SPECIAL BOARD OF ADJUSTMENT

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
(the "Organization")

PARTIES
TO DISPUTE

and

BURLINGTON NORTHERN SANTA FE

(the "Carrier")

(INTERPRETATION OF RULE 36A)

STATEMENT OF CLAIM:

Claim of Employees' that:

(1) Carrier violated the provisions of the existing agreement and practice of the parties by discontinuing reimbursing employes for the cost of lodging incurred while away from their regular outfits or regular headquarters and instead substituting double occupancy lodging at Carrier-provided lodging facilities since on or about March 31, 1995 and continuing.

(2) Carrier discontinue enforcing its new lodging policy against headquartered employees covered by Rule 36A and reinstitute the reimbursement for actual lodging expenses for such employees.

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended and that this Board is duly constituted and has jurisdiction of the parties and the subject matter.

The parties agree that the instant dispute raises the issue of whether Rule 36A and existing practices prohibit Carrier from providing employees with Carrier-paid lodging facilities on a double-occupancy basis in lieu of reimbursing employees for the cost of lodging incurred while away from their regular outfits or headquarters. That rule provides, in pertinent part:

> RULE 36. EXPENSES
>
> A. Employees, other than those covered by Section B of this rule, will be reimbursed for cost of meals and lodging incurred while away from their regular outfits or regular headquarters by direction of the Company, whether off or on their assigned territory. This rule does not apply to mid-day lunch customarily carried by employes, nor to employes traveling in exercise of their seniority rights.

The parties agree that Rule 36A of the current September 1, 1982 Agreement was derived from Rule 54 of the June 1, 1938 Chicago, Burlington & Quincy (CB&Q) railroad company, which, along with three other railroads, merged to form the territory of the Carrier in issue in this dispute. The parties also agree that any interpretation of Rule 36A must be consistent with the interpretation and application of its predecessor CB&Q rule, which was renumbered 47. When this rule was first negotiated into

the consolidated single collective bargaining agreement effective May 1, 1971, then Vice President of Labor Relations T.C. DeButts issued a letter to Carrier personnel explaining the source and interpretation of the rules incorporated therein, and specifically stated that Expense Rule 36 Paragraph (a) provided for "actual expenses to employes .... when away from their regular outfits or headquarters by direction of the Company." The language of Rule 36A remained unchanged when the parties negotiated the current Agreement effective September 1, 1982.

Throughout this period of time, employees covered by this expense rule were permitted to secure lodging in motels of their choice on a single occupancy basis and were reimbursed for actual expenses submitted. More recently, Carrier made arrangements with Corporate Lodging Consultants ("CLC") to make use of its massive buying power to secure reasonable rates for quality rooms at designated motel chains, and began phasing in implementation of this program on regional gangs in 1991. By letter dated March 31, 1995, Carrier advised headquartered Organization employees that they would henceforth be required to use corporate lodging facilities and cards when away from their headquarters over night and that they would be required to stay two to a room if possible; foremen would be assigned single rooms. It noted that expense forms would have to be completed for actual expenses other than lodging, but that lodging charges would be paid directly by Carrier through CLC by use of a plastic card furnished to employees by Carrier. It is the institution and strict enforcement of this policy that is being protested by the Organization's claim in this case.

The Organization contends that this unilateral change in expense policy is a violation of the clear and unambiguous mandatory language of

Rule 36A which it alleges requires Carrier to reimburse employees for the actual cost of meals and lodging and does not give Carrier discretion to provide that lodging in lieu of reimbursement. It notes that the parties clearly enumerated three exceptions to Rule 36A in its text - employees covered by Section B, mid-day lunches and employees traveling in the exercise of seniority rights - and argues that there was no exclusion made for employees provided lodging by Carrier. The Organization relies upon the maxim that "to express one thing is to exclude the other" in arguing that Rule 36A does not permit Carrier to deny reimbursement to headquartered employees away from their headquarters over night if specific lodging is designated by Carrier.

