

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45069
Docket No. MW-46685
24-3-NRAB-00003-200189**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Keolis Commuter Services

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed and refused to pay meal period payments to Mr. B. Kyles on multiple dates in January 2019 (Carrier's File BMW 04/2019 KLS).

(2) The Agreement was violated when the Carrier failed and refused to pay meal period payments to Mr. F. Taveras on, including but not limited to, September 12, 13, 17, 18, 19, 21, 24, 25, 27, 28, 29, 30 and October 1, 2, 8, 10, 12, 14, 15, 18, 19, 21 and 23, 2018 and continuing (Carrier's File BMW 05/2019).

(3) The Agreement was violated when the Carrier failed and refused to pay meal period payments to Mr. J. Turner on, including but not limited to, October 3, 4, 5, 8 and 9, 2018 and continuing (Carrier's File BMW 06/2019).

(4) The Agreement was violated when the Carrier failed and refused to pay meal period payments to Mr. W. Rowe on, including but not limited to, September 26, 27, 28, 29 and October 4, 5, 8, 9 and 13, 2018 and continuing (Carrier's File BMW 07/2019).”

(5) The Agreement was violated when the Carrier failed and refused to pay meal period payments to Mr. D. Petrigno on, including but not limited to, September 9, 10, 12, 15, 17, 18, 19, 21, 24, 26, 27, 29 and

October 1, 2, 10, 13 and 20, 2018 and continuing (Carrier's File BMW
16/2019).

(6) As a consequence of the violation referred to in Part (1) above, the Organization '*** requests that the Claimant be properly compensated for all missed meal period payments under Rule 10. Please advise the pay period in which the Claimant will be properly compensated and made whole.'

(7) As a consequence of the violation referred to in Part (2) above, the Organization '*** requests that the Claimant be properly compensated for all missed meal payments under Rule 10. Please advise the pay period in which the Claimant will be properly compensated and made whole.'

(8) As a consequence of the violation referred to in Part (3) above, the Organization '*** requests that the Claimant be properly compensated for all missed meal period payments under Rule 10. Please advise the pay period in which the Claimant will be properly compensated and made whole.'

(9) As a consequence of the violation referred to in Part (4) above, the Organization '*** requests that the Claimant be properly compensated for all missed meal payments under Rule 10. Please advise the pay period in which the Claimant will be properly compensated and made whole.'

(10) As a consequence of the violation referred to in Part (5) above, the Organization '*** requests that the Claimant be properly compensated for all missed meal payments under Rule 10. Please advise the pay period in which the Claimant will be properly compensated and made whole.'"

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.

Factual Background:

The Carrier declined to make meal period payments to Claimants B. Kyles, F. Taveras, J. Turner, W. Rowe, D. Petrigno on various dates including September 12, 13, 17, 18, 19, 21, 24, 25, 27, 28, 29, 30 and October 1, 2, 8, 10, 12, 14, 15, 18, 19, 21 and 23, 2018. The Organization contested these decisions, and processed a claim through the grievance procedure to consideration by this Board. On the dates involved herein, employee B. Kyles was regularly assigned as an assistant foreman and employees F. Taveras, J. Turner, W. Rowe and D. Petrigno were regularly assigned as assistant foremen flagmen.

Applicable provisions of the parties' Agreement state as follows in pertinent part:

SIDE LETTER 2

July 18, 2018

Mr. Jason Graham
General Chairman
BMWED Consolidated Rail System Federation
9835 South Avenue, Unit 2
Poland, OH 44514

SUBJECT: Force Account Flagmen Positions Side Letter #2

Dear Mr. Graham,

Pursuant to our discussions with the BMWED, and in accordance with the terms of the Collective Bargaining Agreement, the Carrier will establish up to seventy (70) Force Account Flagman positions at a "lock-in" rate. This number may be increased upon agreement of the Carrier and the Organization.

These positions will be utilized for the purpose of performing flagman work for force account projects.

The provisions of the Controlling Agreement between Keolis and the BMWWE will fully remain in effect subject to modification based on the following conditions:

(1) The position of the Force Account Flagman will be created with a “Lock-in” rate of an additional \$2.00 per hour differential over the current Assistant Foreman rate. The \$2.00 rate differential will be applied to overtime compensation but shall not be factored into the calculation of time and one half the rate.

(2) Employees bidding on these positions will be required to stay in such positions for twelve (12) months from the date the position is occupied. In the event of a hardship, the employee may request and may be granted a release from such position, to be agreed upon by local Management and the General Chairman.

