

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 33

Carrier File No. MWA 89-06-22C

Organization File No. C-89-T075-6

STATEMENT OF CLAIM

1. The Agreement was violated when the members of Undercutter Gang No. 2 were required to report for duty and end their work day at Melrose, Iowa instead of Albia, Iowa beginning on May 16, 1989 and continuing.

2. Undercutter Gang No. 2 employees C. J. Bohrman, W. E. Richmond, W. J. Wilson, A. E. Judge, R. E. Leasure, R. L. Littlejohn, J. D. Jeffrey, J. D. Horn and D. R. Pim shall each be allowed one (1) hour overtime at their respective time and one-half rates and mileage (34 miles x 24 cents) for each work day beginning on May 16, 1989.

F I N D I N G S

This is a dispute similar to that considered in Award No. 32, except that it concerns a different portion of Rule 26 (which is quoted in full in Award No. 32). Here, Undercutter Gang No. 2 commenced work on May 16, 1989 at Melrose, Iowa, where no meal or lodging facilities are available. The Organization states that the closest town on the Carrier's line that had meal and lodging facilities is Albia, which is 17 miles from Melrose. (The Carrier

contends that there are such facilities at Chariton, nine miles from Melrose.) The Undercutter Gang is covered under Rule 38.

The parties agreed that the applicable rule is Rule 26.A(3), which reads as follows:

Employees under the provisions of Rule 38 who are not furnished outfit cars or highway trailers, the assembling point shall be the station on the Carrier closest to the work location where meals and lodging are available within a reasonable proximity; however, where the majority of the members of the gang and the supervisor agree, any point may be designated as the assembling point.

It is the Organization's contention that the assembling point should have been Albia, and that employees are entitled to compensation for time spent traveling from Albia to Melrose. The Carrier contends that Melrose is the station "closest to the work location where meals and lodging are available within a reasonable proximity" (i.e., nine miles from Chariton or 17 miles from Albia).

As in Award No. 32, the parties both offer numerous examples of practice to support their positions. Where the rule is unambiguous and the provision is clearly distinguishable from the provisions covering different circumstances, past practice cannot determine the interpretation of the rule. This is particularly true here, where both the Carrier and the Organization offer examples of practice allegedly supporting their views.

As a result, the Board is constrained to read the portion of the rule directly applicable and to determine how it may contrast with rule provisions covering other circumstances. Rule 26.A(3) does not require that the assembling point be the station "closest

to the work location where meals and lodging are available". If it did so, the Organization's position would be correct (at least as to Chariton, if not Albia). Rule 26.A(3) is more specific, adding the phrase, "within a reasonable proximity".

There is some suggestion that the Carrier considers "reasonable proximity" to be 30 miles. As the Organization notes, this is not specified in Rule 26.A(3). The Board here makes no finding as to the 30-mile limit. However, the Board cannot find that either nine or 17 miles is other than a "reasonable proximity". If the parties had meant the rule to provide otherwise, they could have so stated. For example, by contrast Rule 7.F(7), covering Regional Gangs, states:

The time of employes assigned to Regional Gangs will start and end at outfit cars. If none are provided, the assembly point shall be that station on the Carrier closest to the work location where meals and lodging are available.

This is clearly stated. The Organization may not substitute this precise provision for that of Rule 26.A(3), which includes the modifying "reasonable proximity".

A W A R D

Claim denied.

Herbert L. Marx, Jr.
HERBERT L. MARX, Jr, Chairman and Neutral Member

Mark J. Schappaugh - Dissent - written dissent to follow
MARK J. SCHAPPAUGH, Employee Member

D. J. Merrell
D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: February 24, 1946

EMPLOYEE MEMBER DISSENT TO AWARD 33 OF
PUBLIC LAW BOARD No. 4768
(Referee H.L. Marx)

This claim involved a dispute over the Carrier's designation of an assembly point for a Rule 38 gang under the terms of Rule 26A(3). In denying the Organization's claim the Majority made the determination that:

"...the Board is constrained to read the portion of the rule directly applicable and to determine how it may contrast with rule provisions covering other circumstances. Rule 26.A(3) does not require that the assembling point be the station 'closest to the work location where meals and lodging are available'. If it did so, the Organization's position would be correct (at least as to Chariton, if not Albia). Rule 26.A(3) is more specific, adding the phrase, 'within a reasonable proximity'.

