PARTIES TO THE DISPUTE

UNION PACIFIC RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

STATEMENT OF ISSUES

The "Attachment A" to the Agreement establishing this Board lists two differently framed issues submitted for determination. The Parties advised the Chairman that they mutually wanted arbitral resolution of the underlying dispute, but they were unable to stipulate to a common framing of the issues. Rather than paraphrase the submitted issues, we will address each of the following submitted questions in the final and binding arbitration award of the Board :

CARRIER'S QUESTION

1. Were the employees of Gang 9001 properly paid at the travel time (straight time) rate of pay commencing on or about June 6, 2004, pursuant to the Agreement, for time spent traveling between the work site and designated assembly point, preceding and following their regularly assigned hours each day?

ORGANIZATION'S QUESTIONS

1. Did Union Pacific violate its July 1, 2001 Agreement with BMWE (as amended) when, beginning on or about June 6, 2004, it paid employes assigned to Gang 9001 at the straight time rate instead of the overtime rate for time being transported in carrier vehicles from their work site to their designated assembly point after the expiration of their regular assigned hours each day?

2. If the answer to Question No. 1 above is "Yes", what shall the remedy be?

PROCEEDINGS

The Brotherhood of Maintenance of Way Employes ("BMWE" or "Organization") and the Union Pacific Railroad Company ("UP" or Carrier") created this Board of Arbitration ("Board") to hear and decide a dispute over what rate of pay is required, straight time or overtime, under the terms of the July 21, 2001 UP/BMWE Agreement, for time spent by employees of several different Gangs while transported in Carrier vehicles from their work site to their designated assembly point, after the expiration of their regular assigned hours each day. The Parties chose the facts of one such case (employees on Rail Gang 9001, during the time period from June 6, 2004 to July 18, 2004), as a "pilot case"; but they jointly advised the Board of a Side Letter holding several other such cases in abeyance, pending the outcome of this arbitration.

After filing and exchanging written pre-hearing submissions and rebuttal briefs, in accordance with the Agreement establishing the Board, each of the Parties was afforded full opportunity to present oral argument and additional arbitration awards in support of their positions at a hearing before the Board in Chicago, Illinois on October 14, 2004. The record was closed with oral summation at the hearing and the Parties graciously granted an extension of the time for the Board to render its decision in this matter. The Parties jointly requested the Board to retain jurisdiction after issuing the initial Award, to resolve any remaining issues which might arise over interpretation and application of the Award.

BACKGROUND

In the December 1996 merger with the Southern Pacific Transportation Company, Union Pacific acquired the SP track extending from Ogden, Utah (Mile Post 781.2), across the Great Salt Lake to Tecoma, Nevada (Mile Post 669.30). This territory consists of lake, desert and mountains with no public roads or towns paralleling or near the territory except on either end. The Union Pacific as it exists today is the product of the merger of numerous formerly independent railroad companies and, as such, there are numerous separate collective bargaining agreements in effect between UP and BMWE. This dispute concerns only the territory and employes covered by the July 1, 2001 collective bargaining agreement between UP and BMWE.

During the period June 5, 2004 and July 18, 2004, Consolidated System Rail Gangs 9001, 9004, 9006, and 9019 were working between the sidings at Lucin, Utah (Mile Post 679.56) and Groome, Utah (Mile Post 711.75). Due to the inaccessibility of the work location, the designated assembly points for these gangs was Oasis, Nevada, which is approximately 41 miles from their initial work location and 73 miles from their final work location during that work period. The operative facts of the "pilot case"involving Gang 9001 are somewhat complicated but it does not appear that they are in material dispute in this record.

At the time the dispute arose, Gang 9001 was working variable hours in a compressed half work schedule pursuant to Rule 40(a), *supra*. The designated lodging site for Gang 9001 was Wendover, Nevada but, inasmuch as the remote work site did not have adequate roads or parking, Union Pacific designated a parking area at Oasis, Nevada as the daily assembly point for Gang 9001. At the beginning of each compressed half work period, the employes on Gang 9001 traveled in their

personal automobiles from their homes to the designated lodging site at Wendover, Nevada. The employees were compensated for that travel according to the mileage chart in Article XIV of the 1996 National Agreement (Rule 36, Section 7 of the July 1, 2001 Agreement). Each workday during a compressed half work period, the employes were required to report to the designated assembly point at Oasis, Nevada, some 25-30 miles away from Wendover, Nevada. The employes were required to make this part of the daily trip in their personal automobiles and, because that segment did not exceed 30 minutes' travel time, the employes were not compensated for this time, pursuant to Article XVII of the 1996 National Agreement [Rule 30(a) of the July 1, 2001 Agreement]. Those assembly point aspects of travel compensation are not in dispute in this case.