The Organization also argues that considering Rule 36A in the context of the language of Rules 36B, 37, 38 and 39 defeats Carrier's position, since it shows that when the parties intended to provide either Carrier or the employee with an option, they clearly specified this within the expense rule itself. The Organization relies upon Third Division Award 1446 (1941), decided under the predecessor language to Rule 36A in the CB&Q agreement, as indicating that Carrier must reimburse an employee required to work away from his regular outfit for both meals and lodging even if it makes an outfit car available to him for both meals and lodging. It argues that the Organization had the right to rely upon a previous interpretation of the language in dispute when the parties adopted and readopted that provision into subsequent agreements with full knowledge of that interpretation. The Organization avers that since Third Division Award 1146 is not palpably erroneous, it should stand as res judicata of the instant dispute.

Finally, the Organization argues that past practice, while normally not

relevant to a dispute involving clear contract language, as here, also supports its interpretation of Rule 36A. It notes that there is no real disagreement that the parties' practice since the adoption of this rule into the consolidated 1971 agreement, and prior thereto, was to permit employees to secure single occupancy lodging of their choice and to reimburse them for actual expenses of both lodging and meals when headquartered employees were away from their headquartered locations. It argues that the imposition of mandated double occupancy lodging at a designated facility is contrary to both the plain language and practice of the parties in this regard.

Carrier argues that its action in this case was a reasonable exercise of its retained right to designate and provide lodging and meals to employees away from their regular outfits or headquarters. It notes that the original rule was adopted in the context of primitive camp car lodging conditions, and avers that Carrier retained its right to designate or provide lodging for employees when this rule was later incorporated into its consolidated agreement independently of Special Board of Adjustment 298. Carrier relies upon the Organization's position in Third Division Award 1231 (1940) as an admission that Carrier may provide adequate accommodation to employees away from their headquarters under its expense rules.

Carrier contends that arbitrators on other properties have routinely held that it has the right to require employees to use Carrier-provided lodging, citing Third Division Awards 27673, 27674, 26404; Public Law Board No. 4078, Awards 1 & 3. It also argues that arbitrators often implied the term "reasonable" into an expense provision and have held a double occupancy requirement to be reasonable. See Third Division Awards 24139 and 20619. Carrier notes that its new rule is a win-win situation, since

employees get excellent accommodations without effort or out of pocket expenses and Carrier gets to control its cost and administration expenses.

Finally, Carrier argues that, regardless of past practice, which has included instances of double occupancy lodging furnished by Carrier, it never gave up its right to provide such lodging, and has properly exercised its right to do so in this case. Carrier alleges that the Organization is impermissibly attempting to secure private accommodation through arbitration when it was unable to obtain it through negotiation.

As in any contract interpretation case, the Board must first look to the language in dispute and determine if it is clear or ambiguous in order to ascertain its meaning. The language must be considered as a whole, and read in the context of other relevant provisions of the Agreement.

A review of Rule 36A reveals that it has an affirmative component and noted exceptions to its application. The affirmative language states that "employees ..... will be reimbursed for cost of meals and lodging incurred while away from their regular outfits or regular headquarters by direction of the Company ....." This language clearly imposes a mandatory obligation on the part of Carrier to reimburse covered employees for cost of meals and lodging in the designated circumstances. While it does not specifically state that Carrier may provide such lodging in lieu of reimbursement, neither does it specifically state that employees may secure single occupancy lodging. Unlike most expense provisions which provide for reimbursement for "reasonable" costs, Rule 36A does not put any parameters on the cost of meals and lodging other than that they be "incurred" or actual expenses.

The second component of Rule 36A is its specified exceptions to the reimbursement for actual expenses incurred. There are three clearly enumerated exceptions: (1) employees covered by Section B of Rule 36, (2) mid-day lunch customarily carried by employees, and (3) employees traveling in the exercise of their seniority rights. As noted by the Organization, there is no specified exception covering the situation where Carrier furnishes meals and/or lodging facilities.