(3) Flagging will be bulletined by two (2) pool locations which will be as follows:

a. Cobble Hill-MBTA North

b. Readville-MBTA South

(4) Employees will maintain seniority in their assigned pools and will be entitled to be offered overtime in their respective pool before any employees of the second pool are offered overtime in that pool. Overtime on the GLX-Green Line Extension will be first offered to the employees working in those positions. If the overtime work remains unfilled the Carrier may fill the shift by utilizing the most junior employee in that “home” pool unless they display a qualified hardship or have scheduled vacation.

Additionally, a supplemental overtime list of employees who desire to work as a flagmen on their relief day(s) of their assignments after the flagman pool is exhausted will be created. These employees shall be

permitted to make themselves available to cover the force assignment of the junior employees. Employees must sign up for this list ten days prior to the first of each month. These employees will be notified of available overtime positions prior to the junior person being force assigned.

a) Employees who desire to be called for service on their rest day must make written application to the Carrier at least ten (10) days prior to each month. This request must include their relief days and the territories on which they are qualified to flag.

b) The Carrier shall contact these employees in place of the “force assigned” employee in seniority order for assignments on which they are qualified.

c) Employees who fail to accept or miss a call in two successive weeks will be removed from the relief day list for the remainder of the month and the following month.

(5) These positions will receive a Per Diem of \$48.00 per work day in lieu of any travel time or mileage. If the employee is required to move from his initial work location, the mileage payment will apply, in addition to the per diem payment set forth above.

(6) In the event that the hours of the positions must be changed, the positions will not be abolished and reposted. Rather, the Carrier will provide the affected employees with fourteen (14) days notice. Locked-in employees in these positions will be allowed to accept the change in the order of seniority. In the event that the jobs are not accepted, it will be forced assigned to the most junior qualified employee in the locked-in pool.

(7) The Carrier reserves the right to abolish and/or post these positions as necessary, based on the needs of the service.

(8) This Agreement will be effective upon its execution by the Carrier and the Organization. Further, the Carrier agrees to withdraw its notice dated May 15, 2018 pursuant to Rule 24 of the CBA concerning Flagging.

(9) The Carrier agrees that any employee that sustains an injury as a result of a personal vehicle accident who is enroute to performing any flagging duties or enroute to their respective residence thereafter, will be considered as meeting the conditions provided for in Rule 36 of the Collective Bargaining Agreement covering accidents involving off-the-track vehicles authorized by Railroad to transport employees.

This Agreement is made without precedent and resolves all issues surrounding the creation of the "Locked In" Flaggers. Additionally, this agreement may be automatically cancelled at any time by either party by written notification thirty (30) days in advance of any abolishment of the position.

Please indicate your concurrence with the conditions as enumerated above by signing in the spaces as provided below.

RULE 10 - SHIFTS, STARTING TIME AND MEAL PERIODS * * *

2. Meal period will be between the end of the fourth hour and beginning of the seventh hour after starting time. The meal period shall not be less than thirty (30) minutes nor more than one (1) hour. If the meal period is not afforded within the allowed or agreed time limit and is worked, it will be paid for at pro rata rate and thirty (30) minutes with pay in which to eat shall be afforded at the first opportunity starting not later than the beginning of the seventh hour after starting work. A second meal period of thirty (30) minutes with pay will be afforded at the first opportunity after the tenth hour of work. Thereafter, a meal period of thirty (30) minutes with pay shall be afforded at reasonable intervals. The second and subsequent meals shall be furnished by Amtrak.

Rule 29-District Units

I. DISTRICT UNITS

AMTRAK may establish one or more of the following District Units not assigned fixed headquarters to work over a Seniority District.

- 1. Tie Installation Unit**
- 2. Surfacing Unit**
- 3. Mechanical Brush Gang**
- 4. Rail Laying Gang**
- 5. Undercutting Gang**
- 6. Welding/Joint Elimination**
- 7. Switch and Rail Renewal**
- 8. Bridge and Building Construction Unit**

Auxiliary forces that may work in conjunction with the above units:

- 1. Crossing Gang**
- 2. Material Distribution Gang * * ***

VI. TRAVEL ALLOWANCE

1. Employees assigned to positions in District Units established pursuant to this Agreement, will be allowed a travel allowance of:

(a) \$12.505 for each weekend trip from their homes to the headquarters point, including the initial trip in establishing the District Unit.

