SPECIAL BOARD OF ADJUSTMENT NO. 1100

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| In the Matter of Arbitration Between: | ) | AWARD AND OPINION |
| | ) | |
| | ) | Board Members: |
| BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES | ) | Shyam Das<br>Neutral Member |
| and | ) | Steven V. Powers<br>Employe Member |
| BURLINGTON NORTHERN SANTA FE RAILWAY | ) | Dennis J. Merrell<br>Carrier Member |

Date of Hearing: April 16, 1998

STATEMENT OF THE DISPUTE

This dispute is between the Brotherhood of Maintenance of Way Employes ("BMWE" or "Union") and the Burlington Northern Santa Fe Railway ("BNSF" or "Carrier"). It involves the interpretation and application of Article XIV of the parties' 1996 National Agreement and Rule 38 of the 1982 Local Agreement between the BMWE and the former Burlington Northern Railroad Company ("BN"), as revised. The dispute involves only employes who work under the 1982 BN Local Agreement.

Article XIV of the 1996 National Agreement ("Article XIV") provided a new travel allowance to be paid to employes who are required to work away from home. In its entirety, Article XIV reads as follows:

> ARTICLE XIV - TRAVEL ALLOWANCE
>
> Section 1
>
> (a) At the beginning of the work season employees are required to travel from their homes to the initial reporting location, and at the end of the season they will return home. This location could be hundreds of miles from their residences. During the work season the carriers' service may place them hundreds of miles away from home at the end of each work week. Accordingly, the carriers will pay each employee a minimum travel allowance as follows for all miles actually traveled by the most direct highway route for each round trip:
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> |---|---|
> | 0 to 100 miles | $ 0.00 |
> | 101 to 200 miles | $ 25.00 |
> | 201 to 300 miles | $ 50.00 |
> | 301 to 400 miles | $ 75.00 |
> | 401 to 500 miles | $100.00 |
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> Additional $25.00 payments for each 100 mile increments.

(b) At the start up and break up of a gang, an allowance will be paid after 50 miles, with a payment of $12.50 for the mileage between 51 and 100 miles.

(c) Carriers may provide bus transportation for employees to their home area on weekends. Employees need not elect this option.

Section 2

For employees required to work over 400 miles from their residences the carrier shall provide, and these employees shall have the option of electing, an air travel transportation package to enable these employees to return to their families once every three weeks. Ground transportation from the work site to the away from home airport shall be provided by each carrier, and on the return trip the carrier shall provide ground transportation from the away from home airport to the lodging site. In dealing with programmed work, the employees and carrier may know how long the employees will be required to work beyond the 400 mile range, and the employer can require the employees to give advanced notice of their intention to elect the air transportation option so that the carrier may take advantage of discounted air fares. Employees must make themselves available for work on at least ninety percent of the regularly scheduled work days during the three week period. And, they will not qualify for the travel allowance set forth in Section 1 during the three week period. Irrespective of the customary meal and lodging entitlement that employees have under their local agreements, when employees elect the air transportation option, they shall be entitled to meals and lodging during the two away-from-home weekends in the three-week cycle and they shall not be entitled to meals and lodging during the third weekend upon which they return home by air transportation.

Section 3

Nothing herein shall be construed to bar the parties from reaching mutual agreement on alternative arrangements.

Section 4

This Article shall become effective ten (10) days after the date of this Agreement except on such carriers where the organization representative may elect to preserve existing rules or practices pertaining to travel allowances by notification to the authorized carrier representative.

(Emphasis added.)

The BMWE did not elect to preserve existing rules or practices pertaining to travel allowances, and it is agreed that all such rules and practices have been replaced by Article XIV.

Rule 38 of the 1982 BN Local Agreement ("Rule 38") provides as follows, in pertinent part:

RULE 38. MOBILE HEADQUARTERS (WITH OR WITHOUT OUTFIT CARS) - LODGING - MEALS

A. Other than as provided in Rules 37 and 39, the Company shall provide for employes 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:

(1) If lodging is furnished by the Company, the outfit cars or other lodging furnished shall include bed, mattress, pillow, bed linen, blanket, towels, soap, washing and toilet facilities.

(2) An expense allowance for furnishing and laundering pillows, bed linens, blankets and towels in the amount of

thirty (30) cents will be allowed for each day that per diem meal allowance is paid. In the event the Company arranges to furnish and launder pillows, bed linens, blankets and towels, this expense allowance will not apply.

B. Lodging facilities furnished by the Company shall be adequate for the purpose and maintained in a clean, healthful and sanitary condition.

C. If lodging is not furnished by the Company the employe shall be paid a lodging allowance of $10.75 per day.

D. If the Company provides cooking and eating facilities and pays the salary or salaries of necessary cooks, each employe shall be paid a meal allowance of $2.50 [$6.25 under the 1996 National Agreement] per day.

E. If the Company provides cooking and eating facilities but does not furnish and pay the salary or salaries of necessary cooks, each employe shall be paid a meal allowance of $5.00 [$12.75 under the 1996 National Agreement] per day.

F. If the employes are required to obtain their meals in restaurants or commissaries, each employe shall be paid a meal allowance of $7.50 [$19.00 under the 1996 National Agreement] per day.

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 employe is voluntarily absent from service, and it shall not be payable for rest days or holidays if the employe 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.

NOTE: Employes whose place of residence is less than thirty (30) miles from the work site will not be allowed the lodging allowance for rest days and holidays unless worked on those days. The place of residence is determined by Company records reflecting the W-4 form filed at time of assignment to position.

(Emphasis added.)

This dispute arose when, upon implementation of Article XIV, the Carrier discontinued payment of the per diem meal allowance provided for in Rule 38 on rest days when employes travelled home and were paid a travel allowance under Section 1 of Article XIV.[1] The Carrier maintains that Rule 38 per diem meal allowances payable on rest days when employes travel home are a "rule or practice pertaining to travel allowances" because they serve the same function as the new payments provided for in Article XIV -- compensation for the costs of weekend travel between the work place and home.[2] The BMWE insists that Rule 38 meal allowances are just that -- meal allowances -- and that they do not pertain to travel allowances for purposes of Section 4 of Article XIV.

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[1]There is no dispute that under the express terms of Section 2 of Article XIV employes who elect the air transportation option are not entitled to a meal allowance during the weekend upon which they travel home.

[2]The Carrier furnishes lodging, so there is no equivalent issue raised with respect to lodging allowance under Rule 38(g).

BACKGROUND TO THE DISPUTE

Prior to 1967, the railroads did not generally provide travel allowances for weekend trips home for maintenance of way employes required to work away from home, sometimes at considerable distances. On a local basis, carriers provided varying degrees of assistance for meals and lodging while employes were working away from home, but there were no national rules.

In 1966, BMWE and several other Unions sought to obtain on a national basis the following benefits for employes who worked away from home: (1) meals and lodging or full reimbursement for the cost thereof; (2) transportation between home and work locations and from one work location to another or reimbursement for the use of personal automobiles or public transportation; and (3) compensation for all time expended in the carrier's interest, including time in transit between their home and work locations at the beginning and ending of the workweek and transit between work locations outside of regular hours. The parties, which included BNSF's predecessors, were unable to reach agreement on these issues and submitted them to Arbitration Board No. 298.

Arbitration Board 298 consisted of two neutral members, Paul Hanlon (the Chairman) and David Stowe; two carrier members, Alvin Egbers and Richard Harvey; and two union members, George Leighty and Harold Crotty (then President of the BMWE). The Board issued its Award and Opinion on September 30, 1967. The Board denied the union's request for a travel allowance (time and mileage) for weekend trips home, although it did provide a travel allowance for travel between work points outside of regular hours. The Award did include provisions for a meal allowance and

for reimbursement of actual lodging expenses not in excess of $4.00 per day in cases where the carrier did not provide lodging. The meal allowance provision was as follows:

> B. Meals
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> 1. If the railroad company provides cooking and eating facilities and pays the salary or salaries of necessary cooks, each employee shall be paid a meal allowance of $1.00 per day.
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> 2. If the railroad company provides cooking and eating facilities but does not furnish and pay the salary or salaries of necessary cooks, each employee shall be paid a meal allowance of $2.00 per day.
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> 3. If the employees are required to obtain their meals in restaurants or commissaries, each employee shall be paid a meal allowance of $3.00 per day.
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> 4. The foregoing per diem meal 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.

