Case No. 2
Award No. 2

PUBLIC LAW BOARD NO. 7661

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
DIVISION — IBT RAIL CONFERENCE)
)
and)
)
UNION PACIFIC RAILROAD COMPANY)
)

Case No. 2

Claimant R. Nelson

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier failed to compensate Claimant R. Nelson 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 August 24 through 31, September 9 through 15 and September 23, 2012 (System File J-1230U-351/1577835).

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

    a. The Claimant must be paid for one (1) hour at his respective rate for each claim date for a total of sixteen (16) hours; and

    b. The Claimant must be reimbursed at the rate of $0.555/mile for '... the time and mileage that exceeded 30 minutes from his residence (designated lodging point) to the assembly point each way; and for each day he worked from that assembly point.' "

BACKGROUND:

This is the second of two Claims arising out of the per diem allowance negotiations that resulted in the parties' April 25, 2012, Agreement, which for the first time established an eligibility threshold for Rule 47 mobile track crew employees to receive a per diem allowance: employees living 50 miles or less from the designated assembly point are not eligible for the allowance. The April 25, 2012, Agreement applies across the board to all Carrier employees. The Organization represents all of the mobile track crew employees, but under slightly different collective bargaining agreements, due to the fact that the Carrier has, over time, purchased other carriers and incorporated their operations into its own, along with their collective bargaining obligations. The first Claim (Award No. 1) addressed employees working under the former Chicago and North Western Transportation Company (C&NW) Agreement. This Claim focuses on the Agreement for original Union Pacific employees. As in Award No. 1, there is no significant dispute over the facts that gave rise to the Claim; the case presented to the Board is essentially one of contract interpretation.

The Board is not going to repeat here the historical background set forth in Award No. 1 regarding the development of per diem allowances for mobile track gangs. This case arose in early October 2012 when the Claimant sought compensation for travel time and mileage over 30 minutes in each direction between his home and his work site, a distance of 41 miles, for dates worked in August and September 2012.

The controlling Agreement in this Claim is the July 1, 2001, Agreement between Union Pacific Railroad and the Brotherhood of Maintenance of Way Employes. Rule 29, Headquarters, states:

> The Company will designate a headquarters for all regular established positions covered by this Agreement.... Employees assigned to mobile type of service not headquartered in outfit cars will be considered as being headquartered on-line. . . .

The Claimant is an "on-line" employee.

Rule 30, Designated Assembly Point, provides in relevant part:

> (a) . . . . .
> The assembly point for employees headquartered on-line will be the designated work site where the days [sic] work is scheduled to begin. If the assembly point for on-line employees is changed from one workday to another, the Carrier much designate the new assembly point no later than the close of shift on the previous workday. Unless so designated, the assembly point will remain unchanged. If the employees are prevented from assembling at the work site to begin their tour of duty because of inadequate roads or parking for their personal vehicles, arrangements for a suitable assembly point located nearest the work site will be made for the beginning of the employees' tour of duty.
> . . . . .

(b) Employee's time will start and end at the designated assembly point as provided by Section (a) with the following exception.

. . . . .

(d) Paid time for production crews that work away from home will start and end at the reporting site designated by the appropriate supervisor by the end of the previous day, provided the reporting site is accessible by automobile and has adequate off-highway parking. Such unpaid time traveling between the carrier-designated lodging site and the work site will not exceed thirty (30) minutes each way at the beginning and end of the work day. If a new highway site is more than 15 minute [sic] travel time via the most direct highway route from the previous reporting site, paid time will begin after fifteen minutes of travel time to the new reporting site from the carrier-designated lodging site for it, and from the new reporting site to the carrier-designated lodging site for it, on the first day only of such change in the reporting site.

In order that there will be no duplication, time paid in accordance with this Article will not be included in determining compensation that may otherwise be due an employee for travel time under the Award of Arbitration Board No. 298, as amended, or similar provisions.

Production crews include all supporting BMWE employees who are assigned to work with or as part of a production crew. As it relates to this section, a production gang or crew is defined as a mobile and mechanized gang consisting of ten (10) or more employees. The Carrier will not change the headquarters of supporting BMWE forces, as that term is defined, for the purpose of avoiding payment of away-from-home expenses to such supporting forces.

Rule 37 of the Agreement, Transportation, is also pertinent:

. . . . .

(c) **AUTOMOBILES AND MILEAGE** — Employees travelling at the direction of Management where other suitable means of transportation are not available or provided, upon securing proper authorization from the employee's immediate Supervisor, may, if mutually agreeable, utilize his personal automobile for transportation and will be paid the Carrier's authorized mileage rate for normal roadway travel miles by the most direct route.

. . . . .

