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

Award No. 44699
Docket No. MW-46194
22-3-NRAB-00003-200613

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Keolis Commuter Services, LLC

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed and refused to allow employes J. Turner, J. Sweeney, J. Lydon, F. Silva, A. Richards, L. Sanderson, J. Joyce, J. Ahem, T. Cooper, D. Semler and S. Jung travel time compensation and mileage reimbursement in connection with the use of their personal vehicles for overtime work performed on various dates beginning March 16, 2019 (Carrier's File BMWE 21/2019 KLS).

(2) As a consequence of the violation referred to in Part (1) above, Claimants J. Turner, J. Sweeney, J. Lydon, F. Silva, A. Richards, L. Sanderson, J. Joyce, J. Ahern, T. Cooper, D. Semler and S. Jung shall now be properly compensated for all missed travel time compensation at their respective rates as well as mileage reimbursement. Moreover, given the Carrier's outright refusal to comply with the Agreement, we request that the Claimants be allowed an additional $25.00 for each day of travel for which they are not properly compensated in accordance with Rule 32 during the claim period. This is necessary to enforce the clear terms of the Agreement which the Carrier is knowingly and willfully violating. This Claim is continuous and inclusive of all violations until the violation ceases to exist. Please advise in which pay period the Claimants will be properly compensated."

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.

Claimants J. Turner, J. Sweeney, J. Lydon, F. Silva, A. Richards, L. Sanderson, J. Joyce, J. Ahern, T. Cooper, D. Semler and S. Jung have established and hold seniority in the Carrier's Maintenance of Way Department.

On multiple dates beginning on March 16, 2019 and continuing, the Claimants used their personal vehicles to travel outside of their regularly assigned hours, to report for voluntary overtime service; and the Carrier declined to pay them overtime compensation and mileage reimbursement related to use of the personal vehicles to report for the voluntary overtime service. The Organization timely filed a claim under the Railway Labor Act, 45 USC §§ 151, *et seq*., alleging a violation of Rule 32, which was denied on the property and timely referred with or without an agreed upon extension to the National Railroad Adjustment Board for final adjudication.

Significantly, this Claim is essentially identical to one previously decided on March 1, 2019 by another Referee: Third Div. Award No. 43455, *BMWED - IBT Rail Conference And Keolis Commuter Services, LLC* (Meyers; Mar. 1, 2019). There, the Board found and held as follows:

> **…[W]e find that the Organization has met its burden of proof that the Carrier violated the Agreement when it failed to allow the fourteen Claimants travel time compensation and mileage reimbursement in connection with their use of their personal vehicles for overtime work performed on various dates between May 14, 2016, and May 22, 2016.**

The rule at issue is Rule 32, which states the following:

> **'Except as otherwise provided, the following rule will apply:**
>
> **1) An employee waiting, or traveling by direction of MBCR by passenger train, motor car, or any other method of transportation will be allowed straight-time for actual time waiting and/or traveling during or outside of the regularly assigned hours.**
>
> **2) When authorized to use their personal vehicle, the employee will receive the standard MBCR/IRS authorized mileage reimbursement.**
>
> **3) This rule does not apply to employees waiting or traveling in the exercise of their seniority rights.'"**
>
> **Moreover, in connection with the aforementioned provisions of Rule 32, we note that this Board has consistently held that agreements must be applied as written…**
>
> **In this instance, there is no dispute that the Claimants utilized their personal vehicles in performance of overtime service required by the Carrier. Rule 32 of the Agreement requires that the Claimants be allowed straight-time for actual time waiting and/or traveling during or outside of the regularly assigned hours. Here, the Carrier simply failed and refused to apply the Agreement as written and compensate the Claimants for their travel time and mileage as set forth in Rule 32 of the Agreement. Consequently, there should be no doubt that the Claimants are entitled to the full remedy requested.**
> **The Carrier relies on the words "by direction of MBCR" and says that it can deny the travel reimbursement to the Claimants because they were working on a voluntary basis. This Board disagrees. A review of that rule makes it clear that if the parties did not want it to apply to some cases, such as is pointed out in Paragraph 3, "in the exercise of their seniority rights," then the parties could have made another exception to that rule. The rule does not have an exception for cases where the overtime is voluntary. The Carrier argues that the words "by direction" make it clear that the rule only applies to work that is involuntary. This Board has reviewed the rule and disagrees.**
> **The Organization has met its burden of proof in this case and, therefore, the claims are sustained.**

Id. **at pp. 3-5, hereinafter "Meyers Award" (emphasis added).**

The Carrier did not appeal the Meyers Award, which the Parties agree is non-precedential under the Railway Labor Act. However, the Carrier alerted the Organization on or about March 25, 2019 "that the Carrier intend[ed] to pay the Claimants in the Award as ordered by the Referee", but "that they did not intend to pay BMWED members Travel Time and Mileage automatically for overtime work moving forward and that the Organization would again have to progress Claims on non-payment." (Org. Subm. at 23.)