Subsequently, these paragraphs, with some modification, were included in Rule 38 of the 1971 BN Agreement and were reissued in Rule 38 of the 1982 BN Agreement quoted earlier. The amount of the per diem meal allowance was increased in negotiations in 1978, 1981, 1986 and 1991, but these provisions otherwise remained unchanged.

The 1991 National Agreement was based on recommendations of Presidential Emergency Board (PEB) No. 219 which were imposed on BMWE and most railroads, including BN, by an Act of Congress. Article V of the 1991 Imposed Agreement provided for increases in meal and lodging allowances derived from Award 298. It also provided in Section 3 that:

> Section 3 - Minimum Allowances
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> On carriers where expenses away from home are not determined by the allowances made pursuant to the Award of Arbitration Board No. 298, such allowances will not be less than those provided for in this Article.

The 1991 Imposed Agreement also granted the carriers the right to operate "production gangs" on a regional or system basis and required the parties to arbitrate over the applicable terms and conditions if they could not reach agreement. BN and BMWE did not reach agreement and submitted their dispute to Arbitrator Joseph Sickles. The Sickles Award included a provision which allowed the Union to accept the following BN proposal:

> TRAVEL ALLOWANCE
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> Regional/System Production Gang employees will be provided a travel allowance of $20.00 for each week worked, except that if the employee elects to remain at their lodging facility during their rest days, the employee will be ineligible for the end of work week travel allowance.

The BMWE accepted this proposal and, thereafter, BN employes on regional and system production gangs received this travel allowance in addition to the seven day per week meal allowance provided for in Rule 38.

In 1994, BMWE and carriers represented by the National Carriers' Conference Committee (NCCC), including BNSF, exchanged proposals to change existing agreements. BMWE's proposals included a change in the existing system of providing allowances for away from home expenses. Its proposal sought reimbursement for the actual cost of meals and lodging, and travel time and mileage for trips between home and the work site. The carriers proposed only to increase per diem payments consistent with previous practices and Award 298. The parties were unable to reach agreement and PEB No. 229 was appointed to recommend a settlement. PEB 229 issued its report on June 23, 1996. Its recommendations included increases in the maximum reimbursement for actual lodging expenses and meal allowances provided under agreements derived from Award 298 and a recommendation that:

> On carriers where expenses away from home are not determined by the allowances made pursuant to the award of Arbitration Board No. 298, such allowances should not be less than those recommended herein.

PEB 229's report also stated:

> We recommend that the award of Arbitration Board No. 298 be amended to provide for a travel allowance for employees who are employed in the maintenance of way crafts who regularly are required throughout the work week to live away from home. We also recommend that on Carriers where expenses away from home are not determined by Arbitration Board No. 298, that the appropriate general chairman or chairmen be given the option of electing the below set forth travel allowance or retaining the travel allowance options that may be provided under their local agreements.

The travel allowance recommended by PEB 229 formed the basis for Article XIV of the subsequently negotiated 1996 National Agreement. Sections 1 and 2 of Article XIV (quoted at the outset of this decision) are identical to PEB 229's recommendation, except for the last sentence of Section 2.[3]

After the September 26, 1996 National Agreement went into effect, the Carrier informed BMWE that, pursuant to Section 4 of Article XIV, regular payments of the Sickle Award $20 travel allowance and Rule 38 rest day meal allowances would cease and would be replaced by Article XIV benefits for members of regional and system gangs.[4] The Carrier continues to pay the Rule 38 meal allowance on work days and on weekends when an employe does not claim travel benefits under Article XIV.[5]

In response to the Carrier's refusal to pay the rest day meal allowance to employes who receive a travel allowance under Section 1 of Article XIV, BMWE filed three claims under the grievance procedure of the 1982 BN Local Agreement. It also filed suit in federal court, in Denver, arguing that, under the Railway Labor Act (RLA), this was a "major dispute" over which it

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[3]The last sentence of Section 2 negotiated by the parties replaced the following sentence at the end of PEB 229's recommendation: "They [employes who elect the air transportation option and, therefore, do not qualify for the mileage travel allowance during the three-week cycle] shall however be entitled to meals and lodging during the two away-from-home weekends in the three-week cycle."

[4]The parties are engaged in a separate dispute over whether Article XIV benefits are limited to employes on regional and system gangs.

[5]Evidently, the NCCC's general position is that all rest day meal allowances are displaced under Section 4 of Article XIV, but some carriers, including BNSF, have allowed employees to claim meal allowances on rest days when they do not claim an Article XIV travel allowance.

was entitled to strike. The parties meanwhile agreed to process the claims filed under the grievance procedure to the highest carrier officer and to hold them there pending the outcome of the federal litigation. On June 17, 1997, the court ruled that the dispute was a "minor dispute" which must be arbitrated under Section 3 of the RLA. On December 5, 1997 the parties agreed to establish this Special Board of Adjustment No. 1100 to arbitrate the three claims that previously had been filed.

The first claim was filed on December 16, 1996 on behalf of H. F. Wendtlandt, Sr. and H. F. Wendtlandt, Jr. The second claim was filed on the same date on behalf of "all members who the Carrier has denied them their weekend per diem when they were compensated for their Travel Home Allowance per Article XIV ....". The third claim was filed on January 8, 1997 on behalf of "all members" of gang TP-02. In addition to denying the claims on the merits, the Carrier maintained that the second and third claims were improperly filed because they failed to specifically list claimants' names and other required information.

## BMWE POSITION

The BMWE contends that its decision to accept the travel allowance provisions of Article XIV did not have the effect of abrogating the payment of per diem meal allowances on rest days and holidays provided for in Rule 38.

The BMWE's main point is that the clear language of Article XIV and Rule 38 supports its position. Under Section 4 of Article XIV, the Article XIV travel allowance replaced and abrogated "existing rules or practices pertaining to travel allowances". The $20 per week travel allowance provided under

the Sickles Award is such a rule. But the meal allowance provided under Rule 38F and 38G is a meal allowance, not a travel allowance. There is no basis in either Rule 38 or Award 298, on which Rule 38 was based, to find that the meal allowance provided thereunder is a travel allowance. Indeed the Opinion of the neutral members of Arbitration Board 298 specifically stated that the unions' request for compensation or reimbursement for weekend trips home should be denied.

The BMWE argues that its position is supported by Section 2 of Article XIV. In adopting the recommendations of PEB 229, the parties revised the last sentence of Section 2 which relates to the air transportation option. The plain language of that revised sentence shows that it was drafted to clarify that an exception to the "customary meal and lodging entitlement" was being created when employes chose the air transportation option. Under BNSF's interpretation of Section 4, there would be no surviving "customary meal and lodging entitlement".

The BMWE contends that the bargaining history of Article XIV supports its position. In the proceedings before PEB 229, both parties repeatedly stated that the Award 298 meal allowance was to defray expenses for meals and that Award 298 did not provide compensation in any form for weekend trips home. BMWE insists that the Carrier should be estopped from asserting an inconsistent position in this arbitration, namely, that the meal allowance on rest days is a rule or practice pertaining to travel allowance. Even if not estopped, as it should be, BNSF's credibility is impeached by the inconsistent position it asserted in the PEB 229 proceedings. The report of PEB 229 shows that the Board intended that BMWE elect between the new national travel allowance it recommended and existing local travel allowances,

and did not intend BMWE to elect between the new national travel allowance and other national allowances established by Award 298.

