carrier to reimburse an employee for meals when that service is unplanned, because that employee would not have the ability to make meal preparations ahead of time, unlike an employee who knows he will be working overtime.

The Carrier asserts that the Organization "failed to prove the Claimant was working incidental overtime, as opposed to planned overtime" on the dates in question. In addition, the Carrier cites to Award 31 of Public Law Board 5564, in which that board found that the parties had for more than 25 years, "mutually understood 'incidental overtime' to mean something other than the planned overtime the Claimant worked."

While Award 31 of PLB 5564 is well-reasoned, it is not dispositive of the issue here. The agreement between this Carrier and the BMWED differs from the Signalman's Agreement in at least one important aspect: Section 15(d) and (e) of that agreement mandated reimbursement for meals when employees were required to perform "incidental overtime service." The Agreement before this Board contains no reference to "incidental overtime." In PLB 5564 Award 31, the Carrier suggested that the Organization was "wrongly ignoring" the term; here it appears to be inserting a term into the agreement that was not negotiated by these parties.

In addition, the reference to an employee being "called" to perform service outside of his regular hours is found in Rule 9(b), which provides for a meal period. If the Carrier's interpretation of "called" were accepted, employees on planned overtime would not be entitled to any meal period, regardless of how long they worked, while those who worked unexpectedly would be. Such a result would be absurd and unlikely their intention. The plain meaning of "called" includes both types of service.

The Carrier asserts that the plain meaning of "subsequent meal periods" in the title of Rule 9 can only mean a meal period after an "initial" meal period has been

provided pursuant to Rule 8. According to the Carrier, since the Claimant's request for reimbursement occurred in connection with his first meal period during his scheduled overtime work period, he was not entitled to reimbursement for his first meal, and there was no evidence in the record that Claimant had worked more than two (2) hours after and continuous with his regular work period entitling him to a subsequent meal and qualifying for his meal expense to be reimbursed.

However, the Carrier's position that Rule 9 must be read in conjunction with Rule 8 is inconsistent with its proffered intent to limit meal reimbursement to employees who worked unplanned overtime. An employee who performs unexpected overtime work on his rest day has not been given an initial meal period under Rule 8, yet the Carrier concedes that this employee would be entitled to be reimbursed for a meal. The Carrier inexplicably differentiates between these two situations on a basis not identified in the Agreement.

Consequently, if there is an "initial" meal period, it is the one provided by Rule 9, not Rule 8. The plain language of Rule 9(b) provides that employees who are called to perform service outside their regular working hours cannot be required to work more than 4 hours without a meal period and *subsequent* meal periods at four-hour intervals. It makes clear that the employee is entitled to an initial meal period after four hours, and subsequent, or additional, meal periods if the overtime service continues for more than four more hours afterward.

Rule 9(c) provides that employees called to perform service outside of their regular assigned working hours "shall be reimbursed for actual necessary expenses for such meals." It does not refer to Rule 8 and certainly does not, on its face, limit meal reimbursements to those employees who have already observed an initial meal period.

The Organization asserted that the clear intent of Rule 9 was corroborated by the parties' long-standing practice of providing meal reimbursement or Carrier-paid meals for employees who worked overtime. The Organization provided written statements from 17 employees and 94 pages of expense reports dating back to 2004 to support its claim. The Carrier challenged this evidence, which was presented during the on-property handling, arguing that the circumstances of the payments were unknown, and it could not determine whether the work involved was unscheduled. The Carrier also argued that the submitted expense reports only demonstrated reimbursements

were approved by one particular supervisor. The Carrier also argued, notwithstanding, erroneous payments by local supervisors did not create a binding past practice.

The Carrier is correct that payments made by mistake will not alter clear contractual language to the contrary. However, the Carrier offered no evidence that the decades-long practice attested to by the employees and the 94 expense reports payments for overtime meals were, in fact, made by mistake. In addition, there was no showing by the Carrier that these payments were only made to employees who were called to work unexpected overtime or who had been given an initial meal period under Rule 8.

If the intent of Rule 9 were ambiguous, the consistent expectation of employees and foremen that the expense of overtime meals would be reimbursed would help to clarify the parties' intent. Despite the Carrier's arguments to the contrary, the Board finds that the plain meaning of Rule 9 was that employees shall be reimbursed for actual necessary expenses for meals taken while working after being called to perform service outside of their regular assigned working hours, without regard to whether the overtime service was planned. The Organization demonstrated that the Claimant was entitled to reimbursement for meal expenses he incurred while performing overtime service on March 9, 10, 11, and 12, 2016.

AWARD

Claim sustained.

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 28th day of January 2020.