

Award No. 3
Case No. 3
NMB Case No. PLB-07920-000003

PUBLIC LAW BOARD NO. 7920

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 14-18-0326
Organization File No. 2404-SL38-1885

Claimant — J. Smart

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1. The Agreement was violated when the Carrier failed to allow Mr. J. Smart rest day meal allowance on various dates in February 2018 (System File 2404-SL38-1885/14-18-0326 BNS).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant J. Smart must be allowed twenty-eight dollars (\$28.00) or the current rate of twenty-nine dollars and thirteen cents (\$29.13) for February 3, 4, 10, 11, 17, 18, 19, 24 and 25, 2018.**

BACKGROUND:

The Carrier and the Organization are parties to several distinct and separate bargaining agreements. This case arises under the “BNSF South Agreement,” formerly the ATSF/BMWE Agreement, which was renamed in the 2015 ATSF/SLSF Implementing Agreement.

The nature of track work is such that employees are sometimes required to travel to perform their job duties and must stay overnight away from home. The parties have negotiated provisions in the Agreement under which the Carrier provides meals and lodging for its mobile gangs or pays or reimburses those employees for their meals and lodging expenses. This claim raises the issue of whether the Carrier violated the Agreement when it refused to pay a per diem rest day meal allowance to employees who occupy their own camper or trailer, in lieu of staying in Carrier-provided lodgings.

Rule 38 of the South Agreement establishes mobile employees' entitlement to expense per diems and/or reimbursements. Rule 38(a) states:

38(a) – Employees with Home Stations. Employees who are employed in a type of service that nature of which regularly requires them throughout their work week to live away from home in outfit cars, highway trailers, campers, hotels or motels, shall be subject to the provisions of Rule 38 – (c) and/or Rule 38 - (i).

Rule 38(c) is the general provision regarding “Per Diem Allowances”; Rule 38(i) addresses “Employee With Approved Campers/Trailers.”

Prior to 2012, pursuant to Rule 38(c) of the South Agreement, employees in mobile positions who stayed in Carrier-provided lodging were eligible for a per diem allowance of \$23.00. The allowance was not designated in the Agreement as a meal per diem, but presumably employees were expected to use it to pay for meals and other expenses. Mobile employees who did not stay in company-provided lodgings were eligible for a combined lodging and meal allowance per diem of \$52.00 for each day that service was provided, but not on their rest days.

38(c) — Per Diem Allowance. Employees provided lodging by the Carrier, include outfit cars, shall be paid a per diem allowance of \$23.00 *for each day service is performed*, except as provided in Rule 38-(j) and NOTES 1 and 2 below.

.....

Employees who are not provided lodging by the Carrier and who are not in detached service shall be paid a per diem allowance of \$52.00 in lieu of any other expenses provided by this rule, *for each day service is performed*, except as provided in Rule 38-(j) and NOTES 1 and 2. (Emphasis added.)

Per diems for employees who elected to stay in their personal campers or trailers were addressed in Rule 38(i):

38(i) — Employees With Approved Campers/Trailers. An employee employed in a type of service, the nature of which regularly requires him to perform service away from home station, residence or headquarters point, as the case may be, who in lieu of an outfit car, hotel or motel, provides his own accommodations such as a camper or trailer (containing bona fide arrangement for sleeping preparation of meals), or such an employee who may hereafter purchase or replace such equipment, shall be paid a per diem allowance of \$32.00 *for each day service is performed on a position listed below: . . .* (Emphasis added.)

Again, entitlement to the camper per diem was limited to days on which the employee performed service for the Carrier.

Rule 38(j) is also relevant:

38(j) — Employees Working 250 Miles or More from Home Station or Residence. When assembling for work 250 miles or more from their home station or residence, employees of Groups 5 and 6, subject to Rule 38(c), *excluding those with approved campers or trailers*, will be entitled to the applicable per diem allowance set forth below, on a calendar-day basis, including rest days and holidays (provided service is performed on the workdays immediately preceding and following the rest days or day observed as the holiday):

.

B. Employees who are not provided lodging by the company shall be paid a per diem allowance of \$52.00 per day. (Emphasis added.)

Sections 2 and 3 of the Addendum to the 2012 National Agreement modified the language of Rule 38(c) to increase the meal allowance per diem and to expand it to seven days per week:

2. The mobile employee per diem for meals will be increased \$3.00, to \$28.00 per day. . . .

3. The allowance for meals on mobile positions assigned under the former ATSF and SLSF Agreements will be paid seven days per week, that is under the same terms and conditions as mobile crews established under the former BN Agreements.