The BMWE urges that the evidence submitted by BNSF (the Crotty letter and Egbers declaration) to establish that Arbitration Board 298 understood and intended the payment of meal allowance on rest days as a travel allowance should be excluded under both the parol evidence rule and the "mental processes" rule. Examination of the deliberative processes of members of the Arbitration Board would destroy the finality of arbitration awards and chill the functions of tripartite boards. Moreover, the BMWE argues, even if such evidence were admissible it does not establish that the meal allowance was a rule or practice pertaining to travel allowances. The BMWE stresses that the meal allowance provided for in Award 298 is only an allowance and does not cover the actual cost of meals away from home. It also points out that even when employes travel home on weekends or holidays they may incur away-from-home meal expenses on those days before leaving and/or after returning to camp and/or en route. Even assuming, and there is no proof of this, that an employe spent the rest day meal allowance to defray the cost of traveling home, that would not transform the meal allowance into a travel allowance, any more than the meal allowance would become a "clothes allowance" if the employe used the money to purchase work clothes.

The BMWE further argues that any unwritten understandings that Board 298 may have had concerning rest day meal allowances were superseded and abrogated by Rule 69 of the 1971 and Rule 78 of the 1982 BN Local Agreements, which provide that: "[t]his Agreement supersedes all previous and existing agreements, understandings and interpretations which are in conflict with this Agreement." Rule 38 of the 1971 and 1982 BN

Local Agreements provides for a per diem "meal allowance" to be paid "for each day of the calendar week, including rest days and holidays", and any prior understandings are of no effect.

Not only is the language in Rule 38 clear, the BMWE asserts, but the parties have acted in accordance with that language for almost 30 years. The parties' conduct clearly shows either that there never was an understanding that meal allowance payments on rest days actually were rules or practices pertaining to travel allowances or, if such an understanding ever existed, it was superseded by the 1971 and 1982 BN Local Agreements or simply abandoned by the parties in favor of the plain language of Award 298, which is incorporated in Rule 38 of the BN Local Agreement. This history culminated in the PEB 229 proceedings where the parties clearly, conclusively and in writing stated that Award 298 provided allowances for meals and did not provide compensation of any type for weekend trips home. In the face of this history, it simply is not possible to credibly assert that the parties to the 1996 National Agreement had an understanding that the payment of meal allowances on rest days was a rule or practice pertaining to travel allowances.

Finally, the BMWE contends that BNSF's position in this dispute leads to absurd and nonsensical results. Employes often remain at their work location on weekend rest days. Even when they are able to go home, the distances are often so great that they must obtain meals in transit. Yet under the Carrier's interpretation of Article XIV, such employes would not be entitled to weekend meal allowance. The BMWE insists that as a matter of contract, Section 4 of Article XIV cannot displace Rule 38 meal allowances on some weekends and not others. It maintains that the Carrier cannot apply Section 4 as a faucet, turning it on and off as it chooses. By continuing to pay the meal

allowance on rest days when an employe does not travel home, so as to avoid an absurd result, the Carrier has tacitly acknowledged that its position is internally inconsistent and unreasonable.

The BMWE argues that Award 298 meal allowances do not compensate employes for the full cost of meals. So to deprive them of weekend meal allowances, even if they might not have away-from-home meal expenses on some weekends, would increase the extent to which they already subsidize the Carrier's most productive gangs. In this regard, the BMWE stresses that it long has sought to replace the artificial allowances of Award 298 with full reimbursement for actual meal costs, but the carriers have vigorously fought to retain those allowances because they are cheaper than paying actual meal costs.

The BMWE asserts that the appropriate remedy in this case was agreed to in the federal district court proceeding that preceded the establishment of this Board. In each case where BNSF withheld Rule 38 weekend meal allowances for employes to whom it paid an Article XIV travel allowance beginning in October of 1996, BNSF should now pay the weekend meal allowance and interest on that amount at the "judicial rate".

## BNSF POSITION

BNSF contends that rest day per diem meal allowances under Rule 38 are a rule or practice pertaining to travel allowances. It argues that rest day per diem allowances under Rule 38 pertain to travel allowances because, as a practical matter, an allowance payable on rest days when an employe travels home serves the function of compensating the employe for the

expenses of travel over his rest period, just like the new payments under Article XIV were designed to do. A rest day allowance certainly does not serve the function of compensating the employe for "meals away from home". By definition, the employe is at home, not the work site, over a rest period when he receives Article XIV travel payments. Accordingly, to the extent Rule 38 in fact operates to partially reimburse employes for travel over their rest days, then it certainly is a rule or practice pertaining to travel allowances that is displaced under Section 4 of Article XIV.

BNSF maintains that this common sense interpretation of rest day allowances is confirmed by the history of Rule 38. The relevant provisions of Rule 38 came directly from Award 298. In its proposal to the Board, the Union requested a meal allowance only on work days. Following issuance of that award, Harold Crotty, a member of Board 298 and then President of the BMWE, circulated a letter on October 5, 1967 in which he provided an analysis of the award's provisions relating to travel time and expenses for employes required to work away from their home station. In that letter, Mr. Crotty stated as follows:

> The payment of the per diem meal allowances for rest days and holidays even though the employes may be absent from the camp was considered by the Board to be a partial payment for the expenses of making weekend or holiday trips to their homes and thus is not dependent on the employe incurring expense for meals in camp on those days. If, however, the employe voluntarily absents himself from service when work is available on work days he does not receive the meal allowances on those days nor on rest days or holidays which are immediately preceded or followed by such absence.

BNSF insists that this letter stands as undeniable proof that, from the outset, the BMWE itself has regarded the per diem allowance paid to employes on rest days as a payment to help defray travel costs, that is, a de facto travel allowance. Moreover Mr. Crotty's letter is confirmed by the notes and recollections of Alvin Egbers, one of the carrier members of Board 298, who submitted a declaration and was deposed in connection with the litigation preceding this arbitration. Mr. Egbers related that the carrier members of the Board questioned the neutral members' proposal to provide a meal allowance on rest days when the employes were not at work. According to Egbers, Paul Hanlon, the Chairman of the Board, explained the reason that the neutral members had provided for meal allowances on rest days and holidays was that they were denying any claim for travel time and the payment of the meal allowance on those rest days would serve to compensate the men in part for their weekend trips home. BNSF asserts that the Crotty letter and Egbers declaration are highly relevant and are not properly barred by either the parol evidence rule or the judicially created "mental processes" rule.

BNSF further maintains that other local agreements it has cited that incorporated similar rules derived from Award 298 show that rest day per diems were meant to serve a travel reimbursement function. It argues that it is undeniable that the carriers always have treated rest day allowances as travel allowances. BNSF also argues that the reason why the parties have not previously discussed whether rest day allowances are travel allowances is that this question simply never came up since Award 298. Until the establishment of a new national travel allowance in Article XIV of the 1996 National Agreement with its general anti-pyramiding clause in Section 4, there was no reason to dwell on why per diem allowances were paid on rest days; they were simply payable, whatever the reason.

BNSF asserts that the language of Section 4 of Article XIV supports its interpretation. Rest day meal allowances are travel allowances and certainly are rules or practices pertaining to travel allowances. The critical consideration is not whether such meal allowances are called travel allowances but whether they function as such. Furthermore, Section 2 of Article XIV makes plain that employes are only entitled to rest day allowances on the weekends they remain in camp when they elect the air transportation option. The parties preserved the right of employes to rest day per diems, but only in the particular circumstances specified, that is, when they elect the air transportation option and stay at the work site over the away-from-home weekends. BNSF argues this demonstrates that the parties fully understood the linkage between rest day allowances and travel allowances and that it would be inappropriate to pyramid these benefits on days employes go home. BMWE's position that pyramiding which is forbidden when employes travel by air under Section 2 is allowed when employes travel by auto under Section 1 has no rational basis and cannot withstand scrutiny in light of Section 4's displacement of all "rules or practices pertaining to travel allowances".

