NATIONAL MEDIATION BOARD
ARBITRATION BOARD NO. 1114
ARBITRATION OPINION AND AWARD
RICHARD R. KASHER, ARBITRATOR
JUNE 20, 1999

In the Matter of an Arbitration Between

NATIONAL CARRIERS' CONFERENCE COMMITTEE

and

THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Appearances

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Introduction

As the result of recommendations made to the President of the United States, pursuant to Section 10 of the Railway Labor Act, by Presidential Emergency Board No. 229 (hereinafter "PEB 229"), the National Carriers' Conference Committee (hereinafter the "Carriers" or the "NCCC") and the Brotherhood of Maintenance of Way Employes (hereinafter the "BMWE" or the "Organization") resumed collective bargaining agreement negotiations in June and July, 1996. Subsequently the parties executed what has become known as the September 26, 1996 National Agreement (hereinafter the "Agreement").

The Agreement provides, in relevant part, in Article XIV, Section 1(a) as follows:

> **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.**

Article XIV also includes a schedule of travel allowance payments based upon distances eligible employees were required to travel from their homes to their initial reporting locations.

The instant dispute arose when the BMWE contended that the Carriers were failing to pay travel allowances to certain employees whom the Organization contended met the

"eligibility" definition contained in the above-quoted Section of Article XIV.

As will be more fully discussed below, the Carriers maintained that Article XIV Travel Allowances only applied to employees on "regional and system type gangs".

The dispute between the parties resulted in a work stoppage by the BMWE. Injunctive proceedings ensued, and the parties engaged in litigation before the United States District Court for the Central District of Illinois and the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit decided that the issue was a "minor dispute" as that term has been interpreted and understood in the parlance of the Railway Labor Act.

On November 9, 1998 as the result of this decision by the Seventh Circuit, the parties established this Board, Special Board of Adjustment No. 1114 (hereinafter the "Board"), to arbitrate the issue regarding the proper interpretation of Article XIV.

The BMWE and the NCCC viewed the "question at issue" before the Board somewhat differently, and thus attached the following to their agreement to arbitrate:

CARRIERS' STATEMENT OF QUESTION AT ISSUE

Article XIV of the September 26, 1996 National Agreement between the Brotherhood of Maintenance of Way Employes and the railroads represented by the National Carriers' Conference Committee provides a schedule of travel allowances to certain maintenance-of-way employees who are described in Section 1(a) of Article XIV as follows:

> **"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. ..."**

To which employees does this provision apply?

ORGANIZATION'S STATEMENT OF QUESTION AT ISSUE

Do the travel allowance benefits of Article XIV of the September 26, 1996 National Agreement apply to all traveling employes or are those benefits restricted in their application to only employes on regional and system gangs?

The agreement establishing the Board provided for the exchange of submissions and rebuttal submissions and for a hearing before the sole and neutral member of the Board.

Submissions and rebuttal submissions were exchanged and the Board conducted a hearing in Sarasota, Florida on April 27, 1999. At said hearing the parties were afforded a full opportunity to present oral argument and additional documentary evidence in support of their respective positions.

Background Facts

In 1991, as the result of recommendations by Presidential Emergency Board No. 219 which recommendations were then converted into a settlement by the Congress of the United States on April 17, 1991, the Carriers were

given the contractual right to establish regional or system-wide production gangs, which gangs geographic work jurisdictions spanned two or more seniority districts.

Employees who worked on these gangs became entitled to increased travel/lodging benefits as the quid pro quo for their having to travel greater distances from their homes.

The establishment of these regional and system-wide production gangs caused the Organization concern regarding what it considered to be burdensome life style impacts upon the members of the craft or class it represented; and a number of disputes generated as a result.