There is some suggestion that the Carrier considers 'reasonable proximity' to be 30 miles. As the Organization notes, this is not specified in Rule 26.A(3). The Board here makes no finding as to the 30-mile limit. However, the Board cannot find that either nine or 17 miles is other than a 'reasonable proximity'. If the parties had meant the rule to provide otherwise, they could have so stated.***"

The Board clearly erred in its determination that the claim had no merit. In this connection, Rule 26A(3) provides that the assembling point for employees under Rule 38 who are not provided with outfit or camp cars shall be the station on the Carrier closest to the work location where meals and lodging are available within a reasonable proximity. The Board in this case was faced with the responsibility of determining what the parties intended when they wrote the phrase "within a reasonable proximity". On that point the record was filled with one-hundred forty-eight (148) written statements from long-time employees, many of whom had worked on Rule 38 gangs most of their railroad careers, establishing that under Rule 26A(3) such gangs assembled to begin and end their work day at a station on the Carrier (town) where meals and lodging were available in that town. The many statements on this point were consistent and straightforward. For example, Mr. T. E. Dowell stated that:

"I have been employed by Burlington Northern Railroad since June 19, 1978. Since September 1 of 1982, when the current Agreement between Burlington Northern Railroad Company and its employees represented by the

Brotherhood of Maintenance of Way Employees went into effect, whenever I was assigned to a mobil gang getting Rule 38 expences (sic), I always began and ended my work day at a station on the railroad in the same town where there was adequet (sic) meal and lodging services provided.

Some Examples are as follows:

3rd & 4th week of April, 1987 - Assigned P811-S cement tie gang, working Cassa, Wyo, bussed to and from Glendo Wyo. each day. Adequet (sic) meals and lodging were found in Glendo.

"4th & 5th weeks of May 1987, Assigned to cement switch building gang, Worked between Ravena Ne. & Broken Bow Ne. on undercutter - bussed to and from Broken Bow Ne. each day." (Attachment No. 1 to Employees' Exhibit "A-7")

According to employe R. K. Malcolm:

"I have work (sic) for the Burlington (sic) Northern Railroad Since May of 1978. Since September of 1982, when the current contract went into effect, whenever I was assigned to a mobile gang getting Rule 38 expences I always began and ended my day at a station on the railroad in the same town where there were meals and lodging. If there was no section house or depot in that town I began and ended my day at the Motel where I was staying. This has always been a pratice (sic) on the Chicago Region.

1987, while on Welding Gang 7 working at Augusta, Il., the closest station that had meals and lodging was Macomb, Il. Macomb was 32 miles away, with several stations in between, but our starting and ending point was the motel where we were staying at. (Attachment No. 2 to Employees' Exhibit "A-7")

The remaining 146 statements echo the testimony of Messrs. Dowell and Malcolm regarding the consistent application of Rule 26A(3).

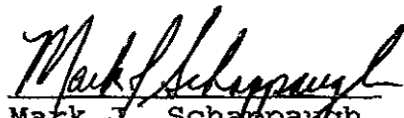
On the other hand the Carrier presented eight (8) statements to support its position that the phrase "within a reasonable proximity" meant within a 30 mile limit. At best, those statements would represent nothing more than a small inconsistency in the application of the rule over the entire system. In fact, however, several of those statements contain no evidence to conflict with

the Organization's position here. For example, Roadmaster C. J. Fredrickson provided the following comments regarding the application of Rule 26A(3):

"Employees under the provisions of Rule 38 who are not furnished outfit or hiway trailers have always started at there machines on my territory which is usually at a station or else the majority of the gang will agree with the Supervisor where the assembling point will be." (Carrier's Exhibit No. 8, Page 9)

Nothing in Mr. Fredrickson's statement conflicts with the position of the Organization. The statement of Roadmaster D. L. McCurdy likewise lends no support to the Carrier's position. While Mr. McCurdy asserted that "In my experience, mobile track gang members have been instructed to report to a designated point on Burlington Northern Railroad property where meals and lodging were either at this location or within 30 miles.", his only example of such was an incident during the spring of 1980, before Rule 26A(3) was negotiated.

The overwhelming evidence in the record supported the Organization's position regarding the meaning of Rule 26A(3) and its consistent application. The Board's decision to deny the claim serves to destroy eleven years of consistent application of the rule. We submit that the record in this claim clearly supports a finding in favor of the Organization. For the above reasons this decision is erroneous and is of no precedential value. Therefore, I respectfully dissent,



Mark J. Schappagh
Employee Member-PLB 4768