The "BN Agreement" referred to is the National Agreement between BNSF and the BMW (also known as the BN North Agreement). Regarding per diems for employees required to stay overnight away from home, it states, in relevant part:

Rule 38. Section 1—Mobile Headquarters (with or without Outfit Cars) – Lodging – Meals

A. Other than as provided in Rules 37 and 39, the Company shall provide for employees who are employed in a type of service, the nature of which regularly requires them throughout their work week to live away from home in outfit cars, camps, highway trailers, hotels or motels as follows: ...

.....

C. If lodging is not furnished by the Company the employee shall be paid a lodging allowance of \$29.00 per day. [5/31/01 National Agreement]

.....

F. If the employees are required to obtain their meals in restaurants or commissaries, each employee shall be paid a meal allowance of \$23.00 per day. [5/31/01 National Agreement]

G. The foregoing per diem meal and lodging (if applicable) allowance shall be paid for each day of the calendar week, including rest days and holidays, except that it shall not be payable for work days on which the employee is voluntarily absent from service, and it shall not be payable for rest days or holidays if the employee is voluntarily absent from service when work was available to him on the work day preceding or the work day following said rest days or holiday.

The BN North Agreement does not expressly address employees staying in campers or trailers.

Prior to implementation of the Addendum to the 2012 South Agreement, "campers"—employees who stayed in Carrier-approved campers or trailers—did not receive a separate meal allowance per diem, only the camper allowance, which was only paid for each day service was performed, not on rest days. The record establishes that for some period of time following implementation of the Addendum, employees who had elected the camper allowance claimed and were paid the rest day meal allowance per diem. When the Carrier realized this, it disallowed any further rest day

meal allowance per diems for employees who had elected the camper allowance in lieu of lodging expenses because, in its opinion, “campers” were never entitled to a meal allowance in the first place under Rule 38(i), and the 2012 modifications to Rule 38(c) did not apply to them.

This dispute arose when the Claimant was assigned as an Extra Gang Foreman on Mobile Surfacing Gang TSCX1034 in February 2018, and the Carrier disallowed rest day meal allowance per diems that he claimed for February 3, 4, 10, 11, 17, 18, 19, 24 and 25, 2018. Claimant was paid the camper allowance of \$52.02 for each day he performed service.

The Organization contends that the Claimant’s assigned gang is mobile in nature and therefore he qualified for the appropriate rest day meal allowance per diem as provided for under Paragraph 3 of the 2012 Addendum, which modified the per diem meal allowances for *all* mobile employees assigned under the South Agreement so that they would receive meal allowance per diems on their rest days. The clear and unambiguous language of the Agreement stipulates that employees assigned to mobile positions will be allowed a meal allowance per diem that will be paid “seven days per week.” There is no dispute that the Claimant was a mobile employee, and the Carrier violated the Agreement when it failed to pay him the contractually mandated per diem meal allowances on rest days, as provided within the Agreement. The Carrier does not deny that employees under the South Agreement, including the Claimant, were paid the camper allowance on work days and the per diem meal allowance on their rest day. This established practice is evidence that the Carrier concurred with the Organization’s interpretation of Paragraph 3 prior to arbitrarily deciding to refuse such payments to the Claimant. The provisions of Rule 38 relied upon by the Carrier do not support its position in any regard. The \$52.02 per diem camper allowance is a comprehensive allowance that includes both meals and lodging, and is paid on days when service is performed. Paragraph 3 of the 2012 Addendum extended the meal allowance per diem to rest days, when no service is performed. It did not exclude employees who claimed the camper allowance. The Carrier’s contention that the rest day meal allowance per diem is only provided for employees who use company-provided lodging fails to comport with the intent or clear language of the 2012 Addendum or the parties’ practice regarding per diem. There is no language in the 2012 Addendum that excludes mobile employees staying in Carrier-approved campers or trailers from the rest day meal per diem. The Addendum states

that *all* mobile employees under the former ATSF and SLSF Agreements (BNSF South Agreement) will be paid a per diem meal allowance seven days per week. The Carrier's reliance on Rule 38 of the BNSF North Agreement is not persuasive: Rule 38(a) clearly includes "highway trailers" as acceptable away-from-home lodging. Accordingly, the terms and conditions of Rule 38 (D), (E), (F), and (G) of the North Agreement apply to mobile employees under the BNSF South Agreement. Rule 38(F) of the BNSF North Agreement stipulates that employees required to obtain their meals in restaurants or commissaries shall be paid a meal allowance per day, which the Claimant had to do on the claimed days.