After the Gang 9001 employes arrived at the Oasis assembly point at their designated starting time, they received job and safety briefings and boarded a bus that transported them approximately 27 miles to a rail siding at Montello, Nevada. At Montello the employes boarded an old Metra railway coach car (which accommodates approximately 150 people) and the rail car was pulled by a Brandt Truck (a heavy duty rail mounted truck with rail car couplers) to the remote work location where Gang 9001 then installed rail each day. Perforce, the distance between Montello and the movable work site changed each day as more rail was installed and the Gang worked its way farther and farther from Montello; hence, by the time the project was completed, Gang 9001 was installing rail at Groome, Nevada, approximately 50 miles from Montello. [On several occasions, Union Pacific transported the employes between Montello, Nevada and the work site by bus, but the rough terrain caused so much damage to the bus tires that eventually the bus was abandoned in favor of the rail mounted coach car].

At the end of their workday, after regularly assigned hours, these employees were transported from the work site back to the assembly point at Oasis in the same manner, *i.e.* by rail car for 18 to 50 mile distances from the movable work site to Montello then by bus from Montello to the Oasis assembly point. Thus, Gang 9001 installed new rail each day at the moveable work site until the end of their regular assigned hours under Rule 40(a), at which time they boarded the coach car for the return trip to Montello and then at Montello boarded the bus for the last leg of the trip to their designated assembly point at Oasis, Nevada. It is the appropriate compensation for this particular travel time, at the end of each work day during the compressed half work schedule periods, outside the regularly assigned work day hours, which primarily is in dispute in this case.

On or about June 6, 2004, Union Pacific advised the employes that the time they spent traveling outside their assigned work hours from the movable work site to the designated assembly point at Oasis would be paid at the straight time rate of pay. The employes on Gang 9001 immediately protested to both Union Pacific and BMWE that this particular travel time outside of regular assigned compressed half work schedule hours should be paid at the overtime rate of pay.

After the Union defused threats of a wildcat strike, the Parties ultimately agreed to have this Board arbitrate their dispute over which rate of pay applies under the July 1, 2001 Agreement-- the straight time rate of pay (as maintained by Carrier) or the overtime rate of pay (as maintained by the Organization)–for time spent by on-line gang employees being transported in Carrier conveyances, outside of the employees' regularly assigned work hours, from the moveable work site to the designated assembly point.

PERTINENT CONTRACT PROVISIONS

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RULE 40 - ALTERNATIVE WORK PERIODS

(a) With the election in writing from the majority of the employees working on a project and with the concurrence of the appropriate Manager, a consecutive compressed half work period may be established where operations permit. The consecutive compressed half will consist of consecutive workdays that may be regularly assigned with eight (8) or more hours per day , *i.e.* 8, 9, 10, 11, or 12 hour workdays) and accumulated rest days. The consecutive compressed half will commence on the first calendar day of the payroll period unless changed by mutual agreement between the Manager and a majority of the employees. The consecutive compressed half arrangement will equal the number of hours worked as if the assignment was for a normal half with 8-hour workdays. Accumulated rest days for employees assigned to a gang working a consecutive compressed half arrangement will consist of the remaining days in the payroll period.

* * *

c) Where it would be required to work a fraction of a day on a consecutive compressed work period arrangement under (a) or (b) in order to equal the number of hours in the period, respectively, the remaining hours will be distributed and worked throughout the compressed work period unless agreed to work a partial day at the end thereof.

(d Rules in effect covering payment for service performed on rest days will apply to those accumulated rest days provided within this rule.

(e) **Except for any distributed hours provided for in paragraph (c), time worked prior to or after the assigned daily hours will be paid at the overtime rate in accordance with the overtime provisions of the Agreement.**(Emphasis added)

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RULE 30 - DESIGNATED ASSEMBLY POINT

(a) The starting place for section forces will be the section tool house. The starting place for bridge and building forces, steel erection forces and others assigned with fixed headquarters in terminals, will be the designated tool house or shop. The starting place for employees assigned with headquarters outfits will be the designated outfit's tool or supply car, provided, however, that when the outfit car is located at a point away from the assigned tool or supply car to meet the requirements of the service, the starting time will commence at the outfit car. When the assigned outfit cars are located at a point away from the tool or supply car for the convenience and request of the employees, the starting time will continue as commencing at the location of the tool or supply car.

The assembly point for employees headquartered on-line will be the designated work site where the days work is scheduled to begin. If the assembly point for on-line employees is changed from one workday to another, the Carrier must 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. (Emphasis added).

For the purpose of insuring that traveling on-line employees are afforded an opportunity to secure adequate rest, it is agreed that the distance traveled between a former assembly point and a new

assembly point during any 24-hour period will not normally exceed four hundred fifty (450) miles. Likewise, traveling on-line employees will not normally be expected to travel in excess of one hundred fifty (150) miles in moving from the former assembly point to the new assembly point during the unassigned hours between two consecutive workdays.

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

c) The assembly point for regular forces assigned with fixed headquarters will be subject to change to conform with prevailing conditions, but will not be changed more than once in any ninety (90) day calendar period.

(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 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 for 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 35 - OVERTIME SERVICE

(a) **COMPUTATION - Time worked preceding or following and continuous with the regular eight (8) hour assignment will be computed on an actual minute basis and paid for at time and one-half rate** with double time applying after sixteen (16) hours of continuous service, **until relieved from service and afforded an opportunity for eight (8) or more hours off duty.** (Emphasis added)

(b) NEW EMPLOYEES - In the application of Paragraph (a) of this rule, the regular assigned eight (8) hour work period of new employees temporarily brought into service in emergencies will be considered as of the time they commence work.