On November 1, 1994 the Carriers and the BMWE exchanged Section 6 Notices in accordance with the provisions of the Railway Labor Act. When the parties were unable to settle their bargaining differences directly, the President of the United States appointed PEB 229 to investigate the dispute and make recommendations for its resolution. The issue of travel allowances was a significant one, and the Organization made the following proposal to PEB 229 regarding weekend travel provisions, which proposal reads, in relevant part, as follows:

I. HOME STATION

A. The Carrier Shall Designate A Home Station For Each Employe. Such Station Must Be A Point In The Town, City Or Major Railroad Facility (Freight Yard Or Station) Located On The Line Of The Railroad Nearest To The Employe's Residence.

* * *

III. TRAVEL TIME AND MILEAGE

A. Employes Who Are Required To Work Away From Their Home Station And Required To Travel Outside Of Regular Hours Shall Be Compensated At The Rate Of 2 Minutes' Straight Time Pay Per Mile For The Following Travel Time:

1. All time expended traveling between an employe's home station and the lodging facility at the employe's away from home work location.

2. All time expended traveling between the lodging facility for an away from home work location and the lodging facility for a new away from home work location.

3. All time expended traveling between the lodging facility for an away from home work location and the employe's home station.

* * *

C. An Employe Who Uses His Personal Vehicle To Travel In Connection With Section III A Or B Above Shall Be Reimbursed Therefor At The Standard Mileage Rate For The Cost Of Operating An Automobile (Currently 31 Cents Per Mile) As Published By The Internal Revenue Service.

During the course of its presentation to PEB 229 and in support of its proposal for increased travel allowance benefits, the BMWE focused upon regional and system-wide production gangs and frequently used examples of how members of these gangs were required to travel long distances from their homes to work.

In their presentation to PEB 229 the Carriers contended that the BMWE's arguments regarding travel required of regional and system-wide production gangs and the Organization's proposals seeking increased travel allowance benefits for members of such gangs would amount to the de facto elimination of regional and system-wide production gangs. The Carriers pointed out to PEB 229 that several arbitrators, who heard disputes between the BMWE and member Carriers since the recommendations of PEB 219 had been imposed, had considered and rejected the BMWE's arguments concerning "undue burdens" placed upon regional and system-wide production gangs.

The Carriers' witnesses before PEB 229 argued that the BMWE's travel expense proposals were "just another attempt to do away with system and regional gangs", as the Carriers contended that the proposals would render these gangs "prohibitively costly".

The Report of PEB 229 was issued on June 23, 1996. In its report PEB 229 described its understanding of the parties' "contentions" regarding each of the issues in dispute. On page 34 of its report PEB 229 recommended as follows regarding travel allowances:

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:

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**

Additional $25.00 payments for each hundred mile increments.

It was on the basis of this recommendation that the parties agreed upon the provisions found in Article XIV quoted above. A comparison of the language in PEB 229's recommendation regarding travel allowances and the Agreement language in dispute reflects that they are virtually identical.

Position of the Organization

The Organization contends that Section 1 of Article XIV expressly provides a travel allowance for all employees who travel between their homes and varying successive work locations at the beginning and end of their work weeks. The Organization views this Section of the agreement as applicable to all "traveling employees". The Organization maintains that there is no language in Article XIV which

limits or restricts its application to employees on regional or system-type gangs.

The Organization contends that the Carriers, faced with the "complete and utter absence of contract support for their position", have relied upon "selective bargaining history" in an attempt to add limitations to Article XIV, which limitations do not appear in that provision.

The Organization points out that in a collateral arbitration, in which the record of the litigation in this case was in evidence, Arbitrator Richard Mittenthal concluded that PEB 229 recommended and the parties adopted ". . . a new mileage-based travel allowance for all mobile employes including those on regional or system-wide gangs."

The Organization further contends that even if the parol evidence rule is disregarded and, in spite of the clear language of Article XIV, the Arbitrator considers bargaining history, the bargaining history upon which the Carriers rely is not relevant nor is it proximate to the execution of Article XIV.

