Case No. 1
Award No. 1

PUBLIC LAW BOARD NO. 7661

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
DIVISION — IBT RAIL CONFERENCE)
)
and)
)
UNION PACIFIC RAILROAD COMPANY)
(FORMER CHICAGO AND NORTH WESTERN)
TRANSPORTATION COMPANY)

Case No. 1

Claimant B. Hall

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier failed to compensate Claimant B. Hall for the appropriate travel time and mileage allowance when he drove his personal vehicle between his Carrier-designated work site and his lodging facility on September 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, and 29, 2012 (System File J-1225C-361/1577834 CNW).

2. As a consequence of the violation referred in Part (1) above, Claimant B. Hall shall be compensated in the following manner:

    a. The Claimant must be paid for two (2) hours and fifty (50) minutes at his respective travel time/straight time rate of pay for each claim date for a total of fifty-six and six-tenths (56.6) hours; and

    b. The Claimant must be reimbursed at the rate of $0.555/mile for forty-one miles he traveled to the designated work site to which he reported at the beginning of each day and forty-one (41) miles he traveled from the work site at the end of the day for each claim date."

BACKGROUND:

There is no significant dispute over the facts that gave rise to this Claim; the case presented to the Board is essentially one of contract interpretation.

Routine maintenance and repairs on the extensive miles of track owned by the Carrier are inherent in the nature of the railroad industry. As a result, the Carrier maintains mobile track crews, or gangs, that travel wherever work is required. Because the nature of their work may take them many miles from home during any work week, the Carrier has for years provided accommodations—meals, lodging facilities and so on—for crew members when they are required to work away from home. Historically, the Carrier provided lodging for crew members in mobile "camp cars"—converted box cars or decommissioned passenger cars—which travelled with the crew as it worked. With the advent of more automobile travel and the development of motels and hotels catering to the driving public, the Carrier largely phased out the camp cars. Together, the Carrier and the Organization negotiated ways to compensate track crew members for expenses incurred in traveling to and from far-flung work sites, as well as per diem payments with which track crew members could purchase their own accommodations and meals when their work required them to stay overnight away from home. Compensation included, under certain circumstances, payment for their time and mileage in getting to and from work. This case arose in early October 2012 when the Claimant sought compensation for travel time and mileage between his home and his work site, which was 41 miles from his residence, for time worked during the month of September 2012.

The controlling Agreement in this case is the November 1, 2001, Agreement between Union Pacific Railroad and the Brotherhood of Maintenance of Way Employees, C&NW System Federation. Rule 47, Camp Cars, addresses the Carrier's obligation to provide accommodations for mobile track crew members. Section A addresses Lodging: where lodging is not furnished by the Carrier, employees are entitled to be reimbursed a set amount, or per diem for lodging. Section B establishes Meal Allowances. Section C addresses Travel from One Work Point to Another, while Section F provides that "Incumbents of these positions shall be subject to the travel allowance provisions of Rule 28."[1] Rule 28, Travel Allowance, provides, in relevant part:

> A. (1) At the beginning of the work season employees are required to travel from their homes to the initial reporting location, and at the end of the season they will return home. This location could be hundreds of miles from their residences. During the work season the Carriers' service may place them hundreds of miles from home at the end of each work week. Accordingly, the Carriers will pay each employee a minimum travel allowance as follows for all miles actually traveled by the most direct highway route for each round trip:
>
> 0 to 100 miles $ 0.00

[1] Sections D and E are irrelevant to this dispute.

101 to 200 miles $25.00

. . . . .

Rule 25 of the Agreement, Beginning and Ending of Day, is also pertinent:

Time of employees shall start and end at designated assembly point. Designated assembling or starting point shall be interpreted as follows:

A. Employees in terminals or fixed headquarters shall have one designated assembly point (tool house) where they shall start and end their day's work....

B. For employees under the provisions of Rules 47 or 49, the assembly point shall be a location designated by the appropriate supervisor by the end of the previous day. If that point is in excess of thirty (30) highway miles from suitable, available lodging, then travel time and mileage to and from such lodging shall be allowed. The assembly point shall be accessible by automobile and have adequate off-highway parking.

. . . . .