©) CALLS - Employees notified or called to perform services not continuous with regular work assignment, on rest days, or on one of the designated holidays, will be paid a minimum of three (3) hours at the time and one-half rate for three (3) hours of service or less. If the service for which called extends beyond the minimum of three (3) hours, employees will be paid at the overtime rates, as specified in subsection (a) of this rule until relieved from service and afforded an opportunity for eight (8) or more hours off duty.

In the application of this paragraph, the starting time will commence as of the time they report at their regular assembly point.

(d) CONTINUITY OF SERVICE - For purposes of computing sixteen (16) hours of continuous service, as referred to herein, actual time worked will be counted from time last placed on duty exclusive of the meal period granted during regular assigned hours and emergency calls of three (3) hours paid for under Section ©) of this rule, after last being relieved for eight (8) consecutive hours time off duty.

(e) INAPPLICABLE - Work in excess of forty (40) straight time hours in any work week will be paid for at one and one-half times the basic straight time rate except where such work is performed by an employee due to moving from one assignment to another, or to or from an extra or furloughed list, or where the rest days are being accumulated.

Employees worked more than five (5) days in a work week will be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work weeks, except where such work is performed by an employee due to moving from one assignment to another, or to or from an extra or furloughed list, or where days off are being accumulated.

There will be no overtime on overtime; neither will overtime hours paid for other than hours not in excess of eight (8) hours paid for at overtime rates on holidays or for changing shifts be utilized in computing the forty (40) hours per week, nor will time paid for in the nature of arbitraries or special allowances such as attending court, deadheading, **travel time, etc., be utilized for this purpose,** except when such payments apply during assigned working hours in lieu of pay for such hours, or where such time is now included under existing rules in computations leading to overtime. (Emphasis added).

POSITIONS OF THE PARTIES

The following statements of position have been extrapolated and edited from the respective briefs filed by the Parties (Emphasis in original):

The Organization

The plain language of Rules 30 and 35 requiring payment of overtime for hours in excess of 40 in a workweek or 8 in a workday is further buttressed by reading these rules in the context of Rule 26 (the local codification of the 1949 National 40-Hour Work Week Agreement) and Rule 27. Rule 26(a) provides that, "... *a work week of forty (40) hours, consisting of five (5) days of eight (8) hours each, with two (2) consecutive days off in each seven (7) is hereby established.* ***" Rule 27(a) provides that, "*Except as otherwise provided in this Agreement, eight (8) hours exclusive of the meal period will constitute a day.*"

The failure to pay overtime for all time in excess of eight (8) hours per day or forty (40) per week that is expended between starting and ending the day at the assembly point would essentially render Rules 26 and 27 without meaning. It is axiomatic that a contract interpretation which nullifies or renders meaningless any part of the contract should be

avoided. This is particularly true where the provision that would be nullified (the National 40-Hour Work Week Rule) is a provision of historic national significance that has stood in place for more than five decades, not only for BMWE, but for all non-operating crafts.

BMWE is well aware that Third Division Awards 36525 and 36526 denied straight time versus overtime travel claims involving BMWE and the Burlington Northern Santa Fe. However, there is no precedent value in those decisions in this case. Even if, arguendo, they were not wrongly decided, the present case is readily distinguishable from those prior awards based on the contract language, past practice and facts of record. In short, while we recognize the value of treating like cases alike, this is a very different case not only on the rules, but on the type of record developed and the facts proven by that record.

While BMWE submits that its position can and should be sustained based on the plain language of Rules 30 and 35, support for our position does not stop there. Even if Rules 30 and 35 were not clear (which they are), any ambiguity would be resolved in BMWE's favor by virtue of long-standing past practice. The only known deviation from this Carrier paying overtime for the type of travel in question occurred in September of 1985 and, when the former General Chairman complained, Union Pacific sent a directive to gang supervisors informing them that overtime pay should continue to be paid for travel back and forth between work sites and assembly points outside of regular assigned hours. Hence, even if Rules 30 and 35 were ambiguous (which they are not), a prior settlement and long-standing practice demonstrates that the Parties to the Agreement fully intended that pay for traveling back and forth between assembly points and work sites outside of regularly assigned hours should be at the overtime rate.

BMWE submits that Union Pacific violated the July 1, 2001 Agreement (as amended) when, beginning on or about June 6, 2004, it paid employes assigned to System Gang 9001 at the straight time rate instead of the overtime rate for time being transported in Carrier vehicles from their work site to their designated assembly point after the expiration of their regular assigned hours each day. As a remedy for this violation, the employes assigned to System Gang 9001 should be allowed the difference between their straight time and applicable overtime rates for all time being transported in Carrier vehicles between their work site and assembly point outside of their regularly assigned hours beginning on or about June 6, 2004, and continuing until the violation is corrected. In light of the circumstances of this particular case, the employes should also be allowed interest at the judicial rate on their monetary awards. If money had no time value, there would be no additional loss to the Claimants or windfall to Union Pacific as a result of this Agreement violation. However, it is elementary that money does have time value and the only way to truly make the Claimants whole would be to award them interest. While interest has not historically been awarded in labor arbitration, there is a growing trend to the contrary precisely because it has been recognized that interest is an essential element of a true make whole remedy.