The BMWE acknowledges that the parties "lifted language virtually verbatim from the PEB 229 Report to craft Article XIV". However, the Organization maintains

that during the extensive negotiating sessions regarding travel allowances the Carriers did not at any time "even hint" that they believed that Article XIV was limited in its application to regional and system-wide production gangs. The Organization argues that, if the Carriers had a good faith belief that Article XIV meant something other than what was plainly proposed, the Carriers were obligated to communicate that fact to the BMWE during the thirty day bargaining period.

Additionally, the BMWE submits that the record which was before PEB 229 does not support the Carriers' position. The Organization points out that its Section 6 Notices, its final offer proposal and the oral presentations the Organization made to PEB 229 all sought weekend travel benefits for all traveling employees; and that these proposals were made in clear and unmistakable terms. The Organization argues that merely because it expressed particular concern regarding regional and system-wide production gangs does not suggest that the BMWE disclaimed its interest in or demands on behalf of all traveling employees.

The BMWE further contends that a review of the Carriers' written and oral presentations demonstrates that the Carriers clearly understood that the Organization's travel allowance proposal sought travel allowance benefits for all traveling employees.

The BMWE maintains that the Carriers misconstrue the intentions of PEB 229 when they argue that PEB 229 intended to limit the travel allowance benefits to members of regional and system-wide production gangs. In support of this contention the Organization points out that PEB 229, in the opening sentence of its travel allowance recommendation, wrote "We recommend that the award of Arbitration Board No. 298 be amended to provide for a travel allowance for employes who are employed in the maintenance of way crafts who regularly are required throughout the work week to live away from home." The Organization submits that this language clearly demonstrates PEB 229's intent to provide travel allowances to all maintenance of way employees who are regularly required throughout the work week to live away from home, i.e., all traveling employees.

The Organization suggests that, even if the Carriers could "overcome the hurdles" created by (1) the plain language of Article XIV, (2) the proximate bargaining history, (3) the Organization's presentations to PEB 229 and the Carriers' rebuttal presentations and (4) the plain language of PEB 229's travel allowance recommendations, the Carriers would be confronted by the fact that their position leads to "absurd and nonsensical results". The BMWE points out that railroad mergers and rapidly evolving railroad equipment technology have combined to create a constant demand for larger geographical work territories; and that an employee on a district mobile gang and an employee on a regional gang could perform precisely the same type of work within similarly-sized geographic territories, each traveling the same distance home on weekends, and only the regional gang employee would be entitled to receive the Article XIV travel allowance. Such a result, in the Organization's opinion, is contrary to the language of Article XIV and could not have been the intention of PEB 229 or the negotiators of Article XIV.

Based upon the foregoing facts and arguments, the Organization submits that the issue should be decided in favor of the BMWE.

Position of the Carriers

The Carriers contend that the language chosen by PEB 229 and incorporated in Article XIV, Section 1 of the Agreement best describes employees who work on regional and system-wide production gangs.

The Carriers point out that throughout the railroad industry employees on regional and system gangs typically have a "work season" and report to an "initial reporting location" that is "hundreds of miles from their residences". The Carriers further point out that these regional and system-wide production gangs do not return home until "the end of the season"; and that regional and system gang employees regularly find themselves "hundreds of miles away from home at the end of each work week". Additionally, the Carriers point out that regional and system-wide production gangs do "programmed work", as that work is contemplated by Article XIV, Section 2. Based upon this analysis, the Carriers argue that the language of

Article XIV constitutes an "excellent description" of regional and system gangs and, therefore, identifies employees on those gangs who would be eligible for travel allowances.

The Carriers argue, by contrast, that the language of Article XIV is not a good description of local single-seniority district gangs. The Carriers point out that most of these gangs do not have work seasons, and thus do not report to an "initial reporting location" or return home at the "end of the season". Additionally, the Carriers point out that most employees on such gangs do not work in districts that are large enough for their assignments to "place them hundreds of miles away from home at the end of each work week", or, for that matter, at the end of any work week. The Carriers maintain that, because employees on district gangs do not fit PEB 229's description of employees who are eligible for travel allowances, the language of Article XIV demonstrates that they were not intended to be covered.