GUIDELINES FOR WORK SITE REPORTING UNDER RULE 25 A AND B

At what specific locations would paid time commence and end in each of the following circumstances:

Under Rule 25 A: [Omitted]

Under Rule 25 B:

2. A Carrier designated lodging facility has adequate off highway parking and has been designated as the assembly point. Employees park at the Carrier designated lodging facility and are transported by Carrier to and from the work site.

ANSWER: Paid time starts and ends at the lodging facility (assembly point).

3. The work site has adequate off highway parking and, therefore, can be properly designated as an assembly point. Employees drive their personal vehicles to and from the Carrier designated lodging facility and the designated assembly point.

ANSWER: Paid time starts and ends at the work site (assembly point), if 30 highway miles or less. If the work site is over 30 highway miles, travel time and mileage to and from such lodging facility shall be allowed.

4. The work site does not have adequate off highway parking and, therefore, cannot be properly designated as an assembly point. Carrier designates a location having adequate off highway parking as the assembly point. Employees drive their

personal vehicles between the Carrier designated lodging facility and the designated assembly point. Employees park at the designated assembly point and are transported by the Carrier to and from the work site.

ANSWER: Paid time starts and ends at the assembly point if 30 highway miles or less from the lodging facility. If the assembly point is over 30 highway miles, travel time and mileage to and from such lodging facility shall be allowed.

In early 2012, the parties negotiated modifications to the existing per diem arrangements, resulting in an Agreement effective April 25, 2012. In general, the parties agreed to increase the amount of per diem compensation, in exchange for tightening up conditions under which per diem was payable. The per diem allowance would only be payable on days employees actually worked. In addition, the parties agreed that "No per diem allowance will be paid to an employee headquartered on-line or in other mobile service who is working (work site reporting) within fifty (50) miles of their residence." There is no dispute that Rule 25 was not part of the negotiations for the April 25, 2012, Agreement, nor was it altered or amended in that Agreement.

The relevant facts underlying this Claim are similarly not in dispute. On the twenty dates stated in the Claim, Claimant B. Hall was working on Gang 3224, a mobile gang subject to Rule 47. The work site was the designated assembly point: Fox River Grove Train Station, in Fox River Grove, Illinois. Claimant's residence is forty-one (41) miles from the work site. Each day, he traveled 41 miles to work and 41 miles back to his home. The commute took him one hour, twenty minutes in the morning and one hour, thirty minutes in the evening, for a total of two hours, fifty minutes each day. Under the terms of the April 25, 2012, Agreement, Claimant was not eligible for a per diem allowance because his residence was less than fifty miles from the designated assembly point. This Claim was filed October 16, 2012. After the parties were unable to resolve the matter through their internal dispute resolution process, it was referred to this Board for a final and binding decision.

Organization's Position

According to the Organization, Claimant is entitled under Rule 25B to compensation for his time and mileage. The agreed applications of Rule 25 are incorporated as part of the collective bargaining agreement. Question 3 and its Answer apply: the work site was the designated assembly point. According to the Answer, paid time starts at the work site/assembly point if it is 30 highway miles or less from the Carrier designated lodging facility. If more than 30 miles, "travel time and mileage to and from such lodging facility shall be allowed." Because the Claimant was not eligible for the per diem allowance and had no other Carrier-designated lodging, his residence

necessarily became his designated lodging facility. The distance between the work site and Claimant's "designated lodging facility" was more than 30 miles, so he is entitled under Rule 25B, as interpreted, to travel time and mileage between his resident and the work site. Throughout the history of the evolution of the rules for mobile track gangs, the Carrier provided lodging for every employee assigned to a Rule 47 gang, either by providing a hotel or motel room or by payment of a per diem allowance in lieu thereof.