A review of the Rule 36B exception referenced in Rule 36A is helpful in understanding what the parties intended to be excluded from mandatory reimbursement of actual expenses. Rule 36B refers to employees filling relief assignments, or performing extra or temporary work who are unable to return to their headquarters on a particular day. In pertinent part, that rule states:

> .....shall be reimbursed for the actual reasonable cost of meals and lodging away from their headquarters point not in excess of $18.25 per day. If Company provides a lodging facility at an away from headquarters point and an employee is agreeable to using such facility, then the maximum allowance will be $7.50 for meals....

Thus, within the same expense rule, the parties set a "reasonable" limitation on the costs incurred and a maximum dollar amount which they determined is reimbursable. Further, and more to the point, the parties specifically provided an option to both Carrier and the employee concerning the provision of lodging. Rule 36B states that Carrier may choose to provide a lodging facility and the employee may choose to either accept or reject the use of such facility. The financial consequences of each

are set forth in that provision.

Carrier's argument in this case, by necessity, begins with the proposition that we should imply a "reasonable" limitation in Rule 36A. Next it notes that requiring employees to use double occupancy lodging has been held to be "reasonable" on other properties. Finally, it contends that its provision of clean and comfortable accommodations in well-known hotel and motel chains is a reasonable exercise of its inherent power and responsibility to control costs, and that it would therefore be unreasonable for employees to seek their own single occupancy lodging and expect reimbursement under such circumstances.

While we have little problem understanding the efficacy of Carrier's position, we are bound to interpret and apply the provisions negotiated by the parties as set forth in their agreement. Not only does Rule 36B set forth Carrier's right to provide lodging in a given circumstance as well as the employee's option with respect to lodging, but other expense rules within the Agreement similarly reveal that the parties set their minds to the right of Carrier to provide lodging in certain circumstances and the consequences to employees if they did. For example, Rule 37 applicable to roadway equipment operators and helpers provides, in pertinent part:

> ....If the Company does not provide an outfit car for such employes when they are away from their headquarters point, lodging will be provided by the Company or the employees will be reimbursed for the expenses incurred therefore.

Rule 38, applicable to mobile headquarters, states, in pertinent part:

> A.....(1) If lodging is furnished by the Company, the outfit cars or other lodging furnished shall include .....
>
> C. If lodging is not furnished by the Company the employe shall be paid a lodging allowance of $10.75 per day....

Rule 39, *Cooperative Boarding and Lodging*, states:

> A. Where cooking and eating facilities are furnished by the Company on a cooperative basis by mutual agreement between General Chairman and the Company, Rule 38 will have no application except as specifically provided herein.....

These rules clearly state that Carrier may provide lodging and that employees may only receive reimbursement in the event Carrier does not provide lodging. Such language is notably missing from Rule 36A, and considering its inclusion in these other expense provisions, we must conclude that its absence was by design and that the parties intended what they had written.

To adopt Carrier's position would be to ignore the clear language of the parties in drafting and/or incorporating their expense provisions in this Agreement. Not only does Rule 36A clearly state that "employees ... will be reimbursed for cost of meals and lodging incurred", but employees who are covered by Rule 36B and are specifically excepted from the receipt of actual expense reimbursement under Rule 36A, have the option to use or reject Carrier-provided lodging with the maximum daily expense reimbursement rate set forth in the Agreement. By requiring employees covered by the broadest expense reimbursement provision in the

Agreement to accept Carrier-designated lodging on a double occupancy basis or receive no reimbursement for lodging, Carrier has placed them in a worse position than employees covered by the stated exception to the rule, who may reject Carrier lodging in favor of receipt of $18.25 per day. We are unable to find that the language of the expense rules in this Agreement supports such a result. In line with long recognized principles of contract construction, we decline to imply additional exceptions to those stated in Rule 36A. See Third Division Awards 20693, 18287, 15876.