The Carriers contend that PEB 229, in summarizing the parties' contentions regarding travel allowances, recognized that the BMWE was complaining that maintenance

of way employees were "subsidiz[ing] the Carriers' *regional and system gangs* with staggering amounts of unpaid travel time and unreimbursed automobile expense for travel between their homes and distant work locations." (emphasis by the Carriers)

The Carriers submit that the BMWE based its entire presentation regarding travel allowances on the alleged onerous travel burdens placed upon regional and system gangs; and that the BMWE presented no evidence or claims concerning the amount of travel required of any single-seniority district gangs. The Carriers point out that the BMWE's chief spokesperson, in addressing travel allowances, explained that the "fundamental purpose" and "goal" of the Organization's travel allowance proposal was to obtain travel benefits for members of regional and system-wide production gangs. In support of this assertion, the Carriers cite the following excerpt from the BMWE's presentation to PEB 229:

> ***Here is what we are after, here is what the BMWE wants out of this [travel allowance] proposal*: We believe maintenance-of-way employees should not be required to subsidize the carriers' most productive gangs, its *regional and system gangs*, by traveling long hours without pay or travel expense to work on the gangs. (Emphasis by the Carriers)**

The Carriers submit that this background to Article XIV confirms what the language of Section 1 clearly suggests; that is, that PEB 229 described regional and system gangs when it drafted its travel allowance recommendation, and that it recommended travel allowances for regional and system gang members and gave the BMWE what it said it was "after". The Carriers contend that PEB 229, whose assignment was to develop recommendations for compromise, would have no reason to provide the BMWE more than it said it "want[ed] out of this proposal."

The Carriers maintain that, even if Article XIV was not limited to regional and system gangs, it cannot possibly be read to apply to the broad group of employees that the BMWE would prefer, i.e., "all traveling employees" who do not work out of fixed headquarters. The Carriers point out that the BMWE argued to the Seventh Circuit that the "plain" language of Article XIV provides a set of "definitional" criteria or "elements". The Carriers contend, however, that very few district gang employees meet those criteria; as the vast majority of such single-seniority district employees do not have "work seasons", many others live in districts that are much too small to

have an "initial reporting location" that is "hundreds of miles" from their residences, and that even in the larger seniority districts most district gang employees do not live more than two hundred miles from the furthest district boundary, and, therefore, could never be "hundreds of miles from home" at the end of any work week, let alone "each" work week. Accordingly, the Carriers maintain that, even if the eligibility language in Article XIV is not read as a description of regional and system gangs, it certainly cannot be read to cover "all" traveling employees.

The Carriers argue that the BMWE's reading of Article XIV *requires that it be interpreted in two inconsistent* ways simultaneously; that is, as a strict definitional provision that encompasses any employee who meets one of the listed criteria, but also as general language that includes individuals who do not meet the other listed criteria. The Carriers point out that the BMWE claims that this Board should find that Article XIV covers all traveling employees who have "initial reporting locations", but then argues that this Board should ignore the rest of the provision and find that it covers employees who do not meet any other element in the provision, such as those

employees who do not have work seasons and/or do not report at the beginning of the season or finish work at the end of the season "hundreds of miles" from their residence and/or who are not "hundreds of miles away from home" at the end of "each work week". The Carriers maintain that the BMWE "cannot have it both ways"; that is, the Organization should not be allowed to pick and choose among the criteria for eligibility for travel allowances. The Carriers contend that "under a definitional reading" only employees who meet each of Article XIV's "definitional elements" are eligible for travel allowances.

In conclusion, the Carriers submit that the BMWE is seeking to have this Board grant it a much broader benefit from Article XIV than it was able to extract from the PEB 229 process. The Carriers contend that the Organization achieved its "goal" when it persuaded PEB 229 to recommend travel allowances for regional and system gang members.