Thereafter, the Organization filed its Claim on May 14, 2019, and the Carrier denied it on June 18, 2019, stating:

> **The Carrier does not pay Travel Time during voluntary weekend work, therefore No Travel Time and mileage entitlement. Considering the relevant facts and established precedent, this time claim is denied.**

Here – exactly as in the prior Meyers case – the Organization argues its members are entitled to Rule 32 compensation for travel time and mileage reimbursement, while the Carrier asserts such pay is not owed for voluntary overtime.

Citing to U.S. Supreme Court and Board decision, the Organization argues that it should apply the Meyers Award, unless it determines the Meyers Award was decided in "palpable error". *See Slocum v. Delaware, L & W. RR. Co.*, 339 U.S. 239 (1950) ("[p]recedents established by" the Adjustment Board "while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems"); and Third Div. Award No. 38350, *Transportation Communications Int'l Union and CSX Transportation, Inc. (former Seaboard Coast Line Railroad* (Campagna 2007). The Third Div. Award No. 38350, which commented on the *Slocum* is helpful so also quoted at length:

> **[T]he Board has consistently reaffirmed the principle that the legalistic common-law doctrines of res judicata and stare decisis do not technically apply in arbitration", however (sic), proper regard for the arbitration process and harmonious labor-management relations militate in favor of accepting the interpretation of a prior arbitration so long as the subsequent claim before the Board involves the same controlling facts and the same contractual provisions that were fully**

> **adjudicated in an earlier dispute, assuming it is on point and not palpably erroneous….**
> **That being said, we would not blindly follow a precedent where to do so would merely serve to compound an error. In other words, we would not hesitate to reach a different result if we were convinced that the prior Award was palpably erroneous.**

***See* 3-38350. The Organization also argues that if the Meyers Award exceeded that Board's authority and jurisdiction – as the Carrier asserts – then the Carrier would have had grounds to have the Award overturned via a civil action in Federal District Court. As such, the Organization asserts that the Carrier's failure to seek to do so speaks volumes about the merits of its position. Lastly, the Organization urges that a penalty payment is appropriate here because the Carrier is willfully violating the contract and the Meyers Award.**

In contrast, the Carrier argues that the Meyers Award was "errant" and erroneously decided; the Meyers Award flouts the plain language of the Rule 32, and in doing so impermissibly amends the Parties' agreement; and that prior Awards are not stare decisis but, in any event, the Meyers Award is palpably erroneous because it contradicts the plain language of the contract. The Carrier also argus that the Organization has supplied no evidence that the parties have previously paid travel time or mileage for voluntary overtime. As such, it asserts "[t]he Meyers Award was a lapse in judgement by that neutral and this matter must not extend that misjudgment." The Carrier also argues that had the Parties intended to provide for travel compensation or mileage reimbursement for voluntary overtime, they would have more naturally addressed that in Rule 11, which governs overtime. Lastly, the Carrier argues that under Tenth Circuit precedent, awarding punitive or liquidated damages absent express authorization in the Agreement exceeds the Board's authority. *See Bhd. of R. R. Trainmen v. Denver & R. G. W. R. Co.*, 338 F.2d 407, 409 (10th Cir. 1964) (holding that the power to employ such sanctions as liquidated damages or punitive provisions "cannot be inferred as a corollary to the Railway Labor Act" so must be expressly authorized in the CBA).

Upon consideration of the whole on property record, this Board finds and concludes as follows. The plain language of Rule 32 requires payment of "straight time for actual time waiting and/or traveling" only for "[a]n employee waiting, or traveling <u>by direction of</u>" the Carrier. Moreover, the plain language of Rule 32

requires "standard…mileage reimbursement" only for those employees "authorized to use their personal vehicle" for such travel. Finally, the plain language of Rule 32 expressly states that it "does not apply to employees waiting or traveling in the exercise of their seniority rights." (Id. emphases added.)