BNSF argues that the Union's interpretation of Section 4 violates the fundamental presumption in labor contracts against duplication of pay or benefits. It notes that the BMWE's own Section 6 proposal that gave rise to Article XIV specifically included a "savings clause" that stated that there "shall be no duplication of benefits". In contrast to the Union's approach, BNSF's interpretation is "reasonable and equitable" and consistent with industry practice because it replaces rest day allowances only to the extent necessary to avoid duplication of benefits.

BNSF also contends that, aside from the merits of this dispute, two of the three claims presented by the Union failed to provide specific information for claim processing, and so were properly denied on that basis. One of those two claims refers to "all members" of a particular gang, TP-02, and the other claim is even more vague, simply referring to "all members" who "were compensated for their Travel Home Allowance per Article XIV". BNSF maintains that this claim provides no documentation or details whatsoever, making it impossible for it to assess the claim. Even if rest day allowances were not displaced pursuant to Section 4, BNSF argues, it would have no way of knowing whether "all members" who were paid Article XIV benefits also qualify for rest day allowances under the terms of Rule 38(g), which requires that employes be present on the work days preceding and following the rest period.

Finally, BNSF argues that although for purposes of this arbitration only it does not contest that this Board has the power to award interest, it nevertheless would be entirely inappropriate to do so here because the year-and-a-half delay in reaching a ruling on this matter is largely the Union's doing. BNSF asserts that when this dispute first arose, it was ready and willing to arbitrate the merits on an expedited basis, and it was BMWE that insisted on dragging these issues into federal court. Had these issues been arbitrated when BNSF first proposed that option, the dispute would have been resolved long ago. Thus, even if the Union's case were sound on the merits, it would not be entitled to interest on any award in this case.

FINDINGS

In this case BNSF contends that payment of the per diem meal allowance provided for in Rule 38F and 38G of the 1982 BN Local Agreement on rest days when employes travel home is a rule or practice pertaining to travel allowances for purposes of Section 4 of Article XIV of the 1996 National Agreement. While BNSF has decided to apply Section 4 to deny meal allowances only in instances where it sees a duplication of payments, the NCCC's contractual position -- as expressed in the federal district court proceedings preceding this arbitration -- is that all rest day meal allowances are "rules or practices pertaining to travel allowances". That contractual position is consistent with BNSF's argument that, as shown in the Crotty letter and Egbers declaration, rest day meal allowances provided for in Award 298 were intended as a form of travel allowance.

The record indicates that over the years the Union and the carriers, including BNSF, have used the term "travel allowance" in connection with reimbursement of full or partial compensation for the costs of transportation or time spent in travel. There is no evidence that they have used that term to encompass reimbursement or full or partial compensation for the cost of away-from-home meals, whether at the work site, in transit or elsewhere.

On their face, Rule 38F and 38G do not provide for any form of "travel allowance". They provide for a meal allowance. This is not just a matter of how the allowance is labeled. The form of the allowance is that of a fixed per diem allowance to help defray the cost of meals, which employes are free to spend in any way they choose. Indeed, the amount of the per diem varies depending on the provisions for cooking and eating

facilities made by the employer, which is hardly the attribute of a travel allowance. This is equally true of the provisions of Award 298 from which Rule 38 is derived. (Lodging allowances are not involved in this case.)

As to the evidentiary issues raised in connection with the Carrier's submission of the Crotty letter and Egbers declaration, the latter should be excluded since there are sound reasons to exclude evidence as to internal discussions between Board members that are not included in the Award or Opinion. The same considerations do not apply to the Crotty letter, at least to the extent that it is presented to show the Union's understanding of Award 298. But there is no dispute as to the proper interpretation of the terms of Rule 38F and 38G or the corresponding provisions of Award 298. Thus, there is no need to consider extrinsic evidence to help determine what these provisions mean. The language is not ambiguous. Whatever the parties' or Board 298's reasons for providing a meal allowance that is payable on rest days and holidays, as well as on work days -- provided the employe is not voluntarily absent from work on the day before or day after the rest days or holiday -- it is a meal allowance, not a travel allowance.

Even assuming that in providing for a meal allowance on rest days as well as work days the members of Board 298 had in mind that employes could use that money to help defray the cost of travel home on weekends, that does not make the meal allowance a travel allowance. It is not uncommon in collective bargaining or interest arbitration over the terms of collective bargaining agreements for a particular form of compensation or type of benefit to be enhanced in partial offset for not agreeing to some other form of compensation or benefit, but that does not change its nature or identity.

Moreover, whatever the Board's reasons for providing a seven-day per week meal allowance, the record convincingly shows that since Award 298 was issued in 1967 these parties have not treated any part of the meal allowance provided therein as a travel allowance. The Carrier stresses that the parties in the railroad industry generally provide for non-duplication of benefits or anti-pyramiding. Yet, both the 1971 and 1982 BN Local Agreements not only provide a seven-day per week meal allowance (derived from Award 298) in Rule 38, but also include the following rule:

> RULE 67. WEEK-END TRIPS
>
> A. Employes working away from home will be permitted to make week-end trips to their homes when requirements of the service will permit. Free transportation consistent with pass regulations will be furnished.

If the parties had considered rest day meal allowances to be travel allowances, presumably the Carrier would have sought in negotiations to exclude them on weekends when employes were furnished free transportation, but there is no claim that was done.[6]

It may be that under some other local agreements which did provide a mileage or other travel allowance prior to 1996, such as the 1975 Frisco-BMWE Agreement cited by the Carrier, the parties agreed that employes would forgo Award 298 rest day meal (or lodging) allowances when they received the travel allowance,

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[6]While free transportation may not ordinarily have been available, that does not detract from the general proposition that if rest day meal allowances were actually travel allowances this necessarily would result in duplication of benefits.

but that was by agreement. Such an agreement shows that parties may agree that employes will receive only one of those benefits, not both on a particular weekend. They may also agree to provide both a meal allowance and a travel allowance as occurred when BN offered a $20.00 travel allowance in 1991, which the Union accepted under the Sickles Award. In that instance, the Carrier -- whatever its reasons -- did not propose to couple this payment with a reduction in the meal allowance payable under Rule 38.

The Carrier has cited the following provision found in the 1973 Union Pacific-BMWE Agreement:

> It is understood that the application of this provision to accord an allowance on the sixth and seventh days of an employe's work week is intended as a reasonable allowance to help defray transportation expense which it is anticipated an employe might incur in making weekend visits to his home.

The Union points out that the Union Pacific Agreement, which since has been changed, was one of the few agreements not derived from Award 298. Moreover, a careful reading of that agreement shows that the "allowance" referred to in the quoted paragraph is not defined as a meal allowance, but as a "per diem expense", and that only those employes who worked in excess of 100 miles from home received this allowance on rest days and, if they were headquartered more than 200 miles from home they received a larger per diem. In other words, this particular per diem included a travel component, which the parties explicitly acknowledged. The Union Pacific parties subsequently agreed to an On-Line Service Agreement which included a "daily per diem allowance ... to help defray expenses for lodging, meals and travel". In implementing the 1991 Imposed Agreement, a question arose as to whether the Union Pacific per diem allowance was less

than that provided under Award 298. The Union argued that it was if the travel portion of the Union Pacific per diem properly was subtracted from the daily allowance. The Neutral Member of the Contract Interpretation Committee set up under the Imposed Agreement agreed that should be done (CIC Decision 26) noting:

> Article V [of the Imposed Agreement which provided for increases in Award 298 meal and lodging allowances] does not refer to travel allowances that carriers may grant to employees working away from home. There is no evidence before this Committee that PEB 219 intended travel allowances to be subsumed in the meal and lodging allowances provided for in Article V of the Imposed Agreement.

In sum, that decision recognized there was a clear distinction between a travel allowance and a meal allowance, even if both may be included as components within a single per diem allowance.