Accordingly, the Carriers request that the Board find that its interpretation of Article XIV is the correct one.

Findings and Opinion

The first inquiry to be made when contracting parties advocate conflicting interpretations of a collective bargaining agreement provision(s) is to determine whether the language in dispute is sufficiently clear and unambiguous, and, therefore, susceptible to only one reasonable interpretation.

The dispute in this case was thoroughly analyzed by the parties in detailed written submissions and oral argument. The language in dispute was carefully parsed by the Carriers in their effort to establish the intent of PEB 229. The parties joined the narrow question of whether Article XIV Travel Allowances are only payable to regional and system-wide production gangs, as advocated by the Carriers, or whether such allowances are payable to all "traveling employees" as claimed by the BMWE.

The language in dispute bears repeating here and reads as follows:

> **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.**

It is significant to note that the paragraph upon which both parties rely in support of their respective interpretations does not reference "traveling employees", or "regional and system-wide production gangs", or "regional gangs", or "system gangs", or "mobile gangs", or "single-seniority district gangs", or, for that matter "gangs". The language only speaks to "employees".

Standing alone the reference to "employees" tends to support the position advocated by the BMWE; that is, the language in Article XIV covers maintenance of way employees in general who travel the distances specified in the payment schedule, and is not restricted to those members of the craft or class who are assigned to regional and system-wide production gangs.

A lay person, not familiar with railroad industry maintenance of way jargon or terms of art, would justifiably conclude from reading Article XIV that any maintenance of way employee, who traveled between one of the various sets of mileage parameters found on page 34 of PEB 229's recommendations, would be entitled to the travel allowance payment for such trip.

Thus, if one were to apply the preponderance of evidence standard, the position of the BMWE would be sustained. A foundation principle of contract construction states that when contract language is clear and unambiguous the intent of the negotiators is not admissible to contradict that language.

However, there is reason in this case to consider the historical and negotiating background associated with the development of Article XIV, Section 1(a), and to address the Carriers' argument that the language of Article XIV, Section 1(a) is written in definitional terms that best describe employees assigned to regional and system-wide production gangs.

This consideration is necessary, in this Arbitrator's opinion, because there is a question in this case which goes to the intent of three entities, and not just the negotiators of Article XIV. Those entities are the BMWE, the Carriers, and PEB 229.

The BMWE, having proposed increased travel allowance entitlements in broad general terms clearly intended that said allowances apply to any employee who was required to travel significant distances; although there is limited

probative evidence that this Arbitrator has found in the record which would support a conclusion that the parties "joined the issue" as to whether the travel allowances proposed by the Organization and recommended by PEB 229 were to be applicable to all traveling employees. In its presentation to PEB 229, the BMWE did not exhort, for example, "While we are particularly concerned about the onerous travel and away from home burdens placed upon the members of regional and system-wide production gangs, we are seeking increased travel allowance benefits for all traveling employees."

On the other hand, the Carriers, who opposed increased travel allowances in principle, may have intended, once PEB 229 recommended increased travel allowances, to limit those allowances to members of regional and system-wide production gangs; although there is no probative evidence that this Arbitrator has found in the record which would support an argument that such intent was clearly manifested and communicated to the Organization.

Thus, the Carriers must rely upon what they construe to have been the intent of PEB 229 when it crafted the

introductory language to the increased travel allowance schedule.

Clearly, it is the terminology chosen by PEB 229 which has given rise to the instant dispute. In this Arbitrator's opinion it is significant to note that, although there were many references to regional and system-wide production gangs in the written submissions and in the oral arguments presented to PEB 229 that Board chose not to specifically identify the group or groups of employees whom it recommended should be entitled to increased travel allowances.