Moreover, it is clear under the record developed on property that the Claimants are seeking Rule 32 benefits for voluntary overtime; they exercise their seniority rights in picking a voluntary overtime assignment, for personal benefit based upon personal choices; and they are not directed by the Carrier to undergo this overtime service, as that word is ordinarily understood. There is also no evidence in the record that the Claimants were authorized by a supervisor to use the personal vehicles for the travel. While there was some suggestion in oral arguments before this Board that an employee became "directed" once they accept the overtime assignment and therefore become obligated to perform it, this line of argument was not developed in the on-property record. In any event, it is not a particularly probative or persuasive argument given that it twists the plain language of Rule 32; and it still leaves the issue of authorization unaddressed. Nor has the Organization proven a past practice that Keolis or its predecessor in interest, Massachusetts Bay Commuter Rail, had deemed workers volunteering for overtime service to be so directed and authorized, and thus entitled to Rule 32 benefits.

Given these facts, this Board is not persuaded by the reasoning of the Meyers Award, and instead finds it to have been decided in palpable error due to its conflict with the plain language of the contract. Specifically, the Meyers Award does not explain how use of the words "by direction of" could be either ignored or interpreted in a unique and contradictory way without violating the plain language of Rule 32, and/or imposing a new obligation by fiat. *See, e.g., BMWE* and *Burlington Northern Santa Fe* (Suntrup 1999, unnumbered). ("[t]he…interpretation, while most ingenuous, finds hidden meanings which the application of common principles of contract construction would be hard pressed to detect"). The Award also does not explain why Subsection 3's exclusion of "employees waiting or traveling in the exercise of their seniority rights" is not implicated, given that voluntary overtime is always obtained through the exercise of seniority rights. (This latter point supports the Carrier's inferential argument that the Parties intended Rule 11, rather than Rule 32, to address all matters of overtime.)

Admittedly, there are sound policy reasons to hold the Parties to prior Awards, even if the Board does not agree with the prior decision, particularly promotion of industrial peace and creating a disincentive for inappropriate forum

shopping for what should be settled matters. However, this Board's role ultimately is to enforce the contract as written, which militates against "blindly follow[ing] a precedent where to do so would merely serve to compound" a "palpable error" of interpretation that contradicts the plain language of Rule 32 and is also not supported by evidence of a past practice. *Disting*. SBA 1019, Award No. 1 at 8-9, *New Jersey Transit Rail Operations*, (VanWart 1987) (dismissing a similar claim that contradicted the plain language of the travel benefits in the face of a proven past practice and timely Carrier objection).

The Board, like the Organization, is troubled by the Carrier's failure to appeal the Meyers Award, given its immediate determination within the appeal time limit to not abide by the Award in future cases. However, the Carrier was not required under the Contract or the Act to file a civil appeal, and the Parties agree that such Awards have no precedential or binding effect under the Act. As the VanWart Award noted, "[h]owever onerous the terms of an agreement may be, they must be enforced if such is the meaning of the language used, and the intention of the parties using that language"; even where "there is an inequity created thereby," because "the Board is not authorized to do equity". *Id.*

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 28th day of January 2022.

LABOR MEMBER'S DISSENT
TO
AWARD 44699, DOCKET MW-46194
(Referee Pilar Vaile)

The Majority erred in its findings in this case when it failed to apply the findings of Third Division Award 43455. The Majority correctly recognized that "… this Claim is essentially identical to one previously decided on March 1, 2019, by another Referee.…", but nonetheless refused to follow its findings.

The Supreme Court held in Slocum v. Delaware, L & W RR. Co., 339 U.S. 239 (1950):

> "*** The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. 6 Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems."

Clearly, while the Railway Labor Act (RLA) does not make arbitration decision controlling, the Supreme Court recognized the necessity for the uniformity and consistency that the National Railroad Adjustment Board (NRAB) could provide to the Parties.