As noted earlier, in early 2012, the parties negotiated modifications to the existing per diem arrangements, resulting in an Agreement effective April 25, 2012. The parties agreed to increase the amount of per diem compensation, while limiting conditions under which per diem was payable. The per diem allowance would only be payable on days employees actually worked. The parties also 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 neither Rule 30 nor Rule 37 was part of the negotiations for the April 25, 2012, Agreement, nor were they altered or amended in that Agreement.

The relevant facts that gave rise to this Claim are similarly not in dispute. On the dates stated in the Claim, Claimant R. Nelson was working on Gang 9013, a mobile gang headquartered "on-line" pursuant to Rule 29 of the Agreement. The Gang was then working in Mason City, Iowa, and the work site was the designated assembly point under Rule 30(d). The Claimant resides in Belmond, Iowa, forty-one (41) miles from the work site. Because he resides less than fifty miles from the assembly point, the Claimant was not eligible for a per diem allowance, and he commuted to work daily during the assignment. On the claim dates, Claimant drove his personal vehicle to and from the work site, for a total of 82 miles round trip. The commute took about an hour and five minutes in each direction.

This Claim was filed October 16, 2012. Invoking Rule 30(d) and Rule 37, the Claimant seeks to be compensated for his travel time between home and work in excess of 30 minutes in each direction and for his mileage, also after 30 minutes. 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, the clear contract language of the second sentence of Rule 30(d) limits unpaid travel time between the carrier-designated lodging and the work site to no more than thirty (30) minutes each way at the beginning and end of the work day. Because the Claimant was not eligible for the per diem allowance and had no other "Carrier-designated lodging site," his residence necessarily became his designated lodging facility. Accordingly, the Claimant is entitled to be paid travel time and mileage in excess of 30 minutes each way for the dates he drove to work in Mason City from his residence in Belmond, and the Carrier violated the parties' Agreement when it refused to compensate the Claimant. The history of the evolution of the rules for mobile track gangs establishes that the September 26, 1996, Agreement required that unpaid travel time between the employee's lodging and the work site be limited to no more than 30 minutes each way at the beginning and end of the work day. Moreover, employees were paid mileage for the distance traveled after 30 minutes. Until the adoption of the April 25, 2012, Agreement, the Carrier provided lodging for every employee assigned to an "on-line" headquarters, or mobile gang, either by providing a hotel or motel room or by payment of a per diem allowance in lieu thereof. Under the April 25, 2012, Agreement, 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 30 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, in effect, his designated lodging. During the negotiations for the April 25, 2012, Agreement, no changes were made in the work site reporting rules in general nor in the specific restriction in Rule 30(d) that unpaid travel traveling between the lodging site and the work site be no more than 30 minutes each way at the beginning and end of the work day, and none 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. Rule 37(c) requires the Carrier to reimburse the Claimant for his excess mileage; it also was not changed or amended as a result of the April 25, 2012, Agreement.

The Organization contends that none of the Carrier's defenses have merit. The fact that there was "suitable available lodging" near 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 30. The work site reporting rule, Rule 30, was not amended by the April 25, 2012, Agreement. Under Rule 30, the Carrier was required to allow Claimant the travel time and mileage claimed because he was required to travel more than 30 minutes between his lodging site and his work site on each of the claim dates. The Carrier did not provide transportation between the Claimant's lodging and his work site, so Rule 37(c) applies. "Proper authorization" for the Claimant to use his personal vehicle to travel to the work site may be implied, as there was no other way for the Claimant to travel from his lodging to his work site, and he is entitled to be reimbursed for the use of his automobile at the mileage rate in effect on the claim dates. The Claim should be sustained.

Carrier's Position

According to the Carrier, Rule 30 allows payment for travel time only when the work site is more than 30 minutes from "the carrier-designated lodging site." In this case, the Carrier did not designate any lodging facility. There was plenty of suitable lodging (hotels and motels) close by the work site for the Claimant to stay in if he wanted. Nothing in the rule or agreement requires the Carrier to ignore suitable available lodging and make payments for excess mileage and travel time to on-line 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.

Rules 30 and 37 together, the Carrier continues, do not state that excess travel time and mileage are owed when the designated assembly point is more than 30 minutes' travel from an employee's residence. If the Organization wanted to change Rules 30 and 37 as it argues, it needed to negotiate for employees who were not receiving per diem on a given day to be provided excess travel time and mileage 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 excess travel time and mileage simply because they lived more than 30 minutes' travel from the work site. No supervisor or manager ever designated the Claimant's residence as a lodging facility or as an assembly point for anyone. 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

Rules 30 only requires the Carrier to pay travel time when an employee must travel more than 30 minutes from the "carrier-designated lodging site" to his work reporting site. An employee's residence is not a "carrier-designated lodging site" under either the language of the Rules or practice on the property. Under Rule 37(c), mileage reimbursement requires "proper authorization" from a supervisor, which the Claimant did not secure. Accordingly, the Claimant is not entitled under travel time under Rule 30 or to mileage under Rule 37, and 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.