Most importantly, when the parties presented their respective positions to PEB 229, both parties stated that Award 298 (which is virtually identical to Rule 38) provided a meal allowance to defray the cost of meals and did not provide a travel allowance. The Carrier argues that the NCCC stated only that Award 298 provided for a meal allowance to be paid seven days per week and that Award 298 turned down the Union's request for travel time and expenses. But the NCCC's submission on "Expenses Away From Home" (Employe Exhibit 21) states more broadly:

> ... The meal allowance that most maintenance-of-way employees lodged in hotels or motels currently receive is $14.50 per day, or $101.50 per week. (Employees receive the full $101.50 reimbursement for seven days of meals, even though many production workers work only four days per week, ten hours per

day.) Employees housed in camp cars usually receive $4.75 per day if the carrier furnishes both cooking facilities and cooks to prepare the employees' meals, and $9.50 per day if cooking facilities alone are supplied.

Finally, although Arbitration Board 298 explicitly rejected the proposition that employees were entitled to compensation for weekend travel, most carriers today do pay a fixed travel allowance of between $14 and $50 to employees who choose to go home over a weekend, and some carriers charter buses at their own expense to assist employees with this weekend travel.

* * *

... The specific amounts payable under Award 298 have been gradually increased -- six times by national agreement, many other times by local agreements, and most recently upon PEB 219's recommendation -- and the Award's basic structure has continued to guide the resolution of issues relating to expenses away from home.[5] In keeping with that framework, the carriers today provide (or reimburse their traveling employees for) lodging while away from home, either in camp cars maintained in accordance with applicable F.R.A. regulations or in motels and hotels, and pay a per diem to defray the cost of meals. ...

[5]Not all of the employees before this Board are covered by Award 298. Any distinctions stemming from disparate local agreements are not significant for these purposes, however, since all maintenance-of-way employees do receive reasonable reimbursement for (or direct provision of) meals and lodging while away from home.

* * *

In the carriers' view, these payments appropriately defray an employee's away-from-home expenses just as Award 298 intended, and

> the Organization has not demonstrated that its members working away from home in fact regularly spend materially more than the difference between these payments and what they would have spent had they not been working away from home. Nevertheless, the carriers are amenable to increasing these amounts by a reasonable margin, as they have done every few years since 1967, [Footnote omitted] in conjunction with the implementation of an economic package that follows the pattern settlements. There is no need or justification, however, for abandoning per diems and the structure for dealing with away-from-home expenses for traveling forces that was established by Award 298.
>
> (Emphasis added.)

On the basis of statements such as these, there was no reason for PEB 229 or the Union to have any thought that the NCCC considered rest day meal allowances to be travel allowances.

PEB 229, whose recommendations determined the basic framework of the 1996 National Agreement, clearly did not consider the meal allowances provided by or derived from Award 298 to be in any way a travel allowance. That seems clear from the Board's recommendation that Award 298 "be amended to provide for a travel allowance" and its separate recommendation to increase the amount of the meal allowance under Award 298, which it certainly was aware was provided seven days per week including rest days. Moreover, PEB 229 undoubtedly was mindful of the general rule against duplication of benefits -- which was included in BMWE's proposal -- as shown by its recommendation that where expenses away from home are not determined by Award 298, the Union was to be given "the option of selecting the below set forth travel allowance or retaining the travel allowance options that may be provided under their local agreements". In

context, it is evident that PEB 229 did not consider the meal allowances paid under Award 298 to be any form of travel allowance and that this was entirely consistent with the parties' presentations to the Board.

BNSF argues, however, that Section 4 of Article XIV which is at issue here was not included in PEB 229's recommendation, but was subsequently negotiated by the parties as part of the 1996 National Agreement. It also stresses that Section 4 refers not just to travel allowances but to "rules or practices pertaining to travel allowances". Taking into account the history leading up to the negotiation of Article XIV, this Board is not persuaded, however, that the inclusion of "practices" or the use of the words "pertaining to" serve to broaden the scope of this clause to encompass rest day meal allowance payments that possibly could be used by an employe to offset part of the cost of travel home on rest days. In this Board's opinion, the phrase "rules or practices pertaining to travel allowances" in Section 4 is not materially different to PEB 229's reference to "travel allowance options that may be provided under ... local agreements".

Section 4 also has to be read in the context of the rest of Article XIV. When the parties negotiated that article of the 1996 National Agreement they adopted verbatim the travel allowance provided for in PEB 229, except for the last sentence of Section 2 relating to the air transportation option. In that sentence, the parties agreed:

> Irrespective of the customary meal and lodging entitlement that employees have under their local agreements, when employees elect the air transportation option, they shall be entitled to meals and lodging during the two away-from-home weekends in the three-week

> cycle and they shall not be entitled to meals and lodging during the third weekend upon which they return home by air transportation.
>
> (Emphasis added.)

This provision, as the Union explained, involved a trade-off. Employes who otherwise receive only five-day meal and lodging per diems under their local agreement are to receive such per diems on the two away-from-home weekends, and employes who otherwise receive seven-day meal and lodging per diems under their local agreement are not to receive those per diems on the third weekend when they travel home by air transportation.

The last sentence of Section 2 as negotiated by the parties establishes an exception to the normal application of "customary meal and lodging entitlement that employes have under their local agreements". It provides that employes, such as those covered by the 1982 BN Local Agreement, who normally receive a seven-day per week per diem meal allowance as provided for in Award 298 will not receive that per diem on travel weekends if they elect the air transportation option. If the parties had considered the reference to "rules or practices pertaining to travel allowances" in Section 4 to encompass rest day meal allowances provided for in Award 298 and its progeny, such as Rule 38, there would have been no reason to have negotiated the last sentence of Section 2 as an exception to local rules or practices relating to weekend meal or lodging allowances that would be abrogated in their entirety under Section 4.

The Carrier argues that pyramiding forbidden by Section 2 cannot rationally be allowed under Section 1. If the NCCC believed that to be the case, however, it is difficult to comprehend why it did not seek to have a similar provision added

to Section 1, which sets forth the mileage travel allowance which PEB 229 recommended be added to Award 298.

In its reply statement in this arbitration proceeding, the Carrier cites (at page 15) a passage from Corbin on Contracts which begins:

> The meaning [of words used in a contract] to be discovered and applied is that which each party had reason to know would be given to the words by the other party.

Applied to Section 4 of Article XIV it is fair to conclude on the present record that the Carrier had reason to know that the Union would not consider the words "rules or practices pertaining to travel allowances" to apply to rest day meal allowances provided under Rule 38F and 38G, and that the Union did not have reason to know that the Carrier would give such meaning to those words.

Finally, there has been no showing that employes who receive both meal allowance per diems on rest days and a mileage travel allowance under Section 1 of Article XIV are receiving an undeserved windfall or double payment for the same expense. The seven-day per week meal allowance is just that, a liquidated payment to help defray the cost of meals during a week in which the employe works away from home, no matter how many meals the employe actually eats, how much they cost or whether some are eaten in transit.[7] The mileage travel allowance is a liquidated payment to help defray the cost of a weekend trip home, when the employe actually makes that trip, no matter how the employe chooses to travel or at what actual cost, if any. While it would

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[7]Employes are penalized, however, if they are voluntarily absent from work on the day before or day after their rest days by loss of the rest days meal allowance.

not have been illogical for the parties to have agreed that the employe should receive only one of these two benefits in the same week, as they did in Section 2, the evidence does not establish that a combination of these two benefits in a single week results in unjust enrichment of the employe or otherwise is unreasonable.[8]

For these reasons, the Board concludes that the Carrier violated Rule 38F and 38G of the 1982 BN Local Agreement when it failed to pay rest day meal allowances thereunder to eligible employes on the sole basis that they received a travel allowance under Section 1 of Article XIV of the National Agreement.