The NRAB has taken this charge seriously and followed prior Awards unless they were palpably erroneous.[1] See Third Division Awards 15570, 22547, 32404, 38350, 40959, 41846, 42189 and Award 1 of Public Law Board (PLB) No. 6086. Specifically, Third Division Awards 22547, 41846 and Award 1 of PLB No. 6086 held:

AWARD 22547:

> "It is a well recognized principle of this Board that once an issue is decided between the parties, it should not be disturbed, absent a finding that the prior Award(s) is palpably erroneous. There is, of course, a sound basis for that doctrine as it tends to guarantee a basic predictability of labor relations between the parties. This doctrine applies even if a subsequent authority would have reached a different conclusion had it considered the matter in the first instance. This, of course, is a classic test of that principle and, regardless of our individual predilictions (sic) we gather, from a close reading of the two prior Awards - and making some reasonable

[1] Meriam Webster Defines palpable as "easily perceptible" and erroneous as "containing or characterized by error". Accordingly, subsequent boards should follow an award unless it contains an error that is easily able to be seen.

"inferences - that the factual circumstances are similar. Here - as in Award 21744 - no one was 'called in' or 'worked overtime' in place of the Claimant."

AWARD 41846:

"The bottom line here is that prior Awards are final and binding between the parties. And as discussed in Third Division Award 34204, supra, '… for purposes of stability, we cannot decide this case de novo … [because t]o do otherwise would be an invitation to chaos and would result in encouraging parties after receiving an adverse decision to attempt to place a similar future dispute before another referee in the hope of obtaining a different result.' While the Board disagrees with the result in PLB 7270, Award 2 and finds that Award to be decided in error, the Board is not prepared to find that PLB 7270, Award 2 was palpably in error.

For the Board to sustain the claim in this matter would only be an invitation for the filing of yet another claim by the Organization with the same allegations and arguments, which would be denied by the Carrier. Then a hunt for another Referee would begin to perhaps give a different result. That is the invitation to chaos and is a two-way street as the Carrier would then be inclined to deny claims that it lost in different cases on different issues with the hope of obtaining a different result from a different Referee. Overriding notions of stability which come about through the parties' claims resolution process would be severely undermined. Under the circumstances in this case, the parties will have to live with the result in PLB 7270, Award 2, which requires that the instant claim be denied." (Emphasis in original)

AWARD 1 - PLB NO. 6086:

"When there is identity of parties, contract language and facts, decisions by respected arbitrators have time and again reaffirmed the notion that proper regard for the arbitration process and for stability in collective bargaining leads to acceptance of an interpretation by a prior arbitration tribunal as authoritative, if in point and if based in the same facts and agreement. It is not necessary that the subsequent arbitrator endorse all of the reasoning expressed in the earlier opinion, so long as there is identity of issue and the holding and decision in the earlier award is not illegal, in excess of jurisdiction or palpably erroneous. In such circumstances, seasoned arbitrators recognize that it would be a disservice to the parties to reward forum shopping and subject them to the unsettling effects of conflicting and inconsistent decisions in the same set of facts and circumstances. Although I may have decided the matter differently in the first instance, there is nothing in the record before me in the present case to warrant my rejection of the decision in Third Division Award 31348 on grounds of illegality, abuse of jurisdiction or palpable error. As that award has already finally decided the matter now before us, it is

> "*stare decisis* and must be treated as authoritative precedent for denying this reiteration of the same claim." (Emphasis in original)

Not only has this Board recognized the need for consistency, stability and finality of arbitration decisions, the Carriers routinely argue in support of this principle. In fact, Carrier Members of the NRAB fully recognized the need for consistency. Specifically, in their dissent to Award 31996, Carrier Members Lesnik, Fingerhut and Varga wrote:

> "The Referee's opinion as set forth in Third Division Award 29230 further convinces us that something went awry:
>
> > 'It has long been recognized and accepted in labor-management arbitration generally, and in railroad industry arbitration specifically, that prior decisions involving the same facts, issues and Parties should be considered authoritative precedent. The legalistic common-law doctrines of res judicata and stare decisis do not technically apply in arbitration. But considerations of stability, predictability and good faith relations generally support the principle that final and binding decisions interpreting and applying a contract provision should be honored. If that doctrine causes "the shoe to pinch," the proper FORUM FOR OBTAINING RELIEF IS THE BARGAINING TABLE, NOT CONTINUAL ADJUDICATION OF ostensibly settled matters. In following such reasoning, the Board held in Third Division Award 2526 as follows:
> >
> > > "Whatever may be said of the soundness of our construction of the contract, our conclusion is impelled by Award No. 1852. That involved a dispute between the same parties under the same contract and upon essentially indistinguishable facts. A different conclusion than we have reached would, in effect, overrule the decision in that Award. To do this would be subversive of the fundamental purpose for which this Board was created and for which it exists: settling of disputes. When a contract has been construed in an award the decision should be accepted as binding in subsequent identical disputes arising between the same parties under the same agreement."
> >
> > To like effect the Board held in Third Division Award 3229:
> >
> > > 'This identical question has been decided in accordance with the views which were here

