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

Award No. 44621
Docket No. MW-45713
22-3-NRAB-00003-190482

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(The Kansas City Southern Railway Company
(former Gateway Western Railway Company)

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. L. Sibley for standby service from Saturday at 7:00 A.M. to Monday at 7:00 A.M. beginning December 30, 2017 and continuing every third week [System File 17 12 30 (96)/K0418-7557A GAT].

(2) As a consequence of the violation referred to in Part (2) above, Claimant L. Sibley shall now be compensated a total of sixteen (16) hours at the time and one-half rate of pay and thirty-two (32) hours at the double time rate of pay which totals two thousand two hundred thirty-four dollars and seventy-nine cents ($2,234.79) for the Claimant every third weekend starting from December 30, 2017 and continuing forward plus late payment penalties based on the periodic rate of .0271% (Annual Percentage Rate of 9.9%) calculated by multiplying the balance of the claim by the daily periodic rate and then by the corresponding number of days over sixty (60) that the claim remains unpaid."

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.

After the abolishment of several Bridge Tender positions and posting of new positions, the Claimant accepted one of the several Bridge Tender positions at Pearl, Illinois which closed for bid on December 11, 2017. The Bridge Tender position bid for by the Claimant and awarded to him had hours of Monday through Friday, 11:00 p.m. to 7:00 a.m. The position further required that "New Position is Subject to Call Outs." Notwithstanding that subject to call requirement, the Claimant bid for and accepted that position and signed to following on December 21, 2017:

> **"Shift acknowledgement schedule for Lance Sibley**
>
> **Upon signing this document, I acknowledge that I have reviewed the schedule and am aware of my set work times as well as the weekends that I am to be on call.**
>
> **Commencing on 12/18/17, I understand my shift to be Monday-Friday from 2300-0700. In addition, I will be on call every third weekend beginning December 30th starting at 0700 that morning thru January 1st until 0700."**

The Claimant's subject to call out requirement rotates with other bridge tenders at Pearl. When actually called out on a weekend, the Claimant is compensated in accord with the Agreement. The claim in this case seeks additional compensation for the Claimant for having to be available for call out on the weekends of his rotation for call out.

The relevant language provides:

> **<u>Article VIII</u>–Overtime**

(a) Time worked preceding or following and continuous with the regular work hours shall be computed on the actual minute basis and paid at time and one-half rates, with double time computed on an actual minute basis after 16 continuous hours of work in any 24-hour period, computed from the time the work commences, except that all time during the employees regular shift will be paid for at the pro rata rate. ...

*** * ***

Rule 20

SERVICE OUTSIDE REGULAR ASSIGNMENTS

Employees called for duty and reporting outside of regular working hours and not continuous therewith, either in advance of or following, will be paid a minimum of two (2) hours at time and one-half rate for two (2) hours work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on a minute basis.

The burden in this case is on the Organization to demonstrate a violation of the Agreement. Third Division Award 35457:

"This is a contract dispute. The burden is therefore on the Organization to demonstrate a violation of the Agreement. ... [B]ecause the Organization has the burden in this case, the first inquiry is whether clear contract language supports the Organization's position."

Clear language does not support the Organization's position in this case.

At first look, the Organization's position is plausible. Under Rule 20, on his rotating weekends for call out, the Claimant was "called for duty" and therefore entitled to compensation.

However, supporting the Carrier's interpretation, Article VIII(a) requires payment of overtime for "[t]ime worked". Rule 20 requires payments for "[e]mployees called for duty and reporting outside of regular working hours ...." Because the claim seeks compensation for the Claimant for periods when he performed no "[t]ime worked" and was not "... called for duty and reporting ..."

[emphasis added], that interpretation favoring the Carrier's position is also plausible.

Where equally plausible interpretations exist, the language is ambiguous. Third Division Award 34024 ("Both interpretations are plausible ... [t]he language is therefore ambiguous.")

Because the language is ambiguous, this Board can turn to the tools typically used for contract interpretation. Third Division Award 31976 ("Given that ambiguity, the rules of contract construction can be used to attempt to discern the parties' intent."). See also, First Division Award 28478 ("It is only when contract language is not clear that other tools of construction can be used in an attempt to ascertain the meaning of ambiguous language.").

"One important tool for ascertaining the parties' intent for ambiguous language is bargaining history." Third Division Award 34024. And in order to prevail on a bargaining history argument, the party claiming the existence of the agreement (here, the Organization) must show that there was a "meeting of the minds" across the bargaining table consistent with that party's interpretation. Third Division Award 32701. This record discloses no evidence of bargaining history to show the necessary "meeting of the minds" consistent with the Organization's position.