The Board is not persuaded by the Carrier's argument that the general claim filed on December 16, 1996 on behalf of "all members" who were denied their weekend per diem when they received a travel allowance, or the subsequent claim filed on behalf of gang TP-02, were improperly filed. The Carrier acknowledges that it can readily identify those employes who received a travel allowance. It claims, however, that it is not so easy to determine which of them may not be eligible for rest day meal allowances because they were voluntarily absent on the day before or the day after the rest days. In this day of computerized payroll and other records it does not seem that this task should be that formidable. Even if it involves the expenditure of some additional time and effort by the Carrier, it is difficult to believe that this is less than what would have

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[8]Moreover, there are, of course, differences between the travel allowances provided in Sections 1 and 2. Air travel of at least 400 miles is undoubtedly much shorter in duration than ground transportation to the same location, and the employer pays not merely an allowance, but the full cost of air transportation. Moreover, the Union obtained a quid pro quo in Section 2 for employees who normally do not receive rest day meal allowances under their local agreement.

been required if every time employes were denied rest day meal allowances they filed separate claims that had to be individually processed by the parties. Moreover, the Carrier assured the federal district court:

> If it is ultimately decided that we are wrong in our contract interpretations and that the union is right, the arbitrator will be able to fashion a remedy that makes the union members whole for any losses they may have sustained or any payments to which they are entitled and they have been withheld, so there is not anything lacking in the arsenal that an arbitrator will have available at his disposal. He can make the union and the union members absolutely whole if in the end it is determined that their position in these contract interpretations is the correct position on the merits.

The Union, however, is obliged to work jointly with the Carrier in determining which employes are entitled to be made whole.

As remedy, the Carrier is to make the affected employes whole. In the court proceedings, the parties stipulated that the arbitrator would have authority in fashioning an appropriate compensatory remedy in this case to award interest which takes account of the delay in the employes receiving the meal allowances they are entitled to. Awarding interest in this context is not any sort of penalty against the Carrier, which in the interim has had the use of the monies involved. Although not generally awarded in labor arbitration, the payment of interest does serve to help make the employes whole for not having received the payments when they were contractually entitled to them. Accordingly, the Board includes payment of interest at the judicial rate in its award, but only for the period after June 17, 1997, the date on which the federal district court granted a preliminary injunction against the Union striking over the

substantive issue in dispute in this case. While the Union previously had submitted the grievance claims now before this Board, it seems apparent that the Union was not going to take steps to expedite their resolution through arbitration while it was still pursuing its asserted right to strike over this issue. Therefore, the Board believes it would not be appropriate to award interest for the period prior to June 17, 1997. Although there was some additional delay thereafter before agreement was reached to establish this special Board of Adjustment on December 5, 1997, the record does not clearly establish that this delay was attributable to the Union.

## AWARD

The claims are sustained. Affected employes are to be made whole for meal allowance payments improperly denied to them, together with interest at the judicial rate for the period after June 17, 1997.

## SPECIAL BOARD OF ADJUSTMENT NO. 1100

Shyam Das 7/6/98
Shyam Das, Neutral Member

Steven V. Powers
Steven V. Powers
Employe Member

Dennis J. Merrell
Dennis J. Merrell
Carrier Member

Written dissent to follow.
DJM

**SPECIAL BOARD OF ADJUSTMENT NO. 1100, AWARD #1**

**DISSENT**

I write to express my separate views to make clear, for future cases, that while this panel has misapplied basic principles relating to "class" grievances that are well understood and uniformly accepted by arbitrators familiar with the railroad industry, this panel nonetheless does not challenge the basic principles themselves. Thus, the decision in this case depends on the unique facts of the case and is not a precedent for future cases.

**I. "Class" Claims**

It is well settled in this industry that employee grievances must present enough information about a claim to allow the employer to assess its validity on the face of the claim. The employer is not required to devote any resources to developing claims for the employees. This means the claim must identify the claimant, the dates on which he claims his contractual rights were violated, and the facts that establish the alleged violation. "Blanket" claims that purport to cover groups or "classes" of unidentified individuals are *per se* improper. *See, e.g.*, Award No. 26256, NRAB Third Div. (Carrier App. Tab 42) *at* 2 (rejecting claim on behalf of "all members of the Local"); Award No. 24440, NRAB Third Div. (Carrier App. Tab 43) *at* 5 (dismissing claim on behalf of unnamed claimants); Award No. 11897, NRAB Third Div. (Carrier App. Tab 44) *at* 39-40 (same).

This case concerns three claims. One is on behalf of named individuals, states the dates for which the claim is made, and states the facts constituting the alleged violation of their rights. That claim was properly presented.

The second claim, by contrast, is on behalf of "all members" of a particular gang, TP-02, for the duration of an entire work season, and the third is on behalf of "all members" who "were compensated for their Travel Home Allowance per Article XIV" and also claim rest day allowances under Rule 38g on days they traveled home. These were improper "class claims."

The panel has nonetheless sustained these claims, under the misapprehension that BNSF merely has to push a button and its computers will "readily identify" all employees who, during a

period of nearly two years, (1) received a so-called Travel-Home Allowance on particular rest days, (2) did not receive rest-day allowances for the same days, and (3) are entitled to such allowances under Rule 38(g) (i.e., were not voluntarily absent on the work day before and the work day after the rest days in question.) *Award and Opinion at* 30-31. No evidence was offered in these proceedings to support the notion that these un-named persons can be readily or accurately identified. The parties are about to discover just how difficult it will be to identify the claimants here, as they wade through thousands of employee records (many of them hand-written) looking for those that may be relevant to these claims. My primary point, however, is that while the panel erred in its application of the rule to the facts of this case, it does not challenge the basic requirement that a claim under Section 3 must have sufficient detail to permit ready identification of each claimant and the factual basis for the claim on each occasion for which claim is made.

## II. Interest

It is clear the Board awarded interest in this case in light of statements the Carrier made at the arbitration hearing and in a preceding court hearing, "for purposes of this arbitration only BNSF does not contest that this Board has the *power* to award interest." BNSF Br. *at* 22 (emphasis in original). Nevertheless, it must be emphasized that neither that limited stipulation or this Board's opinion based on that limited stipulation can be considered as precedent for payment of interest in any other dispute or a Carrier concession of any kind as to the appropriateness of awards of interest in future cases. Indeed, the Board recognizes that interest is "not generally awarded in labor arbitration." *Award and Opinion at* 31.

In short with respect to the interest issue, as with "class" grievances, this arbitration award is limited to this case only.

## III. Merits

My discussion of these two points should not, of course, be taken as agreement with the panel's decision on the merits. It baffles me how this panel could conclude that the rest day allowance for employees who travel home established by Award 298 is not a "travel allowance."

As contemporaneous notes show, the Chairman of Board 298 stated to the partisan members in executive session that payment of the allowance on rest days would serve to compensate the men in part for the expense of travel home and would serve as "reimbursement toward the cost of getting home." Immediately afterward, the President of the BMWE circulated a memorandum through the industry which he said was "derived for the most part from discussions in executive session," in which he stated that the rest day allowance for employees traveling home "was considered by the Board to be a partial payment for the expenses of making weekend or holiday trips to their homes."

It is beyond me how anyone could conclude that there is no need to consider this "extrinsic evidence," which shows *why* these rest day payments are required, on the grounds that the language of the rule is not ambiguous as to the amount of the payments or when they are to be made. It appears that the Board rests its Opinion on "plain language" tautologies that prove nothing, instead of looking to the actual proven intent behind the provision. The disputed payments were intended as "reimbursement for the cost of getting home," *i.e.*, a travel allowance, and therefore were abrogated by Section 4 of Article XIV of the 1996 national agreement.

Although I regard this panel's decision on the merits to be inexplicable, however, I would not express my disagreement were it not for the need to make it clear just what this decision does and does not hold with respect to "class" grievances and future awards of interest. In the end, the Board's Opinion leaves no doubt as to the continuing vitality of the settled and fundamental rules on those subjects in this industry.