In the April 25, 2012, Agreement, a significant increase in the per diem payments was exchanged for significant restrictions on the conditions under which employees qualified for such payments. Per diem allowances are no longer paid to employees when their work site reporting location is within 50 miles of their residence. However, in order to make Rule 25 effective, there must be a designated lodging site for every employee. Once the Carrier no longer provides lodging or per diem payment in lieu, the employee's residence becomes his designated lodging facility. During the negotiations for the April 25, 2012, Agreement, no changes were negotiated in the work site reporting rules in general nor in the specific requirement that if the work site location is in excess of 30 highway miles from the employee's lodging, then travel time and mileage to and from such lodging will be allowed, and no such change can be implied. It was understood that employees who lived within 50 miles would be traveling home each night because they would no longer be eligible for per diem payments. None of the Carrier's defenses have merit. There fact that there was "suitable available lodging" within thirty miles of the work site for employees who resided more than 50 miles away is irrelevant—it was not "available" to the Claimant unless he paid for his own lodging, since he was not entitled to a per diem allowance. Nor is there any reason why his residence cannot be considered his "lodging" for purposes of Rule 25B. The work site reporting rule, Rule 25, was not amended by the April 25, 2012, Agreement. Under Rule 25B, the Carrier was required to allow Claimant the travel time and mileage claimed because he was required to travel over 30 miles between his lodging site and his work site on each of the claim dates, and the Claim should be sustained.

Carrier's Position

According to the Carrier, Rule 25 allows payment for mileage and travel time when the work site is more than 30 miles from "suitable, available lodging." It is uncontested that there was plenty of suitable lodging (hotels and motels) close by the work site at the Fox River Grove train station. Nothing in the rule or agreement requires the Carrier to ignore suitable available lodging and make payments for mileage and travel time to employees who choose to travel to and from their residences. The Organization has based its position on a mere presumption that the Carrier designated lodging facility is the employee's residence. Rule 25 does not state that travel time and mileage are owed when the designated assembly point is more than 30 miles from an employee's residence. If the Organization wanted to change Rule 25 as it argues, the

parties needed to negotiate for employees who were not receiving per diem on a given day to be provided mileage and travel time between their home and the designated assembly point. No such language was ever discussed or added during the negotiations, and it should not be read into the Agreement. It has never been the application or practice on the property to pay employees travel time and mileage simply because they lived more than 30 miles from the work site. Under Rule 25, if a designated lodging facility is more than 30 miles from the work site, it becomes the assembly point for the gang. The Carrier only designates an assembly point when there is not adequate off highway parking at the work site, and there is only one assembly point for the entire gang. No supervisor or manager ever designated the Claimant's residence as a lodging facility or as the assembly point for the gang. One need only look to the language in the Agreement and its usage to see that the parties never intended for an employee's residence to be considered lodging. The Organization has not met its burden of proof. The plain language of Rule 25B only requires the Carrier to pay travel time and mileage when "suitable, available lodging" is not available within 30 miles of the designated assembly point. An employee's residence is not a "designated lodging facility" under either the language of Rule 25 or practice on the property and Claimant is not entitled under Rule 25 to travel time and mileage. Accordingly, the Claim should be denied.

FINDINGS:

The 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 Board has jurisdiction over the dispute involved herein. Parties to this dispute were given due notice of hearing thereon.

There are three locations pertinent to Rule 47 track gangs. One is the work site, or location where work is actually done. Another is the designated assembly point, which the supervisor sets each day, where employees gather at the beginning of their shift to start their work day. Sometimes the work site and assembly point are one and same. However, some work sites are remote or unable to provide safe, off-highway parking for employees' vehicles. When that is true, management designates a daily assembly point somewhere else. The third important location is the "Carrier designated lodging facility." In providing lodging for Rule 47 employees, the Carrier may provide the lodging itself, it may designate a particular lodging (hotel or motel) for employees to use, or it may permit employees to use their per diem allowance to select their own lodging from whatever options are available in the area. However lodging is provided, the term "Carrier designated lodging facility" means where employees are staying during their work week. (When management has to designate an alternate assembly point, it may choose a lodging facility close to the work site.) Under Rule 25B, if the assembly point is more than 30 highway miles from "suitable, available lodging," employees are paid for their travel time and mileage to and from the assembly point.