The Rules at issue in this case are different than those involved in Award No. 1, but the arguments submitted by the parties are essentially the same, and the Board's findings are analogous.

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 "on-line," or mobile gang, employees 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 who live less than 50 miles from the designated assembly point. The parties assumed during their negotiations that these employees would commute daily to and from their work site, and they are no longer eligible for a per diem allowance that would pay for accommodations closer to work. The question raised by this Claim is whether they are entitled to be paid for certain travel time and mileage driving to and from work.[1] There are two Rules on which the Organization bases its position: Rule 30(d), regarding compensation for travel time in excess of thirty minutes in each direction, and Rule 37 regarding compensation for mileage after 30 minutes' travel time.

Rule 30(d) provides, in part:

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[1] 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.

> Paid time for production crews that work away from home will start and end at the reporting site designated by the appropriate supervisor by the end of the previous day, provided the reporting site is accessible by automobile and has adequate off-highway parking. *Such unpaid time traveling between the carrier-designated lodging site and the work site will not exceed thirty (30) minutes each way at the beginning and end of the work day....* (Emphasis added.)

As in Award No. 1, the Claimant is a member of a "production crew[...] that work[s] away from home" but he was not working away from home on the dates set forth in the Claim—he was, in fact, commuting from home. Rule 30(d) nonetheless applies to him as a member of the crew. Under Rule 30(d), as historically interpreted and applied by the parties, employees traveled up to a maximum of 30 minutes unpaid between the lodging site and the work site. After that, they were compensated for travel time in excess of 30 minutes and for mileage incurred after 30 minutes.[2]

Because he was staying at home in Belmond, Iowa, 41 miles from his reporting site in Mason City, Iowa, on the Claim dates, the Claimant drove his personal vehicle more than 30 minutes to and from his residence and the work site. The Organization argues that for Rule 30(d) to have any meaning, every employee must have a "carrier-designated lodging site"; in the absence of a formal "carrier-designated lodging site" for the Claimant, because he was not eligible for a per diem allowance, his residence is the *functional equivalent* of a "carrier-designated lodging site" for purposes of determining whether he is entitled to travel time over 30 minutes in each direction. Therefore, according to the Organization, the Claimant should be compensated under Rule 30(d) for travel time in excess of 30 minutes in each direction on the dates set forth in his Claim.

Rule 30(d) does not expressly address the situation of an employee who drives directly from his personal residence to the designated assembly point on a daily basis. Rule 30(d) addresses employees who are staying at a "carrier-designated lodging site." Before the April 25, 2012, Agreement, almost all employees lived in lodgings away from home during the work week, 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 who must nonetheless travel more than 30 minutes—the traveling time referenced in Rule 30(d)—to and from work. Instead of traveling to the assembly point from a formal "carrier-designated lodging site," they travel from their personal residences. In creating this new class of employees, however, the parties did not discuss or amend Rule 30(d) 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 30(d), before the April 25, 2012, Agreement, essentially every employee who drove more than 30 minutes to get to the assembly point was compensated for travel time over 30 minutes. Since Rule 30(d) was not amended in the

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[2] Compensation for mileage derives from Rule 37 in conjunction with Rule 30(d).

April 25, 2102, Agreement, the Organization's reasoning goes, every employee who drives more than 30 minutes to the assembly point should still be compensated for excess travel time; whether they drive there from a motel or from their personal residence should not make a difference. The problem is that Rule 30(d) does not address the new class of employees who drive to work from their residences. It only addresses employees who are staying in a "carrier-designated lodging site." Nor did the parties ever discuss in any negotiations how to handle travel time and mileage for on-line employees who commute from home on a daily basis when their assignments are within 50 miles of their residences.