(b) \$12.50 for each week end trip from the headquarters point to their homes, including the final trip after termination of the District Unit.

However, an employee assigned to a unit working a four (4) day week shall forfeit twenty-five percent (25%) [twenty percent (20%) when working a five (5) day week] of such travel allowance for each day of the work week on which compensation paid him by AMTRAK for service performed has not been credited. Compensation referred to in this section is understood to include that received for holidays under Article II of the Agreement of August 21, 1954 as amended.

2. The payment referred to in Section (a) hereof, is to cover any expenses these employees may incur while making such week end trips and is in lieu of all other compensation said employees may be entitled to under the provisions of any other agreement, practice or working condition for such week ends.

3. The provisions of this Article are not applicable to trips made by employees to and from their homes on legal holidays.

4. Each employee assigned to a position in a District Unit established under this Agreement will receive, in addition to regular earnings, a per diem allowance of \$29.508 per day for each working day in which he performs compensated service. This allowance is in lieu of any Travel allowance increase effective December 9, 1997. This allowance is in lieu of any other allowance or provisions by rule, custom or practice relating to travel time, transportation, meals or lodging, however established.

5. Should the headquarters for a particular gang change more than 70 miles from the point originally established, the per diem allowance provided for in Article VI, Paragraph 4 above, will cease and the following will apply: Employees are entitled to lodging and meals. Amtrak may substitute a \$29.506 per diem allowance in lieu of meals for each work day that covered employees perform compensated service, whether Amtrak provides camp cars or other lodging.

Position of Organization:

Claimants performed service for the Carrier which extended beyond ten hours after beginning work. In accordance with Rule 10 of the Agreement, Claimants were entitled to meal period payments. The Carrier has refused to provide Claimants with this payment, depriving them of monetary benefits entitled to them under the Agreement. The Carrier has historically paid eight dollars and fifty cents (\$8.50) in lieu of furnishing meals under Rule 10, and should have done so here.

Side Letter #2 does not state that the per diem allowance will be paid in lieu of meal payments or any other payments for that matter, but specifically provides that it takes the place only for travel time and mileage allowance. It was never agreed that the *per diem* would be paid in lieu of meals or any negotiated compensation beyond the listed

travel time and mileage. Had the parties intended for the *per diem* to be paid in lieu of meal periods, they would have said so in Side Letter #2.

Position of Carrier:

In denying the Organization's claims, the Carrier stated: "The Carrier does not pay Overtime for Travel Time, therefore No meal entitlement. Considering the relevant facts and established precedent, this time claim is denied." As the Carrier sees it, the Agreement makes payment of a *per diem* in lieu of any other allowance or provisions.

During bargaining for Side Letter #2, the Carrier clearly stated it wanted to create the Locked in Flagging positions to apply the District Unit Rule for the BMW flagging employees; it did not want to have to assign flaggers to fixed headquarters. The Carrier was seeking flexibility to assign flaggers as necessary, and employees receiving an allowance of \$48.00 a day are fairly compensated for their travel time, mileage and meals.

Analysis:

Rule 10(2) requires the Carrier to give employees a meal after ten consecutive hours of work. The mutually agreeable practice has been for the Carrier to pay \$8.50 in lieu of such meals. The question posed in this case is whether Side Letter #2 alters this obligation.

Paragraph 8 of Side Letter #2 provides that Force Account Flagmen will receive a *per diem* payment of \$48 per day "in lieu of any travel time or mileage. Plainly, "travel time or mileage" does not reference or include meal compensation. There is no confusion here between travel time, mileage and meal allotments. Side Letter #2 excludes additional payments for travel time or mileage; it has no impact whatsoever on meal payments.

Side Letter #2 states it is "made without precedent and resolves all issues surrounding the creation of the 'Locked In' Flaggers." The Carrier interprets this language as excluding meal payments for flaggers. The Board is not persuaded that this was the intent of Side Letter #2. We find it does not function to change the practice of paying for meals under Rule 10. Side Letter #2 resolved all issues surrounding the Locked In Flaggers without changing the applicability of Rule 10(2). We find any intent to nullify the applicability of a concrete, negotiated contract provision would have to be express

within the terms of Side Letter #2. It is not, and the exclusions are specified without naming meal payments. In contract interpretation, where parties go to the trouble to expressly specify exceptions, circumstances not named as an exception are deemed to have been intentionally excluded. Side Letter #2 is not properly interpreted as excluding meal payments.

AWARD

Claim sustained in accordance with the Findings.

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.