The Carrier

The Carrier has carefully read the agreement and can find no instance where overtime is to be allowed for an employee traveling. On examination of this collective bargaining agreement in its entirety, we find the issue of travel time mentioned in six (6) rules and five (5) appendixes. Perusing these ten pages of contract language, the Referee will be unable to find any place which specifies that travel time is to be paid at the overtime rate of pay, as requested by the Organization. In those rules and appendixes we find references to travel time as "unpaid travel time" or "travel time at the straight time or pro rata rate" but nothing about "travel time at overtime rates". With such clear language throughout the agreement, it is apparent that the Organization is petitioning the Referee to change the way travel time is handled by awarding premium pay where no contractual support exists.

This contract language cannot be any more specific that travel time is not to be paid at the overtime rate of pay. The Agreement is to be applied as written and there is no ambiguity. Additionally, travel time has never been considered as "work" or "service" for which overtime is paid and the Claimants' traveling or riding on a bus or a Metra Car is certainly not work in any sense or form. No track is being relayed, no ties are being replaced or track being surfaced and aligned, which is the work that these production crews perform.

It should therefore be apparent that the only provision for payment for employees traveling is pay at the straight time or pro rata rate of pay. There is no scenario, in any of the rules of the agreement, where the employee is allowed the overtime or punitive rate of pay for travel service. It would be beyond the scope of the arbitrators' authority to award overtime for employees traveling between these points based upon all of the agreement rules holding otherwise. It would be tantamount to rewriting the collective bargaining agreement.

Even though the Agreement language clearly supports the Carrier's position, there are other good reasons why the Organization's position should not be sustained by this Board. Since the Union Pacific is subject to the national language on "work site reporting", along with other Class 1 Carriers such as the Burlington Northern Santa Fe, the Norfolk Southern, etc., it is certainly permissible to look at any prior decisions concerning this subject. In this regard the Union Pacific is aware of some recent arbitration between the BMWE and Burlington Northern Santa Fe over this issue. See NRAB Third Division Awards 36525 (M. Zusman), 36526 (M. Zusman) and 36675 (D. Eischen).

The rule addressing travel time between the work site and the assembly point for on-line gangs has a national origin from the Presidential Emergency Board 219 and the BMWE recognized this in their Third Division submissions in the BNSF cases. None of the rules addressed in their submission commencing from 1919 forward address on-line gangs like the ones at issue in the present case. Rather, they address "fixed headquarter gangs" or gangs in "outfit cars". The travel pay for those two groups of employees are not in dispute in this case. While on another Carrier, these three (3) Third Division decisions all denied similar claims by this Organization for travel time at the overtime rate of pay. It is the Carrier's position that Third Division Awards 36525, 36526 and 36675 should be followed as they address the same issues (travel time at the straight time rate of pay for travel between

the work site and designated assembly point after scheduled hours) and rules (the rules emanating from PEB 219 and the 1996 National Agreement addressing work site reporting and pay for employees between the assembly point and work site). Union Pacific urges that these decisions be considered stare decisis or res judicata of the present issue now before this Board.

Finally, the Organization alleges the existence of a long past-practice of paying overtime rate for the type of travel involved in the present dispute. The Carrier does not believe the Organization has met its burden of proof on that point, especially since any so-called "past practice which pre-dates the 1992 Agreement is irrelevant. Further, any such payments, if they were made, were by individuals who lacked authority to interpret the Agreement and who had not sought guidance from those Carrier officials who do have such authority. The Carrier does not find Rule 35(e) to be ambiguous nor do we find the language of the National Agreement Rules involving work site reporting, as interpreted, to be ambiguous.

The Organization's argument of practice somehow having a bearing must fail. In any event, it is the Carrier's position and our rebuttal to the past practice argument, if it even did exist, that this practice argument does not prevail in light of the clear language of Rule 35(e), which excludes travel time from the overtime rate. Also the practice argument of the Organization cannot prevail in light of the national language in Rule 30 as it has been previously interpreted in NRAB and PLB Awards .

Work site reporting or travel between the lodging site and the work site or between the reporting site (assembly point) and the work site has never been determined to be eligible to be paid at the overtime rate. Neither in the written language of the rule nor in the precedent established in the above-referenced three NRAB arbitration awards dealing with this national issue was this eligibility ever attained. For all of the above-discussed reasons, the Carrier has shown that the Organization has not substantiated a violation of the agreement by presenting even a prima facie case that would warrant the remedy they are requesting. Thus, the Carrier respectfully requests a denial award.

Even if the Referee finds overtime to be the correct rate of pay for traveling between the work site and assembly point, which he should not, there is no justification to award the interest requested by the Organization at this late date. An award of interest would run counter to the great weight of arbitral precedent and the Carrier is dismayed that, for the first time in their submission, the Organization demands a remedy far in excess of anything discussed in handling on the property.