In 2012, the parties engaged in negotiations to significantly modify the per diem compensation provided to members of the Carrier's mobile track gangs. Prior to the April 25, 2012,

Agreement, all employees on a Rule 47 gang were entitled to a daily per diem allowance that would enable them to stay close to the work site instead of commuting daily between home and work. During their negotiations, the parties agreed to limit the per diem allowance to employees who lived a good distance from the assembly point: going forward, only employees who resided 50 miles or more from the designated assembly point were entitled to the per diem allowance. This case addresses the situation faced by individuals in the doughnut-shaped area between 30 miles (per Rule 25B) and 50 miles from the designated assembly point. The parties assumed during their negotiations that employees who lived less than 50 miles away would commute daily to and from their work site, and they are no longer eligible for a per diem allowance that would pay for their accommodations closer to work. The question raised by this Claim is whether they are eligible to be paid for their mileage and travel time driving to and from work.[2]

The genesis of the special mobile track gang rules and accommodations at issue here under the Agreement covering the former C&NW is Rule 47. The preamble to the Rule sets out the basis for the undertakings that follow: "The Company shall provide for employees who are employed in a type of service, the nature of which requires them throughout their work week to live away from home in camp cars, camps, highway trailers, hotels or motels..." The predicate, therefore, for the special lodging, meals and travel rules applicable to mobile track crew members is that the nature of their work "regularly requires them throughout their work week to live away from home." However, the adoption of the salient provisions of the April 25, 2012 Agreement overlaid a new requirement onto the provisions of Rule 47. That is, on those days that a mobile track crew member's reporting site is within 50 miles of his residence, he is no longer eligible to receive the per diem allowance. So, while the Claimant is, as a member of a mobile track gang, unquestionably a Rule 47 employee, for the duration of the assignment at issue, his circumstances did not qualify him for a Rule 47 per diem under the April 25, 2012 Agreement.

The Organization cites Rule 25 as the basis for its position that the Claimant is entitled to be paid travel time and mileage for his daily commute while on assignment at the Fox River Grove train station. Rule 25 addresses the start and end of employees' work day, which is pegged to a "designated assembling point." Under Rule 25B:

> For employees under the provisions of Rule 47..., the assembly point shall be a location designated by the appropriate supervisor by the end of the previous day. If that point is in excess of thirty (30) highway miles from suitable, available lodging, then travel time and mileage to and from such

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[2] The Carrier argues that it should not have to pay for employees like the Claimant who "choose" to commute to and from their residences. That characterization is not entirely correct: while employees who live less than 50 miles from the assembly point could elect to stay in lodgings closer to work, they would have to pay out of their own pockets to do so. Under those circumstances, it is not clear whether the decision to stay at home is a choice as much as it is a practical necessity.

> lodging shall be allowed. The assembly point shall be accessible by automobile and have adequate off-highway parking.
>
> . . . . .

The parties have incorporated into the Agreement interpretive guidelines about when paid time would commence and end. In this case, the work site and the designated assembly point were one and the same. Question 3 addresses situations where the work site "can be designated as an assembly point." The Question postulates: "Employees drive their personal vehicles to and from the Carrier designated lodging facility and the designated assembly point." The Answer provides: "Paid time starts and ends at the work site (assembly point), if 30 highway miles or less. If the work site is over 30 highway miles, travel time and mileage to and from such lodging facility shall be allowed." The Answer to Question 3 makes it clear that even when the work site and assembly point are the same, if employees have to drive more than thirty miles between "the Carrier designated lodging facility" and "the designated assembly point" (i.e., the work site), they are entitled to be paid for their travel time and mileage.

The Claimant drove his personal vehicle more than 30 miles to and from his residence and the designated assembly point. The Organization argues that for Rule 25B to have any meaning, every employee must have a "Carrier designated lodging facility"; in the absence of a formal "Carrier designated lodging facility" for the Claimant, because he was not eligible for a per diem allowance, his residence is the *functional equivalent* of a "Carrier designated lodging facility" for purposes of determining whether he is entitled to travel time and mileage. Or, to look at it slightly differently, Claimant's residence is the "suitable, available lodging" referenced in Rule 25B, since he is not entitled to a per diem allowance that would permit him to stay closer to the work site without having to pay for lodging himself. Therefore, Claimant should be compensated for the dates, mileage and travel time set forth in his claim.

Neither Rule 25 nor the interpretive guidelines expressly address the situation of an employee who drives directly from his personal residence to the designated assembly point. Rule 25 focuses on employees who are staying in "suitable, available lodging" or a "Carrier designated lodging facility," *i.e.*, employees who lived in lodgings during the work week. Before the April 25, 2012, Agreement, that was almost all employees, because all employees were entitled to the per diem allowance. In the new Agreement, the parties limited eligibility for per diem allowances to employees who reside at least 50 miles from the assembly point. In doing so, they created an entirely new class of employees, who live too close to the work site/designated assembly point to be eligible for a per diem allowance, but must nonetheless travel more than 30 miles — the distance referenced in Rule 25B — to and from work. Instead of traveling to the assembly point from a formal "Carrier designated lodging facility," they travel from their personal residences. In creating this new class of employees, however, the parties did not discuss or amend Rule 25 to accommodate the ripple effect caused by the changes in the per diem allowance eligibility that they had agreed to.