Dennis J. Merrell 8/28/98
Carrier Member

LABOR MEMBER'S RESPONSE
TO CARRIER MEMBER'S DISSENT
TO
AWARD NO. 1 OF SPECIAL BOARD OF ADJUSTMENT NO. 1100
(Referee Das)

In a transparent effort to blunt the precedential value of the well-reasoned Opinion of the Neutral Member, the Carrier Member has misstated basic principles and precedent as well as the facts of record in this case. If future readers accept the inexorable logic that the precedential value of an award is proportionate to the clarity of reasoning in the award, then Award No. 1 of SBA No. 1100 will indeed carry powerful precedential value. The fact is, that this was a straightforward contract interpretation case and there was nothing unique about the facts of the case or the principles employed in deciding the case that would undermine the precedential value of this carefully reasoned award. Indeed, with respect to the principles employed in deciding the "class claims" issue and interpreting the disputed contract language, Award No. 1 is entirely consistent with prevailing precedent. On the issue of awarding interest on the back pay, the Opinion of the Neutral Member is consistent with not only the holdings of the Supreme Court of the United States but with an emerging line of precedent and academic discourse which supports awarding prejudgement interest in labor arbitration cases.

## I. Class Claims

The Carrier Member's position on "class claims" is confusing at best. Employes are entitled to receive the benefits of the CBA by virtue of the positions they hold, not by virtue of their personal identities. Consequently, since the inception of the standard claim and grievance rule in the railroad industry (Article V of the 1954 National Agreement), it has consistently been held that it is not necessary to identify individual claimants by name. Indeed, in National Disputes Committee Decision No. 4, the parties themselves agreed that it was not necessary to identify claimants by name. In addition, see NRAB Third Division Awards 1835, 3251, 4488, 5078, 7859, 7915, 8526, 9566, 10379, 10801, 12299, 29578 and 31373 which represent the overwhelmingly dominate precedent on this issue and clearly support the Neutral Member's determination with respect to "class claims".

Even more disturbing for the long range relationship of the parties is the Carrier Member's misguided assertion that the employer is not required to devote any resources to developing claims for the employes. Collective bargaining and arbitration are not games of hide the ball. Hence, it has frequently been held that once a prima facie violation has been established, neither party may frustrate the intent or application of the CBA by withholding information in its possession. Typical of the precedent on this issue is NRAB Third Division Award 18447 which held:

> "We reaffirm the principle that Carrier is not required by agreement or otherwise to make available its records to a collective bargaining agent bent on a fishing expedition looking for information from which it might develop claims. But, after a claim has been filed, which contains in its content the procedurally indispens-

"able substance, Carrier acts at its peril if it fails or refuses to adduce its records which contain material and relevant evidence. To hold otherwise would be destructive of the Congressional intent expressed in the Preamble and Section 2. First and Second; and, Section 3 of the Railway Labor Act.

* * *

***** Further, a holding that this Board is without jurisdiction to order Carrier to produce its records to make certain 'dates and amount of time,' which are the gravamen in remedying the continuing violative conduct, would have the effect of absolving Carrier from its statutory duty to 'maintain agreements' which is imposed by law. Section 2. First of the Act. We find that the continuing claim is well pleaded and that this Board has jurisdiction to order Carrier to produce its records containing material and relevant evidence to fix dates and extent of violations within the ambit of the pleaded continuing violations."** (Emphasis added)

Perhaps the only point more disturbing than the Carrier Member's misunderstanding of the carrier's obligations under the Railway Labor Act (RLA) is the absence of moral foundation in his position. Once the Neutral Member found that the Agreement had been violated, the inescapable conclusion was that BNSF was holding money which rightfully belonged to the employes. Even a schoolboy knows that when you come into possession of something that is not yours, you should make every attempt to find the rightful owner. One can only wonder whether BNSF has the same view of its moral obligation to its customers and stockholders that it does to its employes. If it does, pity the customer who is inadvertently overcharged or the stockholder whose dividend is improperly withheld because BNSF apparently does not believe it has a moral obligation to assert any effort to identify such parties so that improperly held money can be returned to its rightful owner.

Finally, it should be noted that the class claims issue is hardly a matter of first impression on this carrier. In a case strikingly similar to this case, BN shortchanged an entire class of traveling employes on their away from home expenses beginning July 29, 1991. Following a one day strike and court ordered expedited arbitration, the arbitrator sustained the BMWE's claims that were filed for the general class of "... all Maintenance of Way Employes who received or were eligible to receive Away From Home Expenses...." beginning July 29, 1991 (unnumbered award rendered by Robert McAllister dated February 4, 1994). The arbitrator not only required BN to compute the back pay for the broadly stated class of employes eligible to receive away from home expenses, but ordered the back pay to be computed and paid within 90 days. Consequently, it is clear that the class claim remedy in Award No. 1 of SBA No. 1100 is consistent not only with general precedent in the railroad industry, but specific precedent on the BNSF property.

## II. Interest

While it is difficult to say that any one section of the Carrier Member's dissent is more misleading than any other, his argument on interest is perhaps the most misleading. The Labor Member agrees that the Board's award of interest in this case was related to statements made in district court. However, those statements were not restricted to this case or even this carrier but went much more broadly to the jurisdiction of arbitration boards established under Section 3 of the RLA. The district court case in question involved BMWE and several of the nation's major freight railroads. A fair reading of the transcript of the court proceedings (see Pages 182-185 — copy enclosed as Attachment "A") shows that the attorneys for the multiple carriers, BMWE's attorney and the judge were all in agreement that if BMWE was successful in arbitration, the Section 3 arbitrator would have the authority in fashioning an appropriate compensatory remedy to award interest on the basis of the delay in payments due to the employes. That authority was not dependant on any special facts in this case, the parties to the case or the multiple CBA's in effect between BMWE and those parties, but was instead found in the RLA itself as interpreted by no less an authority than the Supreme Court in *Consolidated Rail*, 491 U.S. 299.

While the Carrier Member is quick to point out the Board's recognition that interest is not generally awarded in labor arbitration, he overlooks the reason for that fact and the evolving trend to the contrary. In *Atlantic Southwest Airlines, Inc.*, 101 LA 515, 525-26 (Nolan 1993), Arbitrator Nolan noted the developing trend and the reasons for this development:

> **"In virtually all other forums - courts and administrative agencies - a prevailing party routinely receives interest on delayed payments. That is a matter of simple justice: getting a sum a year late does not make the recipient whole. Interest is the normal way to compensate the injured party for delayed payment. Interest awards are relatively unusual in labor arbitration, apparently only because parties seldom seek them. Marvin F. Hill, Jr. and Anthony V. Sinicropi, *Remedies in Arbitration* 450 (BNA, 2nd Edition, 1991). There is no logical reason why labor arbitration remedies should differ from those applied, for example, by the National Labor Relations Board.**
>
> * * *
>
> **[I]nterest awards are only relatively unusual. They are by no means startling. In fact, they are becoming more common as more unions seek them. At the very least, the propriety of an award of interest is a suitable matter for consideration on a case-by-case basis. Not even the company members claim that an interest award would exceed the Arbitration Board's authority. So long as interest is not used as a means of punishing the employer, there**

> **"is nothing improper about it. That interest awards are relatively rare says nothing about their appropriateness.**
>
> **The Company Members' third point is that recovering lost pay and seniority fully compensates the Grievant. The point would be well taken if money had no time value. If getting money in 1993 had the same value as getting it in 1992, there would be no need for interest. Of course, money does carry a time value. At the very least, inflation whittles away at the dollar's worth; to give the Grievant the full value of what she was due, more is required than payment of the same nominal amount a year or more later. The additional amount needed is called interest. Without it, she would be worse off than if the Company had not breached the Agreement."** (Emphasis in bold added)