OPINION OF THE CHAIRMAN

The primary goal of a labor-management arbitrator must be to effectuate the mutual intent of the parties to a collective bargaining agreement. The mutual intent of contracting parties is best ascertained by reading the plain words they used in their contract. Arbitrators and courts alike presume that clear and understandable language means what it says, despite the later contentions of one of the parties that something other than the apparent meaning was intended. Independent School Dist. No. 47, 86 LA 97, 103 (1985) (Gallagher). Thus, it is a fundamental maxim of contract construction that an arbitrator cannot ignore clear-cut contractual language nor may he legislate new language, since to do so would usurp the role of the labor organization and employer. *See* Clean Coverall Supply Company, 47 LA 272, 277 (Fred Witney, 1966). *See also*, Continental Oil Company, 69 LA 399, 404 (A. J. Wann, 1977) and Andrew Williams Meat Company, 8 LA 518, 524 (A. J. Chaney, 1947). *See also* NRAB Second Division Award 2140 and Third Division Awards 13994, 20841, 25053, 28214 and 31082

The following holding in Ohio Chemical & Surgical Equipment Co., 49 LA 377, 380-391, (Solomon, 1967) is but one example of thousands of such reported arbitration decisions which turn on the principle that contract language which is clear should be the primary focus of judicial or arbitral analysis:

> It is a basic and fundamental concept in the arbitration process that an Arbitrator's function in interpreting and applying contract language is to first ascertain and then enforce the intention of the parties as reflected by the language of the pertinent provisions involved. As a necessary and essential corollary is the principle that if the language being construed is clear and unambiguous, such language is in itself the best evidence of the intention of the parties. And, when language so selected by the parties leaves no doubt as to the intention, this should end the arbitrator's inquiry. An arbitrator may not and should not thereafter resort to the application of "equitable" principles to be cloud the other wise clear intentions reflected by the meaningful language adopted. He has no choice but to apply and enforce the provision as written.

See also Hecla Mining Co., 81 LA 193,194 (1983) (LaCugna); Weil-McClain, 86 LA 784, 786 (1986) (Cox); Houston Publishers Ass'n, 83 LA 767, 776 (1984) (Milentz) and other cases at Elkouri & Elkouri, How Arbitration Works, 4th ed., p. 348-349 (1985). .

Since the merits issue for determination in this case is one of contract interpretation, the Union has the burden of proving by a preponderance of evidence that the Agreement was violated in all of the facts and circumstances presented on this record. *See* Certainteed Corp., 88 L.A. 995, 998 (Nicholas, Arb. 1987); Entex, Inc., 73 L.A. 330, 333 (Fox, Arb. 1979); Portec, Inc., 73 L.A. 56, 58 (Jason, Arb. 1979); City of Cincinnati, 69 L.A. 682, 685 (Bell, Arb. 1977). As Arbitrator Nicholas held in Certainteed Corp., 88 LA at 998, *"in a nondisciplinary matter, . . . the grieving party must come forward and properly show with good and substantial evidence that Management did, in fact, violate the Agreement as asserted in the given grievance. This is to say the Union's proof must demonstrate that the preponderance of the evidence runs in its favor."*

Under the plain and unambiguous language of Rule 30(b), which provides that, **"Employee's time will start and end at the designated assembly point...."**, the Gang 9001 employees were "on the clock" for pay purposes from the time they were assembled by Carrier at Oasis each work day morning until the time they were returned to Oasis by Carrier each work day evening. The record establishes that Gang 9001 employees were working a "compressed half" work schedule, under the terms of Rule 40 Alternative Work Periods. In this particular case, the record does not show the assigned daily hours or the length of the compressed half work days, but it is undisputed that the travel time at issue for Gang 9001 occurred after the assigned work day hours but before they were

released from duty at the Oasis assembly point, *i.e.*, it was time spent being transported in Carrier conveyances from the moveable work site back to the assembly point at Oasis.

Contract language application in this case begins with Rule 40 (e), which reads in pertinent part "**. . .time worked prior to or after the assigned daily hours will be paid at the overtime rate in accordance with the overtime provisions of the Agreement.**" (Emphasis added). The elliptical reference in Rule 40(e) to "the overtime provisions of the Agreement" leads directly to the language of Rule 35 Overtime Service, *supra*. Given the recognized primacy of clear language under established principles of contract interpretation, discussed above, it is not surprising that each of the Parties to this dispute asserts that contract language in different sections of Rule 35 Overtime Service clearly and unambiguously supports its own position and proves fatal to the countervailing position.

