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

Award No. 45054
Docket No. SG-45585
24-3-NRAB-00003-230314

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation (formerly C&O, Chesapeake District):

Claim on behalf of all BRS-represented Communication Employees on the C&O-PM property, for compensation for all of the expenses they incurred while working away from their home stations starting in December 2017, and continuing until the dispute is resolved, account Carrier violated the current Signalmen's Agreement, particularly Rule 209, when it required the Claimants to work away from their home stations and failed to properly compensate them. Carrier's File No. 18-16924. General Chairman's File No. 18-26-CD. BRS File Case No. 16051-C&O(CD). NMB Code No. 32."

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 dispute in this case is over the Organization's position that the Carrier failed to compensate Claimants for expenses while away from their home station.

By letter dated January 13, 2018, the Organization filed "... a continuous claim ... on behalf of the BRS represented Communication employees of the C&O-PM property listed in the attachment as BRS Exhibit No. 1." The employees listed on the cited exhibit are Communications Department employees A. B. Lieto, R. C. Siefert, M. A. Cook, R. A. Black, M. S. Perry, B. T. Drake, T. A. Dixon, and D. R. Ferguson with listed amounts due and further supporting documentation for the amounts claimed.

Rule 209 provides:

> **"COMMUNICATION RULE 209 – LEAVING AND RETURNING TO HOME STATION SAME DAY**
>
> **Hourly rated employees performing service requiring them to leave and return to home station on the same day will be paid continuous time, exclusive of meal periods except as provided by S&C Rule 201(e), from time reporting for duty until released at home station. Except as provided by S&C Rule 806, time spent in traveling or waiting shall be paid for at straight time rates. This Rule will also apply to an employee who has not been released from service to a rest point away from home station and whose return trip runs beyond midnight or into the next calendar day. These employees will be allowed actual expenses while away from their home station under this Rule."**

According to the Organization's claim letter dated January 13, 2018 (and not refuted), "[t]he instant dispute was triggered in December of 2017 when CSX Communications Employees were denied expenses while away from their home station."

The claim has merit and will be sustained.

First, "... because the Organization has the burden in this case, the first inquiry is whether clear contract language supports the Organization's position." Third Division Award 35457. Clear language supports the Organization's position. Rule 209 clearly states "[t]hese employees will be allowed actual expenses while away from

their home station under this Rule." For purposes of decision, "[i]f the language is clear, this Board's inquiry can go no further." First Division Award 28478. The Carrier discontinued paying Claimants their expenses while away from their home station. The clear language in Rule 209 that "[t]hese employees will be allowed actual expenses while away from their home station under this Rule" requires a finding that the Carrier violated Rule 209 when it ceased making those payments.

Second, if there is any question about whether the language is clear (which, in the opinion of this Board, there is not), this Board will give the Carrier the benefit of the doubt and assume for purposes of discussion that the language in Rule 209 is somehow ambiguous.

If the language is ambiguous, this Board can turn to the tools typically used for contract interpretation. Third Division Award 31976 ("[g]iven that ambiguity, the rules of contract construction can be used to attempt to discern the parties' intent."). In this case, the important rule of interpretation is how the parties have interpreted the language in the past – i.e., past practice. See Third Division Award 34207 ("... [o]ne of the strongest tools for interpreting ambiguous contract language is past practice.").

"To 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, supra. The Organization asserts in its claim that "[t]he claimants have always received expenses in this manner, as documented by the many exhibits ...." That assertion is not refuted by the Carrier. Therefore, even if the language in Rule 209 can be considered ambiguous (which it is not), past practice supports the Organization's position that Claimants are entitled to the payment of expenses sought under Rule 209.

Third, contrary to the Carrier's position, the claim is a continuing one. The Organization made that clear in the claim ("... this is a continuous claim ... [t]he continuous claim is for a violation of our CBA, particularly but not limited to the Communication Rule 209").

The Organization is correct that the claim is a continuing one. See First Division Award 29768 [quoting Second Division Award 13682]:

> **"... Alleged 'continuing' violations of the Agreement (as opposed to a single isolated and completed transaction) lead to 'continuing' claims because the act complained of is repeated from day to day. Every day an alleged violation continues results in a new 'occurrence'."**

A violation of Rule 209 occurred each time the employees left and returned to their home station the same day. Each time, the Carrier failed to pay the required expenses. Thus, "... the act complained of is repeated from day to day [and e]very day an alleged violation continues results in a new 'occurrence'." First Division Award 29768; Second Division Award 13682, supra.