According to the Carrier, "campers" are not entitled to the rest day meal allowance per diem because the camper allowance does not meet the terms and conditions for establishing mobile positions under the former BN Agreements (BN North Agreement), which was the pre-condition established for the rest day meal allowance per diem in Section 3 of the Addendum to the 2012 Agreement. Under the BNSF North Agreement, Rule 38, Section 1.F, employees who are "required to obtain their meals in restaurants or commissaries" are entitled to a per diem meal allowance of \$23.00. The Claimant was not required to obtain his meals in a restaurant or commissary: in order to be approved, a camper or trailer must be equipped with "bona fide arrangements for sleeping *and preparation of meals*." The parties contemplated that employees electing to provide their own accommodations would also prepare their own meals. Accordingly, the Claimant did not qualify for a meal allowance per diem at any time. In addition, the plain language of South Rules 38(c), (d), and (j) clearly states that only those employees without campers or trailers are eligible for meal allowance per diems. South Rule 38(c) limits the per diem of \$23.00¹ to "employees provided lodging by the Carrier." Rule 38(d) expressly excludes employees with campers/trailers. Rule 38(j) provides a seven-day meal and lodging allowance to certain employees, "excluding those with approved camper or trailer." Those employees only receive the camper allowance. Rule 38(j) provides the same benefit as Section 3 of the Addendum—a seven-day meal allowance—and it is illogical to conclude that these two like provisions would be applied differently. The Organization chooses to ignore the plain language of South Rule 38, but the clear and unambiguous language of the Agreement cannot be ignored. Employees with approved campers and trailers are treated differently, and they are only entitled to the

¹ Increased in the 2012 Addendum to \$28.00.

\$52.02 camper allowance per diem for each day service is performed in a qualifying position. South Rule 38 contains explicit language that denies employees with approved campers the right to any meal allowance per diems. The Carrier made erroneous payments in the past, but those payments do not establish a past practice. First, only five employees received payments, which is not enough to establish a binding past practice. In addition, the Board has already determined that erroneous payments do not establish a past practice. The Claimant is not entitled to any meal allowance per diems. He waived his right to any meal allowance per diem when he elected to provide his own accommodation in a camper or trailer equipped to prepare meals. He is entitled to the camper allowance, and nothing more. The Carrier did not violate the Agreement when it refused to pay his claimed meal allowance per diems, and the Organization has failed to show otherwise.

FINDINGS AND OPINION:

Public Law Board 7920, upon the whole record and all the evidence, finds that the carrier 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.

There is no dispute that prior to the Addendum to the 2012 South Agreement, under Rule 38(i), “campers” received only a camper allowance per diem, and that only on days when they performed service for the Carrier. They did not receive a separate meal allowance per diem. Only mobile employees who did not stay in Carrier-approved campers or trailers were eligible for lodging and meal per diems, pursuant to Rule 38(c). Originally, that too was paid only for days on which the employees worked, unless they were working 250 miles or more from home, in which case they were entitled to the per diem allowance on their rest days as well, per Rule 38(j). While Rule 38(c) does not address campers, Rule 38(j) expressly excludes “those with approved campers or trailers.”² One could conceivably argue that Rule 38(c), which does not *exclude* campers, applied to them—as “Employees not provided lodging by the Carrier”—except that Rule 38(i) makes express, separate provision for employees electing to stay in approved campers or trailers. The parties’ past interpretation of Rule 38(c) and Rule 38(i) establishes that there was historically only one per diem

² Rule 38(d) also excludes campers by providing benefits to “employees *without campers/trailers*.” (Emphasis added.)

benefit for campers—the camper allowance—and a different set of benefits—per diem meal and lodging allowances—for employees who stay in Carrier-provided lodging or at an approved lodging facility and take their meals at restaurants.³

In the Addendum to the 2012 Agreement, the parties modified the previously negotiated benefits for mobile employees. Paragraph 3, which extends the meal allowance to rest days (that is, seven days a week) for certain employees, is the most relevant to this analysis:

The allowance for meals on mobile positions assigned under the former ATSF and SLSF Agreements will be paid seven days a week, that is under the same terms and conditions as mobile crews established under the former BN Agreements.

The Organization interprets this language to mean that *all* employees on mobile positions, including campers, are entitled to rest day meal allowances.

The Organization’s arguments are not persuasive, for several reasons. First, Paragraph 3 references “the allowance for meals on mobile positions.” Prior to the implementation of the Addendum, campers were never eligible for or paid a separate meal allowance; they received instead a camper allowance that covered both lodging and meals without breaking the allowance into distinct components for lodging or meals. Non-camper mobile employees received a meal allowance for every day they worked (typically five days), but not on their rest days. Paragraph 3 is clearly intended to expand “the allowance for meals” to seven days a week, which is consistent with the existing benefit under Rule 38(j) for employees 250 miles or more from home. The Organization does not contend that campers should be paid a meal allowance on the days they work, only on their rest days. This would lead to the odd result that campers would not be eligible for a meal allowance on days that they worked but would be eligible on their rest days. But the language “*the allowance for meals ... will be paid seven days a week*” implies that mobile employees who were eligible only on days they worked are now eligible for the meal per diem every day. There is nothing in the language of Paragraph 3 to suggest any intent to expand *who* is eligible for the meal allowance per diem, only what days employees already eligible are entitled to it.