PEB 229 had the same opportunity as did the parties to state, for example, unequivocally as follows:

"Employees assigned to regional and system-wide production gangs, are required at the beginning of the work season to travel from their homes to initial reporting locations, and at the end of the season return home. These locations could be hundreds of miles from the residences of said gang members. During the work season the carriers' service may place members of regional and system-wide production gangs hundreds of *miles away from home at the end of each work week.*"

It is clear that neither PEB 229 nor the parties chose, respectively, to include in the introductory

paragraph of its recommendations regarding travel allowances or in Article XIV any such limiting language.

In discussing "Expenses Away From Home" in its Report, PEB 229 in the first paragraph of its explanation of the BMWE's position stated as follows:

> **According to the BMWE, meal and lodging allowances for maintenance of way employees are based upon Arbitration Board No. 298. However, since the award of Arbitration Board No. 298, expenses have become, without justification, widely disparate from carrier to carrier, within different maintenance of way groups on a single carrier, and between the maintenance of way craft and other crafts. BMWE contends that current meals and lodging allowances are wholly inadequate to meet the real costs of expenses away from home. *Additionally*, maintenance of way employees subsidize the Carriers' regional and system gangs with staggering amounts of unpaid travel time and unreimbursed automobile expense for travel between their homes and distance work locations. According to the BMWE, employees need their personal vehicles with them throughout the work season, but the Carriers offer bus transportation between work locations to avoid reimbursing employees for mileage expenses. (Emphasis by the Arbitrator)**

Continuing in the first sentence of the next paragraph in describing the BMWE's position concerning the need for increased expenses away from home, PEB 229 wrote as follows:

> ***For these reasons*, BMWE seeks to eliminate the current reimbursement/compensation system and replace it with reimbursement *for actual expenses for meals and lodging*. (Emphasis by the Arbitrator)**

The emphasized words "Additionally" and "For these reasons" provides this Arbitrator with evidence that the

BMWE never abandoned its position that all traveling employees subject to onerous away from home burdens should be entitled to increased benefits.

It is also significant to note that PEB 229 recognized that the BMWE was particularly concerned regarding the travel and expense burdens imposed upon members of "regional and system gangs"; and used railroad jargon, i.e. "regional and system gangs", in describing the BMWE's "additional" concern. It is this Arbitrator's opinion that, had PEB 229 intended to limit the application of travel allowance benefits to members of "regional and system gangs", PEB 229 was sufficiently familiar with that classification of maintenance of way employees, and could easily have incorporated that term in the language of its recommendations.

The individuals who are involved in the negotiation of railroad national agreements are among the most sophisticated collective bargaining agreement negotiators in our nation. They know how to be specific when specificity is required. Had the Carriers at any time during the course of the negotiations sought to distinguish travel allowance benefits applicable to members of regional

and system-wide production gangs from benefits which might be applicable to other traveling employees, they had more than sufficient opportunity to make their desires known to the BMWE and/or to PEB 229. As noted above, there is insufficient probative evidence to establish that any such distinction was sought or articulated.

Certainly, the Carriers are correct when they contend that PEB 229's language "best describes" members of regional and system-wide production gangs. There is a reason, in this Arbitrator's opinion, for the description found in Article XIV, Section 1(a).

As the Carriers correctly contend, the BMWE emphasized the particularly onerous travel and away from home burdens placed upon members of regional and system-wide production gangs. It is clear that the BMWE, as would most organizations, used the most extreme examples to justify its position for across the board increases in benefits for all traveling employees.

However, it is also clear that the BMWE never abandoned its position as originally articulated in its November 1, 1994 Section 6 notices that expenses away from

home should be paid to all employees who were required to live away from home during their work weeks.

Based upon the foregoing facts and findings, it is this Arbitrator's conclusion that the position of the BMWE must be sustained and that the travel allowance benefits of Article XIV of the September 26, 1996 National Agreement apply to all traveling employees.

Award: The position of the BMWE that the travel allowance benefits of Article XIV of the September 26, 1996 National Agreement apply to all traveling employees is sustained. This Award was signed this 20th day of June, 1999.

Richard R. Kasher

Richard R. Kasher, Arbitrator

June 20, 1999