In that connection, the Organization maintains that the applicable overtime rate is payable for the time spent traveling by Gang 9001, after regular working hours, under the terms of Rule 35 (a), which provides that, **"Time worked preceding or following and continuous with the regular eight (8) hour assignment will be computed on an actual minute basis and paid for at time and one-half rate with double time applying after sixteen (16) hours of continuous service, until relieved from service and afforded an opportunity for eight (8) or more hours off duty."** (Emphasis added). For its part, the Carrier urges that any such application of Rule 35 (a) in this case is obviated by the following language from the last paragraph of Rule 35(e): **There will be no overtime on overtime; neither will overtime hours paid for other than hours not in excess of eight (8) hours paid for at overtime rates on holidays or for changing shifts be utilized in computing the forty (40) hours per week, nor will time paid for in the nature of arbitraries or**

special allowances such as attending court, deadheading, **travel time, etc., be utilized for this purpose,** except when such payments apply during assigned working hours in lieu of pay for such hours, or where such time is now included under existing rules in computations leading to overtime. (Emphasis added).

Contract language is not necessarily ambiguous just because the parties to an agreement disagree on what it means, so an arbitrator who finds such disputed language to be clear and unambiguous will enforce its plain meaning. *See, e.g.*, Safeway Stores, 85 LA 472, 476 (Thorp, 1985); Metropolitan Warehouse, 76 LA 14, 17-18 (Darrow, 1981). In doing so, however, it is always presumed that contracting parties do not solemnly negotiate into their agreement language which is intended to have no effect or to cancel out other language in that agreement. *See* John Deere Tractor Co., 5 LA 631 Clarence Updegraff, 1946) and other cases collected at n. 64, p. 353 of Elkouri & Elkouri, 5th Edition.

With respect to Rule 35(e) we concur with Carrier's view that the meaning of the last paragraph is indeed plain; but we are not persuaded to Carrier's proposition that language therein expressly bars payment of the overtime rate of pay for travel time outside of regular assigned hours which the Organization claims under the language of Rule 35(a) and related past practice. In determining the correct application of Rule 35 in this case, we follow the cardinal rule of arbitral and judicial construction of contract language, *i.e.*, an agreement should be read to give effect to all of its provisions, to render them consistent with each other and to avoid whenever possible an interpretation by which one provision cancels or renders another provision of the same agreement meaningless surplusage or of no effect. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S.

Ct. 1212, 1219 (1995). *See also* Borden's Farm Products, 3 LA 401 (Burke, 1945) Beatrice Foods Co. 45 LA 540 (Stouffer, 1965).

Despite circumlocution and redundancy in its internal structure, we find that the last paragraph of Rule 35(e) is nothing more or less than a list of prohibitions against "pyramiding" Rule 35 overtime payments and inflating time utilized to calculate the forty (40) hour work week which triggers overtime payments under Rule 35(a). Thus, the negative reference to travel time payments in the last paragraph of Rule 35(e), which the Carrier misreads as a flat ban on payment of the overtime rate of pay for any travel time, really is nothing more than a simple declaration that "time paid for in the nature of arbitraries or special allowances such as . . . travel time" [irrespective of whether such travel time is paid at straight time rate or overtime rate] "will not be utilized for this purpose" [harking back to the previous reference, *i.e.*, "in computing the forty (40) hours per week"]. In short, while the plain language of Rule 35 (a) provides arguable contractual support for the Organization's overtime position in the present case, Rule 35 (e) provides no support at all for the Carrier's straight time position.

Even though we genuflect devoutly before the altar of clear and unambiguous language, we do so mindful of Justice Oliver Wendell Holmes' trenchant observation that "[a] word is not a crystal, transparent and unchanged; it is the skin of a living thought in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 US 418, 425 (1918). At the end of the day, it appears that the dispute between these Parties narrows down to sharply differing views concerning whether the time Gang 9001 spent traveling from the moveable job site

back to the designated assembly point, after their assigned daily hours each work day, is covered by the contractual term "**time worked**"in Rules 40(e) and 35(a). (Emphasis added).

The BMWE urges that "time worked", "on duty" and "service" should be considered synonymous terms in applying Rule 35(a) to the travel time at issue in this case; because the time spent by Gang 9001 employees after regular work hours traveling between their work point and designated assembly point each day was clearly performed in the service of Union Pacific and traveling at the direction of the Carrier, between the assembly point and work sites designated by the Carrier, at the precise times stipulated by the Carrier. There is no question that they were under pay during such times, traveled in Carrier-owned vehicles and were not free to come and go as they pleased or engage in leisure activities. For its part, Carrier maintains that, irrespective of when or under what circumstances an employee travels in connection with work, the mutual intent of the Agreement is that no compensable "travel time" is ever considered "time worked" for Rule 35 overtime purposes and always and only is to be paid at the straight time rate.

If conflicting interpretations of a contract are plausibly demonstrated, the language in dispute may be considered to be ambiguous. Armstrong Rubber Co., 17 LA 741 (Gorder, 1952). If the language of a collective bargaining agreement is ambiguous, an arbitrator may rightly consider parol evidence of mutual intent to resolve a dispute as to the meaning of the unclear contract language. Brigham Apparel Corp., 52 LA 430 (1969). Several sources of evidence may be utilized in order to determine the intent of the parties when entering into a contract, including the language of the agreement, statements made during negotiations, bargaining history, prior grievance settlements and "past practice". *See,* Milk Producers Ass'n, 95 LA 1184 (Kanner, 1990).