The Organization's point is well-taken: under Rule 25B, before the April 25, 2012, Agreement, essentially every employee who drove more than 30 miles to get to the assembly point was compensated for mileage and travel time. Since Rule 25B was not amended in the April 25, 2102, Agreement, the Organization's reasoning goes, every employee who drives more than 30 miles to the assembly point should still be compensated for mileage and travel time; whether they drive there from a motel or from their personal residence should not make a difference. The problem is that Rule 25B does not address the (admittedly new) class of employees who drive to work from their residences. It only addresses employees who are staying in "suitable, available lodging" or a "Carrier designated lodging facility." However, the clear tenor of the word "lodging," as it has been used historically and throughout the parties' Agreement in reference to employees in mobile service, is to temporary quarters that employees stay in while working away from home. In accordance with that historical usage, an employee's residence is not a "Carrier designated lodging facility." It is a home, not a hotel or motel or camp car; it was never designated by anyone in supervision or management as a lodging facility.

In the absence of express language regarding employees like the Claimant, the Organization's position is similar to a "binding past practice" argument: in the past, all employees who had to drive 30 miles to the assembly point were paid travel time and mileage, so all employees should still be compensated for the same. But the April 25, 2012, Agreement made significant changes to the per diem rules, and for that new class of employees who live too close to the assembly point to be eligible for the per diem allowance, there *is* no past practice.

The Organization's position would require the Board to imply or read terms into the parties' Agreement, which the Board is not authorized to do. The parties must negotiate those terms directly and expressly; the mileage and travel time benefits at issue are too significant to be read into the Agreement as incidental to, or the unintended consequences of, negotiation and agreement on other issues. The parties are sophisticated bargainers, and the length and complexity of their collective bargaining agreement demonstrates that they are capable of being specific about what they have agreed to—and there is no evidence that they agreed to amend Rule 25B or its interpretation as a result of the 2012 negotiations over per diem eligibility and allowances. Indeed, the parties stipulated that Rule 25B was not amended as a result of those negotiations.

Moreover, other provisions in the National Agreement refer expressly to employees' residences (See, *e.g.*, Rule 28), while there is no mention in Rule 25 of residences. In addition, Rule 28, Travel Allowance, makes it clear that in terms of weekly reporting, the Carrier does not pay mileage for employees driving less than 100 miles round trip between their residences and the reporting site. The mileage and travel time sought by Claimant are a form of daily travel allowance. Interpreting Rule 25B as argued by the Organization would raise questions about how to harmonize the two provisions. A contract is the written embodiment of what the parties have *mutually* agreed upon. The parties have proven themselves capable of considerable detail and specificity elsewhere in their Agreement. Hence, the very vagueness of Rule 25B as it pertains to employees who do not

stay in a "Carrier designated lodging facility"—actually, the Rule says absolutely nothing about those employees—leads the Board to conclude that the parties had no meeting of the minds on the issue.

Looking at the record as a whole, the Organization has not met its burden of proof that Rule 25B requires that the Claimant be compensated for mileage and travel time between his residence and his assembly point for work. The 2012 negotiations created a whole new class of employees, those who live too close to be eligible for a per diem allowance but far enough away that a round trip commute is a good distance and an inconvenience despite the comforts of home. However, the parties did not discuss how or whether or if these employees would be recompensed for travel time and mileage, and the Agreement is silent with respect to how these employees should be treated. This is in contrast to the very specific provisions that they normally negotiate and draft. The compensation for mileage and travel time the Organization seeks must be more specifically set out in the Agreement before it becomes an enforceable right under the contract.

AWARD

The Claim is denied.

Andria S. Knapp
Andria S. Knapp, Referee

K. N. Novak
Katherine N. Novak, Carrier Member

Gary L Hart
Gary Hart, Employe Member

Date: 3 September 2014

October 23, 2014