Under the Carrier's position, every day that expenses were not paid, the Organization would be obligated to file a separate claim and the parties would have to go through separate claims handling procedures for those daily claims – a burdensome task for resolving the same ongoing dispute. The Carrier was on notice through the filing of the claim that it was "continuing" and the facts show that the complaint over non-payment of expenses is a "continuing" one.

Fourth, the Carrier argues that the dispute was resolved and must be dismissed. The basis for the Carrier's assertion is that it was admittedly late in responding to the claim and remedied that untimely response (according to the Carrier, its denial was nine days late) by paying the amount requested citing Uniform Rule 3 of the CSXT Agreements 15-018-16 and 15-025-09. See the Carrier's November 2, 2018 letter. According to the Carrier, it allowed the claim "... as presented, paying each Claimant the full amount of denied expenses claimed in BRS Exhibit 1 ...." Carrier Submission at 3. By doing so, according to the Carrier (id.):

> **Here, the Claimants have been paid in full for their claim. Therefore, here is no matter of controversy, and the Board has no jurisdiction to issue an award in this matter. This claim has been paid. Therefore, there is no controversy to consider.**

The rules cited by the Carrier in Agreement Nos. 15-018-16 and 15-025-09 require payment of claims when the Carrier fails to deny claims in a timely fashion. See Uniform Rule 3(b) of Agreement No. 15-018-16:

> **... When a grievance or claim is not allowed, the Highest Designated Officer will so notify, in writing, whoever listed the grievance or claim (employee or his representative) within sixty (60) calendar days after the**

> **date of appeal of the reason therefore. When not so notified, the claim will be allowed as presented. ...**

Uniform Rule 3(b) of Agreement No. 15-025-09 has the same requirement.

But as discussed above, the claim in this case is a continuing claim. And those same rules protect continuing claims from being cut off by payment of a portion of a claim due to a late denial by the Carrier. See Rule 3(d) of Agreement No. 15-018-16. ("A claim may be filed at any time for an alleged continuing rule violation and all rights of the Claimant or claimants involved thereby, shall under this rule, be fully protected by the filing of one claim based thereon so long as such alleged violation, if found to be such, continues."). The same language is found in Rule 3(d) of Agreement No. 15-025-09.

The Carrier cannot through reliance upon Rule 3(b) avoid the consequences of a continuing claim by paying a portion of claim that is specified as of the commencement date of a continuing claim. Such a result would render the concept of continuing claims and the language in Rule 3(d) protecting continuing claims meaningless. It is a fundamental rule of contract construction that "… constructions of one clause which render language in other clauses meaningless should be avoided." Third Division Award 35457, supra.

By asserting that the dispute has been resolved through its partial payment, the Carrier is really arguing that the dispute has been settled. But settlements are contracts and cannot be unilaterally imposed. It is textbook law that "... there must be a meeting of the minds in order for there to be a settlement agreement [and f]or a settlement agreement to be enforced, the party claiming the benefit of the enforcement must prove by a preponderance of the evidence that there was a meeting of the minds." Brown v. H & H Transportation, Inc., 489 F. Supp. 3d 559, 560 (N.D. Mississippi, 2020); Third Division Award 31813 (requiring that there cannot be a settlement unless there is a "true meeting of the minds.").

There was no "meeting of the minds" between the parties on a settlement here. The continuing claim was not settled. Only a portion of the claim was paid and the Organization pressed on with the merits of the continuing claim.

Fifth, Third Division Award 36087 cited by the Carrier does not change the result. In that award "... the claim has been paid in full and the Claimants have been

made whole." Claimants were not "paid in full" here as the continuing aspect of the claim remains unremedied.

The claim therefore has merit as a continuing claim.

With respect to remedies, this Board's discretion and authority to formulate remedies is very broad. First Division Award 26088 ("… in the formulation of remedies, it has long been held that arbitration tribunals have substantial discretion for crafting a remedy to fit a particular circumstance"); First Division Award 27865 ("The Board has broad discretion to formulate remedies").

The purpose of a remedy is to restore the status quo ante – *i.e.* to put the parties back to where they were before the contract violation occurred and to make whole those who have been harmed by the contract violation. See Interpretation No. 1 to First Division Award 25971 ("... it has long been held that where a contract violation has been shown, the purpose of a remedy is to restore the status quo ante and to make any adversely affected employees whole [citing Wicker v. Hoppock, 73 U.S. (6 Wall. 94, 99 (1867) [emphasis in original]). See also, First Division Award 26088 ("... a function of a remedy is to make an adversely affected employee whole.").

As a remedy, Claimants shall be made whole for expenses they incurred but were not reimbursed until the Carrier begins to make the required payments under Rule 209.

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 31st day of October 2023.