³ Rule 38(F) of the North Agreement refers to employees being “required to obtain their meals in restaurants or commissaries...” The parties represented at the arbitration hearing that the Carrier formerly operated commissaries in some locations but that it no longer does.

Paragraph 3 refers to “*the* meal allowance,” not “*a* meal allowance.” “*The* meal allowance” implies a pre-existing allowance, not a new one—and campers were not eligible for the pre-existing meal allowance per diem. Moreover, Rule 38(j) expressly excludes “those [employees] with approved campers or trailers.” To the extent that Paragraph 3 was intended to bring the meal allowance per diems under Rule 38(c) in line with Rule 38(j), the Rule 38(j) exclusion for campers—who have a separate allowance under Rule 38(i)—should be read into Paragraph 3.

In addition, the expanded meal allowance benefit under Paragraph 3 is conditional: “the allowance for meals on mobile positions assigned under the former ATSF and SLSF Agreements will be paid seven days a week, *that is under the same terms and conditions as mobile crews established under the former BN Agreements.*” Rule 38.I of the BN North Agreement establishes meal allowances under specific circumstances: (1) if the Company provides cooking and eating facilities and pays the salaries of cooks (Rule 38.I.D); (2) if the Company provides cooking and eating facilities but does not pay for cooks (Rule 38.I.E); and (3) if employees are “required to obtain their meals in restaurants or commissaries.” (Rule 38.I.F) Campers do not fall under any of those categories, as they can prepare food themselves and are not “required to obtain their meals in restaurants or commissaries.” Certainly they need to purchase food to prepare (or they are free to go to a restaurant if they choose), but presumably the parties factored that fact into their calculation of the amount of the camper allowance. Moreover, Rule 38.I.G establishes that the “foregoing per diem meal and lodging ... allowance shall be paid for each day of the calendar week...,” including rest days.⁴ The most logical reading of the last phrase of Paragraph 3 is that the new provision was intended to comport with the “each day of the calendar week” language in Rule 38.I.G of the North Agreement.

Campers were not eligible for or paid a separate meal allowance under the previous ATSF and SLSF Agreements, which became the South Agreement. They were not eligible for or paid a separate meal allowance under the BN North Agreement. There is no language in Paragraph 3 to suggest any intent to expand eligibility for the meal allowance beyond the employees who were already getting it before.

⁴ There are exceptions for when an employee is voluntarily absent from work or if the employee was voluntarily absent from work the day before or after a holiday or rest day if work was available, but they are not relevant here.

Rule 38 of the South Agreement includes several instances where campers are expressly excluded from per diem allowances, and the evidence is that they were historically paid only the camper allowance established in Rule 38(i). This demonstrates that the parties knew how to include campers if they wanted to. The Organization argues that campers are not excluded from Paragraph 3, therefore they must be included. But in light of the overall content of Rule 38 and its historical interpretation by the parties—that campers are treated separately from non-campers—the burden is on the Organization to show that the parties intended to include them. It has not done that.

Finally, the Organization argues that there was an established past practice of paying rest day meal allowance per diems to campers. The Carrier does not deny that it made such payments, but contends that they were made in error and did not establish a binding past practice. The evidence in the record is not sufficient to establish a binding past practice. The Carrier was entitled to cease making the payments when it realized that they had been made in error.

In the end, the Organization has not established that campers are entitled to a separate meal allowance on their rest days. Under the parties' Agreement, they are entitled only to the camper allowance set forth in Rule 38(i). In order to conclude that campers should get *some* per diem allowance on their rest days, the Board would have to modify the Agreement, which it is not authorized to do. Camper per diems on rest days are a matter for bargaining between the parties.

AWARD

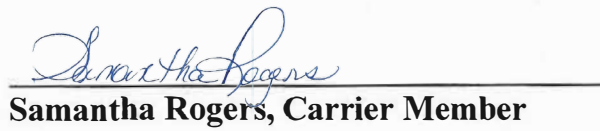
Claim denied.

ORDER

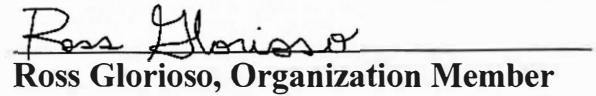
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.



Andria S. Knapp, Neutral Member



Samantha Rogers, Carrier Member



Ross Glorioso, Organization Member

December 17, 2019

Date