It is now well settled that, absent very clear and explicit contract language barring such evidence, "past practice" is admissible and may be relied upon by an arbitrator in determining the mutual intent of the Parties under a written collective bargaining agreement. The Party urging a dispositive custom or practice has the overall burden of proving the existence of that "past practice." In a frequently-cited decision, Arbitrator Jules Justin observed: "In the absence of a written agreement, 'past practice' to be binding on both Parties, must be 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." Celanese Corp. of America, 24 LA 168, 172 (1954). *See also* Great Atlantic & Pacific Tea Company, 46 LA 372. 374 (Scheiber, 1966). The weight to be accorded proof of such a past practice may vary, given the facts of a case and the purpose for which it is introduced.

Persuasively proven past practice frequently is used for the purpose for which the BMWE presented it in this case, *i.e.*, to inform the interpretation of disputed general language in the written contract. [Less frequently, past practice may be taken as evidence of an implicit mutual agreement upon a term or condition of employment in an area in which the written contract is silent and sometimes, though rarely, to supersede or vary clear but contrary language in the written agreement]. The Supreme Court of the United States strongly endorsed the admissibility and utility of "past practice" evidence for such purposes in a landmark case, United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-82, 80 S.Ct. 1347, 46 LRRM 2416 1960) :

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern the myriad of cases which the draftsmen cannot wholly anticipate....The collective agreement covers the whole employment relationship. It calls into being a new common law--the common law of a particular industry or of a particular plant. As one observer put it:

> *...[I]t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail if he cannot point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseen contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledge so plain a need unless they stated a contrary rule in plain words.* (Cox, Reflections Upon Labor Arbitration, 72 Harvard. L. Rev. 1482, 1498-99 (1959), cited by the Court at 363 U.S. 579 n.6).

> A collective bargaining agreement is an effort to erect a system of industrial self-government....Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law-practices of the industry and the shop is equally a part of the collective bargaining agreement although not expressed in it....

In addition to the words of Rule 35 (a), informed by bargaining history and in context with Rules 26 and 27, the BMWE also presented persuasive evidence that, for many years prior to the straight time payments of June 2004 which generated the present dispute, UP consistently paid employees the overtime rate for the same type of travel time at issue in this case. The Carrier questioned whether this past practice evidence concerning the application of Rule 35(a) was relevant in the face of language in Rule 35(e) and disavowed expressly authorizing Maintenance of Way Department supervisors or the Timekeeping Department. However, the record does not contain any flat denial or effective rebuttal by Carrier of the Organization's persuasive record evidence that a past practice of paying the overtime rate for travel like that at issue in the present case has existed for many years, before and continued unabated following the effective dates of the 1992 Agreement, the 1996 Agreement and the July 21, 2001 UP/BMWE Agreement.

The different language of the UP/BMWE Agreement rules, as well as the proven past practice of paying applicable overtime rates thereunder, are critical points of distinction between the present case and NRAB Third Division Awards 36525 (M. Zusman), 36526 (M. Zusman) and 36675 (D. Eischen); all of which denied overtime rate travel time claims arising under the terms of a BNSF/BMWE Agreement. The latter case, Award 3-36675 (D. Eischen) is of little substantive import because it merely applied the arbitral version of *res judicata* or *stare decisis* to yet another BNSF/BMWE Agreement claim which was indistinguishable in issue, facts, circumstances and contract language from the claims denied earlier in Awards 36525 (M. Zusman), 36526 (M. Zusman). However, in examining these NRAB decisions which Carrier urges are authoritative precedent dispositive of the present matter, we find not only contract language different from Rules 40 (e) and 35 (a) but significantly important disclaimers of any past practice. Those significant factors render the NRAB decisions interpreting the BNSF/BMWE materially distinguishable from and inapplicable to the matter presently before us.

Specifically, in Award 3-36525, at pp. 3-4, the NRAB noted in the BNSF/BMWE cases that "there is no probative evidence of record that the past practice was the payment of overtime for travel in these instances. We find no payment records, letters from employees or any rebuttal from the Organization to the Carrier's position that prior to 1991, this had been 'previously unpaid time spent traveling. . . .". Similarly, in Award 3-36526, at p. 2, the NRAB held that "the Organization provided no probative evidence that payment at the time and one-half rate for travel was ever paid for travel...".

The present matter under the UP/BMWE Agreement is most obviously distinguishable from Awards 3-36525 and 3-36526 because, unlike the BNSF/BMWE Agreement cases, in this case BMWE presented substantial evidence that, for many years prior to June 2004 when Gang 9001 was paid straight time for time spent traveling back and forth between the designated assembly point and work site outside of regular hours, Union Pacific had paid the overtime rate for time spent in such travel. The record in this case shows that the vitality of this practice, described in detail in 21 written declarations from active and retired employes and Union representatives, spanned the period 1971 to 2004. Not only does the record evidence show that the practice was long-standing and acknowledged, but it was carried forward unchanged from one collective bargaining agreement to another; remaining in effect continuously before and after the 1992 National Agreement, before and after the 1996 National Agreement and before and after the July 21, 2001 UP/BMWE Agreement.