The gravamen of the Organization's claim is that employees within the coverage of Rule 36A are now required to accept double-occupancy lodging at Carrier-designated facilities in lieu of reimbursement for actual expenses. While the absence of language in Rule 36A concerning Carrier's right to provide lodging to employees cannot be read as foreclosing them from doing so, the right of employees to actual expense reimbursement without specified limitation does prevent Carrier from imposing its lodging option on employees who do not wish to accept it in lieu of their receipt of expense reimbursement for lodging. While many employees may gladly welcome a system where they need not spend time finding lodging or putting up money of their own until their paperwork for reimbursement is processed, Rule 36A gives employees within its coverage the right to receive actual reimbursement for both meals and lodging if they so choose. Carrier's imposition of a double-occupancy criteria for reimbursement, while held to be reasonable under other circumstances or the language of different agreements, is not supported by the broad language of Rule 36A.

The Board's conclusion that the parties did not intend Carrier to be able to force employees covered by Rule 36A to give up their right to select their own lodging and receive actual reimbursement by providing

designated double-occupancy lodging (however adequate) is buttressed by prior Board awards and the long-standing practice of the parties.

In Third Division Award 1231 relied upon by Carrier, claimant was covered by the predecessor CB&O rule. Carrier provided an outfit car which claimant chose to use for lodging but not meals. No claim was made for lodging expense, but Carrier denied the claim for meal expenses arguing that the outfit car was equipped for the preparation of meals. The Board sustained the claim indicating that it was "immaterial whether it was so equipped or not" because he was entitled to reimbursement for meals under the rule. The fact that the employee chose to use Carrier's lodging and the Organization noted in its statement of facts that the lodging provided was adequate, does not equate to an admission by the Organization that Carrier could require an employee to use such lodging in lieu of reimbursement.

Third Division Award 1446 relied upon by the Organization deals with the issue of whether claimant was working away from his regular headquarters so as to fall within the application of the predecessor CB&O expense rule. In finding that claimant was covered by the expense reimbursement rule and sustaining the claim, the Board rejected Carrier's argument that his lunch expense was for a mid-day meal "customarily carried by employees" as well as its contention that the amount of the claim for lodging was excessive.

These cases support the Organization's argument that the parties knew, or should have known, when incorporating the former CB&O provision into their subsequent agreements without modification, that the Board viewed such provision as granting an employee entitlement to actual

expenses of lodging and meals regardless of whether Carrier provided accommodation.

Finally, the parties' practice has clearly evidenced their understanding that Rule 36A entitled employees within its coverage to reimbursement of actual lodging and meal expenses, and that the option of where to stay and what to eat rests with the employee, rather than with Carrier.

This Board's decision in no way minimizes the legitimate interests of Carrier in attempting to maximize the efficiency of its operation by engaging in cost-savings by utilizing the CLC motel chains. However, no matter how reasonable the exercise of its management discretion may appear, when its right to exercise that discretion has been specifically limited by negotiated language of the Agreement, it may not do so unilaterally. Having found that Rule 36A specifically limits Carrier's ability to unilaterally change the manner and method of reimbursement of lodging expenses, we must conclude that Carrier's imposition of the terms of its March 31, 1995 letter containing its new lodging policy on headquartered employees violates the provisions of Rule 36A. Absent agreement by the parties or a change in the language of that expense rule, employees within its coverage are entitled to retain the right to receive actual expense reimbursement for lodging if they opt not to utilize corporate lodging cards or facilities provided.

For all of these reasons, the claim is sustained.

AWARD:

The claim is sustained. Carrier is directed to reinstate the payment of actual expenses to employees covered by Rule 36A who opt not to utilize corporate lodging cards or facilities under the terms designated in its new policy, and to so notify the affected employees, in accord with the findings of this Board.

Margo R. Newman
Neutral Chairperson

Carrier Member
I Dissent.

Employe Member

Dated: June 16, 1997
Chicago, Illinois