> "'expressed in two well reasoned opinions of this Board. Award 813 and 2205. We have no question of the correctness of those decisions. Even if we did have, we would doubt the advisability of deciding the matter differently today. A construction of a rule which is not unreasonable should be maintained. **For it is important that neither the carrier nor the employes should be left in uncertainty as to their rights.**'" (Emphasis added)

Clearly, the same Referee who composed the above decisions would never have dismissed the four prior Awards involving the same issue as not persuasive.

Given the foregoing, this Award should be accorded no precedential effect. This Award causes the same kind of mischief so roundly, and appropriately condemned by the Referee here." (Emphasis in bold and underscoring in original)

Based on the foregoing principle, the Majority should have followed the precedent and applied the findings of Award 43455. This Board readily admitted "… this Claim is essentially identical to one previously decided." Notwithstanding, the Majority inexplicably decided to hold that the previous award was palpably erroneous because it allegedly ignored the clear language of the Agreement. The Majority missed the point; the plain language is not in dispute here.

The Carrier argued that Arbitrator Meyers exceeded his jurisdiction by ignoring the plain language in the previous Award. If that were true, the Carrier should have vacated the Award in federal court as that is one of the very limited reasons in which a court can vacate a NRAB award. Instead, the Carrier told the Organization that it disagreed with the Award and it was going to ignore its findings which led to the Parties re-litigating the same issue.

I must reiterate this case was not a dispute over the plain language; the parties agree on the language, what they disagree on is whether accepting voluntary overtime triggers any of the language. Specifically, the Board had to decide if:

(1) once the employee accepted voluntary overtime did the Carrier direct the employee where to perform the overtime?;
(2) once accepting voluntary overtime were the employees authorized to use their personal vehicles to travel to the worksite?; and
(3) the acceptance of overtime was an exercise of seniority under the Agreement?

These answers are factual findings for the Board to make. Notwithstanding, the Majority in this case, took what it admitted was the same set of facts and reached a different conclusion. The three (3) above-quoted awards from Arbitrators Sickles, Benn and Eischen, along with the Carrier's dissent to Award 31996, clearly hold that taking such an action is improper and not the function of the NRAB. All of those awards held that they would have decided the case differently

but nonetheless followed the factual findings and holdings in awards when they were factually indistinguishable for stability and consistency.

The Majority furthered its error when it stated on Page 7 that the "*** Parties agree that such Awards have no precedential or binding effect under the Act. ***" That statement is directly contradictory to the Supreme Court's holding in *Slocum*. It is also undermined by the fact that both Parties cited awards in their submissions. If awards have no precedential effect, there would be no point in citing them. Apparently, this Board failed to distinguish between persuasive and binding precedent. While this Board is certainly not bound by the Meyers Award, precedent from this Board consistently holds that it should have been extremely persuasive in the analysis in this case, which makes it concerning that the Majority made a statement that Awards have "no precedential or binding effect".

Unfortunately, the holding in this case will have the exact effect that Referee Benn warned about in Award 41846. Now the Parties will undoubtedly progress many future cases to arbitration where the arguments will be over which arbitrator was right (Vaile or Meyers). This will result in continued forum shopping until one (1) party wins enough times that maybe the other party will concede. However, what is more likely to happen is this dispute will repeatedly occur while each Party cites the relevant award that supports its position, thereby never giving the Parties a final answer.

This decision also encourages the Parties to continue to fight over an issue that was at one point resolved rather than bargain their way out of the decision. This principle was affirmed in Award 29230, which is quoted above within the Carrier's dissent to Award 31996. The Majority's holding also encourages future parties to ignore Awards and continue to forum shop for a different result, which undermines any potential stability that Section 3 of the RLA supposedly creates.

For all of these reasons, I must respectfully dissent.

Zachary C. Voegel
Labor Member