As discussed, *supra*, UP's rejoinder that Rule 35(e) contains an express bar against such payments which would trump the proven past practice of Carrier making such payments, is not supported by the Agreement language or by other record evidence. Further, close examination shows that other Agreement citations relied upon by Carrier provide no basis for paying the straight time rate for this particular type of travel time. We find no express language in Rules 35, 36, 37 or any other Agreement provision cited by UP which unambiguously creates a monolithic"travel time" rate applicable to each and every type of time spent by employees traveling in connection with their work for Carrier. To the contrary, these very Rules show that time spent by employees traveling is compensated in a variety of different ways; dependent upon the type of service, the timing of the

travel and applicable rules and practices, all of which must be carefully examined to determine the proper rate for specific types of compensable travel time.

Carrier also looks for support of its straight time payment position in the 1988 On-Line Service Agreement, Article VIII of the 1992 National Agreement and Article XVII of the 1996 National Agreement. However, while these contract provisions control where or when paid time will start and end for certain types of gangs, they have no effect on the various rates of pay that apply to the hours expended between the time pay starts and stops at those locations. Rule 36- Travel Service, Carrier's primary contract reference, serves only to show that when these Parties intended to apply special rates of compensation to particular types of travel, they explicitly stated their intentions. There is no reference in Rule 36 to Gang 9001 employes in on-line service traveling back and forth between the designated assembly point and the work site outside of (before or after) regular assigned hours. Consequently, we conclude that such time is controlled by the general assembly point and overtime provisions of Rules 30(b) and 35(a), including proven past practice thereunder, as incorporated by reference in Rule 40(e).

In the considered judgement of the Board majority, the Organization met its burden of proving on this record that the overtime rate applies to compensable time spent by Gang 9001 employees traveling in Carrier conveyances from the moveable work site to the assembly hours after, following and continuous with their assigned daily hours. Thus, we conclude that Carrier violated Agreement Rules 40(e) and 35(a), including persuasively established past practice thereunder, when it paid the employees of Gang 9001 straight time for that particular travel. The appropriate remedy for the proven violations is to make the employees whole for the difference between the straight time

rate Carrier paid them and the applicable overtime rate(s) Carrier should have paid them, in accordance with the Agreement, for time spent traveling in Carrier conveyances from the moveable work site to the assembly point, at times after or outside their regular assigned hours.

The Organization also made an eloquent plea that a true "make-whole" remedy should recognize the time-value of the monies wrongfully withheld from the employees by Carrier, by including interest at the statutory rate. However, we decline to grant that request in this case- -not because we find a claim for interest on proven money damages unreasonable, illogical or lacking in precedent-- but primarily because that aspect of the present matter was raised *de novo* at the Board level.

Finally, it should be noted that the Parties informed the Board that they wish to use this decision as a basis for possible resolution of a number of related claims. [In addition to Gang 9001, the "pilot case", the record indicates that Gangs 9004, 9006, and 9019, among others, may have been similarly impacted and that Consolidated System Production Tie Gangs 8551, 8552, 8561, 8562, 8581 and 8582 also were compensated at the straight time rate for similar travel from other movable work sites to an assembly point, outside of regular hours, during the period July 1 to August 5, 2004]. At the joint request of the Parties, the Board will retain jurisdiction for that purpose, which may be invoked by either Party upon written notice to the Chairman.

AWARD OF THE BOARD

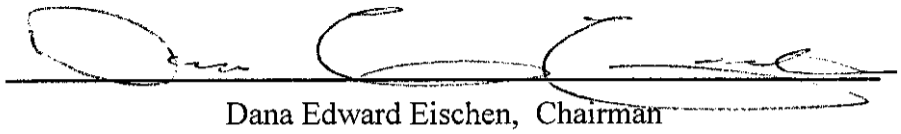
1. Commencing on or about June 6, 2004, the employees of System Gang 9001 were not properly paid pursuant to the Agreement, for time spent traveling between their moveable work site and their designated assembly point, preceding and following their regularly assigned hours each day.

2. Union Pacific did violate the July 1, 2001 UP/BMWE Agreement (as amended) when, beginning on or about June 6, 2004, it paid employes assigned to Gang 9001 at the straight time rate instead of the overtime rate, for time spent being transported in Carrier vehicles from the moveable work site to the designated assembly point, after the expiration of their regular assigned hours each day.

3. As remedy for the proven violation, Union Pacific is directed to make each affected employee whole for the difference between the between the straight time rate and the applicable overtime rate for time spent being transported in Carrier vehicles from the moveable work site to the designated assembly point, after the expiration of the regular assigned hours, on each work day during the applicable compressed half work schedule time period.

4. Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.

5. At the joint request of the Parties, this Board retains jurisdiction to resolve any disputes which might arise over the interpretation and application of this Award and/or over its application to other related disputes which the Parties agree to hold in abeyance pending rendition of this Award.



Dana Edward Eischen, Chairman
Dated at Spencer, New York on March 11, 2005

Steven V. Powers

Steven V. Powers, Union Member
Concur/Dissent 3/15/05

D. A. Ring, Company Member
Concur/Dissent