Pursuant to Rule 30(d), unpaid time is limited for employees "traveling between the *carrier-designated lodging site* and the work site." (Emphasis added.) The phrase "carrier-designated lodging site" is not specifically defined in the Agreement. However, from various usages in the Agreement, the Board concludes that the term "carrier-designated lodging site" means where employees stay during the work week when they are away from home. It does not mean their personal residences. When Rule 30(d) was drafted, all on-line employees received a per diem allowance designed to enable them to purchase lodgings in a hotel or motel.[3] Rule 30(d) is found in the July 1, 2001, Agreement, and it was not changed during the 2012 negotiations. Accordingly, it should be interpreted as the parties intended in that Agreement. Rule 30(d) itself does not indicate what a "carrier-designated lodging site" is. However, Rule 39, Per Diem Allowances, Section (e) provides that on-line employees "will be allowed a daily per diem allowance ... *to help defray expenses for lodging, meals and travel.*" (Emphasis added.) This is clearly a reference to expenses incurred by employees when they are working away from home and need a place to stay and food to eat. The third paragraph of Rule 39(e) also addresses lodging in a way that supports this interpretation: "It is not the intent of either party to place Maintenance of Way employees at locations where *there is a lack of available meals and lodging* with a reasonable distance from the work site...." (Emphasis added.) Again, the use of the word "lodging" clearly means lodging away from home. Rule 39(d) offers additional support for the Board's interpretation. Section (d) focuses on what happens when Outfit Cars or Meal Service are unavailable to employes who work such gangs. When system gang outfit cars are not available, "The employees affected will be reimbursed for actual reasonable expenses incurred *for lodging at commercial facilities*...." (Emphasis added.) "Lodging" there is expressly commercial lodging, not an individual employee's residence.

Even without a specific definition of lodging, the tenor of Rule 30(d) is consistent with this interpretation. The last sentence of Rule 30(d) states:

> The Carrier will not change the headquarters of supporting BMWE forces, as that term is defined, for the purpose of avoiding payment of *away-from-home expenses* to such supporting forces. (Emphasis added.)

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[3] Subject to exceptions set forth in Rule 39.

The reference to "away-from-home expenses" strongly suggests that prior references to lodgings in Rule 30(d) were intended to mean commercial lodgings for which employees had to pay.

There is no reason to conclude that the parties intended "lodging" to mean "commercial lodging" in one section of the Agreement (Rule 39) and something different elsewhere in the Agreement (Rule 30). Moreover, when the parties intended in the Agreement to refer to employes' residences, they did so. Rule 36, Travel Service, refers to employes' homes and residences in several sections. Section 7, End of Work-Week Travel Allowance for Traveling Gangs, specifically addresses employees traveling "from their homes" and returning home. Work locations, Section 7(a) acknowledges, "could be hundreds of miles from their residences." (See also Section 7, Paragraphs (c) through (f).) Of particular note is Paragraph (g), which states "... *employees who complete a round trip from work to home to work* will be granted an allowance pursuant to ..." Such language again demonstrates that when the parties wanted to address travel between an employe's residence and his work site, they did so specifically. The clear tenor of the word "lodging" as used throughout the parties' Agreement is to temporary quarters that employees stay in while working away from home. An employee's residence is not a "carrier-designated lodging site." It is a home, not a hotel or motel or outfit car; it was never designated by anyone in supervision or management as a lodging facility.

In the absence of actual 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 more than 30 minutes to the assembly point were paid excess 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 30(d) or its interpretation as a result of the 2012 negotiations over per diem eligibility and allowances. Indeed, the parties stipulated that Rule 30(d) was not amended as a result of those negotiations.

Rule 37(c) addresses employees' right to be compensated mileage for travel in their personal vehicles: "Employees traveling at the direction of Management where other suitable means of transportation are not available or provided, upon securing proper authorization from the employee's immediate Supervisor, may, if mutually agreeable, utilize his personal automobile for transportation and will be paid the Carrier's authorized mileage rate..." Wherever the day's or

week's reporting site is, the Carrier expects mobile gang employees to be there on time to start their shifts, so one could say that employees are "traveling at the direction of Management." The Carrier does not provide transportation to the work site for employees who are living at home during the work week, so they have to provide their own transportation. Rule 37(c) requires the employee, however, to obtain "proper authorization" from the employee's supervisor as a condition of being reimbursed for mileage in excess of 30 minutes' travel time. According to the Organization, such authorization is implicit in the fact that employees living at home are forced to drive their personal vehicles to get to work. As with the Organization's position on Rule 30(d), this interpretation assumes too much. It would require the Board to read into Rule 37(c) a meaning that the parties did not intend when they adopted the original language. Nor is there evidence in the record to support a conclusion that they intended to change the original meaning when they negotiated the new per diem arrangements in 2012, or at any other time. The record indicates, to the contrary, a stipulation that the parties did not discuss or amend Rule 37 as a result of the 2012 negotiations.

Looking at the record as a whole, the Organization has not met its burden of proof that Rule 30(d) and Rule 37 require that the Claimant be compensated for travel time and mileage in excess of 30 minutes each way between his residence and his assembly point for work. The 2012 negotiations created a 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 these employees would be recompensed for excess 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 excess travel time and mileage that 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 J Hart
Gary Hart, Employe Member

Date: 3 September 2014

October 23, 2014