Arbitrator Nolan is hardly alone. Professor Carlton Snow reflected on the evolving community standard awarding interest in his paper presented to the 48th Annual Meeting of the National Academy of Arbitrators and noted the sound reasons supporting that trend:

> "Another make-whole remedy sometimes used by arbitrators is the use of interest, most often for a back-pay award. 'Interest is the sum paid or payable for the use or detention of money.' Interest on an award is a remedy made not so much to protect the expectation of or reliance on interest as much as it is awarded on a restitutionary theory of recovery. Such a remedy is designed to prevent unjust enrichment by a contract violator at the expense of an injured party. The objective is to require a contract violator to disgorge a gain realized because of the contract violation." [Snow, Make-Whole and Statutory Remedies, 188-89 Proceedings of 48th Annual Meeting of NAA (BNA 1995)]

Other leading Arbitrators in the area of remedies confirm that '[A] contrary trend appears to be surfacing....' in opposition to the out dated 'it's not done' position. Hill, Traditional and Innovative Remedies in Arbitration: Punitive Awards, Interest, and Conditional Remedies, 11 Whittier L. Rev. 621, (1989) (discussing interest granted in arbitration awards). '[I]nterest has been awarded in a fair number of cases....' Elkouri & Elkouri, How Arbitration Works, 5th Edition 591 (ABA 1997). '[I]nterest is a natural consequence of the denied salary, is necessary to truly make the employee whole, and should be awarded. Courts routinely grant interest on improperly withheld sums.' Zack & Bloch, Labor Agreement in Negotiation and Arbitration, 2nd Edition 266 (BNA 1995).

In short, with respect to the awarding of interest, this arbitration award is not only well reasoned, but consistent with the Board's jurisdiction under the law and the evolving trend of awarding interest in labor arbitration cases. Consequently, there is no reason that this award should not be considered as sound authority on the issue of interest. Making the employes whole required interest to be awarded just as it will require interest in many future cases.

## III. Merits

The Carrier Member raises disingenuity to new heights when he asserts that he was "baffle[d]" by the purportedly "inexplicable" decision on the merits. What is inexplicable and baffling is that BNSF had the temerity to assert that the plainly worded Award 298 meal allowance, which was triggered by the carrier's failure to provide meals, could be confused with a travel allowance. Humpty Dumpty would be right at home on BNSF: "When I use a word," he told Alice, "it means just what I choose it to mean— neither more or less." Only in Wonderland — or at BNSF — could "meal allowance" be taken to mean "travel allowance". In the real world, there is nothing tautological about saying a meal allowance is a meal allowance and not a travel allowance. Moreover, in his shameless attempt to undermine the precedential value of the instant award by discrediting the well-reasoned Opinion of the Board, the Carrier Member conveniently fails to mention that Board 298 explicitly stated that it was not providing a travel home allowance and that **BNSF itself repeatedly told Presidential Emergency Board No. 229, in writing, that Award 298 did NOT provide for a travel home allowance.** Apparently, in BNSF's Wonderland, "meal allowance" meant meal allowance when it testified before PEB 229 and negotiated with BMWE and only meant "travel allowance" after the fact when it was looking for an excuse to hedge on the Article XIV travel allowance it owed to its employes. The only point that is baffling or inexplicable in this case is that BNSF had the temerity to adopt such a position in the first place and the audacity to attack the Board's Opinion for refusing to give any credence to that position.

Award No. 1 of SBA 1100 could hardly have been reasoned or written more clearly. Hence, it stands as sound authority supporting the contractual, legal and practical virtues of class claims as vehicles for enforcing collective bargaining agreements and making employes whole for wholesale violations. Similarly, the Board's Opinion on interest is consistent with the RLA and adds to the well-reasoned volume of precedent that is emerging on this issue.

Respectfully submitted,

Steven V. Powers

Steven V. Powers
Labor Member

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MR. EDELMAN: That's right, but if we do prevail before the arbitrator they ought to be able to post bond.

THE COURT: Mr. Lapham. This is always a most interesting facet of an injunction.

MR. LAPHAM: Your Honor, I didn't think this was anything apart to say from what you said. This case is now on its way to arbitration. If they prevail there they will be made entirely whole. Nobody will have lost any payments, and if they do not prevail, then they obviously haven't suffered loss anyway, so either way the arbitration goes there is no reason here for anything more than a nominal bond.

THE COURT: So this is how it works. We go zero to $10 million a week and we have to negotiate from there.

Well, I am having a hard time seeing how a wrongful injunction -- such damage is not to exceed said sum as may be sustained by anyone who is found to be wrongfully enjoined.

How do you answer my analysis that, and I think you agreed with it, that if you prevail before the arbitrator, you will be made whole?

MR. EDELMAN: Your Honor --

THE COURT: You will get what you are entitled to before the arbitrator. If you don't, you haven't suffered any damages.

MR. EDELMAN: Your Honor, if we prevail right now we have employees who are being denied this for months and months

and months and months. This is money out of their pockets ove this period of time. Not to mention you don't normally get interest in an arbitration award either.

THE COURT: So it would be a factor of interest on an arbitration award.

MR. EDELMAN: That would be part of it, but I think that the carriers are holding money that belongs to the employees, your Honor.

THE COURT: Well, how would you figure interest upon an arbitration award? What do you expect to get from the arbitrator?

MR. EDELMAN: We would expect to get an award of back pay, your Honor. At the judicial rate would be fine.

THE COURT: Of about 10 million a week.

MR. EDELMAN: I am sorry. My math. I am advised by my people that's a million a week.

THE COURT: Thank you. It's nice to find somebody whose math is worse than mine.

MR. EDELMAN: Don't tell my son, please.

THE COURT: What about interest, Mr. Lapham? I mean if --

MR. LAPHAM: I haven't re-read Conrail the last few days, but I believe there is a -- I believe what it says is that an adjustment board can take delay into account in making any payments found to be owed to employees, so at least as I

read that, or as I remember that, the arbitration board ought to be able to take into account in fashioning its remedy, assuming the union prevails in the arbitration, the fact that these payments that may have been withheld in the meantime will have been delayed by the time that they reach the employees, and build that delay into the award itself in the form of I suppose an interest payment. I am not exactly sure about that.

THE COURT: Well, I have it here. I have been reading it since last -- over and over since last week.

MR. LAPHAM: The language that I was referring to, your Honor, is on page 491 U.S. 310, in the footnote at the bottom of that page.

THE COURT: Give me a footnote number, would you.

MR. LAPHAM: Yes. It's footnote 7 which begins on page 309 and continues to 310.

THE COURT: I have it. Let me look at it. The copy I have the typing is blurred. It's footnote 8 at the bottom of 310.

Okay. Now I have it. In most cases where the board determines that the employer's conduct was not justified by the contract, the board would be able to fashion an appropriate compensatory remedy which takes account of the delay.

Let's read it all. There may be some circumstances, however, where the delay inherent in permitting the board to consider the matter in the first instance will lead to remedial

difficulties. That doesn't say they can't fix it. I think th board can make you whole. I really think we are looking at a nominal bond without some persuasive --

MR. EDELMAN: If the Court -- part of the Court's analysis that the arbitrator can provide us with interest, the we will accede to the nominal bond.

THE COURT: Okay.

MR. EDELMAN: I have one other request, or perhaps it ought to be in the form of motion in this regard, your Honor, and that is that the Court condition the injunction on an expedited arbitration under a special board of adjustment procedure. The process before the NARB is woefully slow. Thi is a significant issue to many people as we have shown.

We submit that this case needs to be expedited, put i front of a special board of adjustment. There is a procedure under the statute to handle it that way to be done in a national manner, your Honor, a single arbitration since they are talking about the term of this agreement, and in particula I have a concern about a Burlington Northern case, BMWE v. Burlington Northern, 24 F.3d 937 in which the assertion was made that after the union won an arbitration, that that decision applied to just the individual employees involved on small stretch of track, and I don't want to see something like that happen here.

And I think the Court -- it's well established that