Past practice is another important tool for attempting to understand the intent of ambiguous language. Third Division Award 35457 ("... another tool of Contract Construction is to look to how the parties have interpreted the disputed language in the past."). And "[t]o be a past practice, the conditions in dispute must be unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Third Division Award 34207. There is no evidence to show the existence of a past practice favorable to the Organization's position.

We note that while subject to call, the Claimant was free to engage in personal activities; sleep; spend time with friends or family; engage in recreation; and was not subject to the direction or supervision of the Carrier in any respect unless "called for duty". At most, the Claimant was required to carry a cell phone during those activities where he could be reached. Significantly, the Claimant was not tied to a physical location or remain by a phone in a manner which would prevent him from engaging in activities of his choice. We can take note that carrying a cell phone or similar device is the norm and not one that can significantly

restrict freedom of an employee's activities when being "on call". Consumption of inhibiting substances (e.g., alcohol) may be restricted for obvious reasons during on call periods, but that limitation is minor compared to other freedom of movements that exist during on call periods.

Based on the above, we therefore find that the Organization has not carried its burden to demonstrate a violation of the Agreement.

The awards cited by the Organization do not change the result.

Third Division Award 826 is an award from 1937 where employees who were on call were "... to remain in hearing distance of company telephones ... when off duty but subject to call." Third Division Award 1407 is an award from 1941 where the Board found that the requirement to be on call in that case "would interfere seriously with the freedom of the employes ...." Third Division Award 1675 is an award from 1942 where the Carrier required employees "... that they notify the person designated by the Management where they be called in event an emergency situation arises." The inability of employes to move about while on call in in 1937 and 1941 and be out of direct contact with the Carrier compared to the freedom of movement employees have today due to technological communication advancements described above (i.e., through cell phones), does not make those early awards cited by the Organization persuasive authority.

Second Division Award 9428 involved a requirement that employees arrive at a re-railment site, but then the employees were placed on rest at 8:00 p.m. to begin work the following day at 6:00 a.m. rather than allowing the employees to commence work upon arrival at the site. Third Division Award 10969 involved a requirement that employees stay on Carrier trailers, which the Board found "... restricted their freedom ...." In Third Division Award 24373, employees were required to remain at a hotel and be available for work. In Third Division Award 25508, the requirements in 1981 were such "... which place a definite restriction on the freedom of movement of an employe" because the employee "... may not, therefore engage in recreational or other activities where he cannot receive a message from the Carrier ...." In Third Division Award 30874, a potential ice storm resulted in a requirement that employees were told remain on in a motel after their regular shifts which was modified to allow the employees to stand by at their homes. In Third Division Award 36584 (factually repeated in Third Division Award 36585 for another employee), the employee was not permitted to have his one out of two weekends off from standby service. In Third Division Award 42344, employees who lived close by to a troubled area where a washout occurred were told to remain

available on their regularly scheduled rest days, which the Board ordered compensation due to the "unique facts" of that case. These cases address unique circumstances and situations where freedom of movement was restricted. Those cases are not this case and are factually distinguishable. Here, the Claimant was free to move about and engage in personal activities as discussed above. He was not restricted from freedom of movement as were the employees in the awards cited by the Organization.

More on point is PLB 7804, Award 1 cited by the Carrier. In that case, the questions involved whether employees who were required to accept calls on certain days when they were not actually working were "held for duty" so as to have those hours counted towards a threshold necessary for overtime compensation. That Board answered the main question in the negative pointing out, as here, that:

> **"... As the Carrier points out, during the hours of their regular assignment on Saturdays while available for call, employees are free to engage in personal activities. They can sleep, spend time with friends or family, engage in recreation, and the like and they are not subject to the direction or supervision of the Carrier in any respect unless and until they are called, all of which can be easily accomplished because the employees are only required at most to carry a cell phone and be reachable in the event of trouble."**

The ultimate finding in that case was that the Organization did not carry its burden to show that the parties agreed that being on call was compensable for time not actually worked. That same rationale exists here. There is no evidence that the parties agreed that rotating weekends for being on call is compensable when no services are performed (i.e., the employees were not called out). At most, the Organization's arguments are plausible – but so are the Carrier's arguments. However, the burden is on the Organization to demonstrate a violation of the relevant language. A record consisting of plausible arguments from both sides is insufficient for this Board to find that the Organization met its burden. See Third Division Award 35457, supra:

> **"In sum, the Organization has not shown that clear contract language supports its position; the record shows that while there is language that supports the Organization's interpretation, there is also language which supports the Carrier's interpretation ... The bottom line in this case is that both parties' positions are plausible. But, again, these cases**

are decided on burdens and the burden in this contract dispute is on the Organization. If the record leads to a conclusion in a contract dispute that both parties' positions are plausible, the final conclusion must be that the Organization has not carried its burden. That is this case. The claim shall be denied."

Therefore, in this case, under these facts, 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 15th day of December 2021.