SPECIAL BOARD OF ADJUSTMENT

PARTIES TO DISPUTE: **BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT RAIL CONFERENCE**

and

BNSF RAILWAY COMPANY

AWARD NO. 1
(Rule 26 Violation – Starting Point Pay)

Michael Capone, Chair and Neutral Member
Kevin D. Evanski, Employee Member
Joe R. Heenan, Carrier Member

Hearing date: September 12, 2024

STATEMENT OF CLAIM

The parties' "Board Agreement", dated June 18, 2024, presents the following issue to be decided pertaining to "designated assembly points" in Rule 26 of the collective bargaining agreement:

> "whether the Carrier is required by the collective bargaining agreement to pay headquartered employees to return to the same designated assembling or starting point where they began their day ('the Dispute')"

STATEMENT OF FACTS

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the collective bargaining agreement (hereinafter referred to as the "Agreement") and the "Board Agreement" between the Brotherhood of Maintenance of Way Employes Division/IBT (hereinafter referred to as the "Organization") and BNSF Railway Company (hereinafter referred to as the "Carrier").

The Organization filed several claims beginning December 12, 2023, after the Carrier refused to pay mechanics for time back to the starting point when they traveled to another assembly point, and remained overnight and began their work day in violation of Rule 26.[1] On December 14, 2023, the Carrier informed the Organization that it was including fixed-headquartered crews in its decision not to pay for time back to the starting point. Continuing claims were filed into 2024.

On February 9, 2024, the Organization filed a Complaint for Injunctive and Declaratory Relief, in the United States Federal Court requesting that it enjoin the Carrier from refusing to provide the starting point pay. On March 22, 2024, the Carrier filed a Motion to Dismiss with the Court. The parties subsequently agreed to pursue arbitration as described in the Board Agreement.

The on-property record of the dispute indicates that the parties held several conferences to discuss the claims. The Carrier's denials and subsequent appeals by the Organization led to a final decision by the Carrier on July 3, 2024. A hearing was held by the Board on September 12, 2024 in New York.

Relevant Contract Provisions

RULE 26. STARTING POINT

A. Time of employes will start and end at designated assembling point. Designated assembling or starting point will be interpreted as follows:

(1) Section Forces - Tool House.

(2) Employes who are provided with outfit cars or highway trailers, the assembling point shall be the tool or material car provided

[1] For the sake of brevity, the description of the dispute shall hereinafter be referred to as the "starting point pay".

such employes. If a tool or material car is not furnished, or is located away from the outfit cars or highway trailers, the assembling point shall be the location of the outfit cars or highway trailers.

(3) Employes under the provisions of Rule 38 who are not furnished outfit cars or highway trailers, the assembling point shall be the station on the Carrier closest to the work location where meals and lodging are available within a reasonable proximity; however, where the majority of the members of the gang and the supervisor agree, any point may be designated as the assembling point.

(4) Employes authorized to provide their own living quarters in trailer home or pickup camper - the assembling point will be a place such as Carrier railroad station, section headquarters, B&B headquarters, tool house or gang tool cars on a siding in a city or town close to the work site.

(5) Employes in terminals or fixed headquarters - Employes other than those covered above will have one designated assembling point where they will start and end their day's work, except that in Chicago and St. Louis Terminals there may not be more than two such assembling points designated for each gang.

B. When employes are sent away from headquarters and remain away overnight, the beginning and ending of day's work shall be at a designated point such as a railroad depot, section headquarters or motel-hotel accommodations at the nearest town where such lodging and meal accommodations are available.

C. Paid time for production crews* that work away from home shall start and end at the reporting site designated by the appropriate supervisor by the end of the previous day, provided the reporting site is accessible by automobile and has adequate off-highway parking. If a new highway site is more than 15 minutes travel time via the most direct highway route from the previous reporting site, paid time shall begin after fifteen (15) minutes of travel time to the new reporting site from the carrier designated lodging site for it, and from the new reporting site to the carrier designated lodging site for it, on the first day only of such change in the reporting site. [7/29/91 Imposed Agreement, Article VIII]

*Note: Production crews include all supporting BMWE employees who are assigned to work with, or as a part of, a production crew. [7/29/91 Imposed Agreement, Article VIII]

In order that there shall be no duplication, time paid for in accordance with this provision shall not be included in determining

compensation that may otherwise be due an employee for travel time under the Award of Arbitration Board No. 298, as amended, or similar provisions. [7/29/91 Imposed Agreement, Article VIII]

Any unpaid time traveling between the carrier-designated lodging site and the work site is restricted to no more than thirty (30) minutes each way at the beginning and end of the work day. [9/26/96 National Agreement, Article XVII]

POSITION OF THE PARTIES

Organization

The Organization maintains that the Carrier violated Rule 26 when it refused to pay employes with fixed-headquartered positions for time traveling back to the starting point where they began their day when the Carrier changed the starting point for the following day. It argues that the Carrier has not previously disputed paying fixed-headquartered employees for time to return to the starting point when there next day's starting point is at a different location. It cites the National Railroad Adjustment Board's ("NRAB") Third Division Award No. 40789 where mobile employees were paid for time traveling back to their starting point where their day began when the starting point for the next day was changed and they did not physically make the trip. The Organization also references a dispute in 2019 over production crews being denied pay back to the starting point when they did not start at the same location the next day. It claims the Carrier conceded the production crews were entitled to the starting point pay.

The Organization maintains that the Carrier is incorrect in asserting that it alone bears the burden of proof as the moving party claiming a violation of the Agreement. It claims the Carrier also has the burden of supporting its position as to the meaning of Rule 26.

The Organization also argues that the Carrier's reliance on the *doctrine of laches* is misplaced. It avers that even if the Carrier presents evidence of a past practice in support of its argument regarding starting point pay, which the Organization does not concede, the Agreement is unambiguous and therefore, must be applied as written.

The Organization contends that the instant dispute arose when the Carrier refused to pay Traveling Mechanics' starting point pay. It claims the Carrier rejected the Traveling Mechanics' claims and informed all mechanics that they would no longer receive starting point pay. The Organization avers that during a conference on November 7, 2023, the Carrier agreed that mechanics were entitled to the starting point pay. According to the Organization, the mechanics continued not to receive starting point pay and additional conferences were held to address the dispute. It maintains the Carrier reversed its previous position and decided to reject the claims and to also no longer pay fixed-headquarter crews starting point pay.

The Organization asserts that the Carrier had been paying the starting point pay to fixed-headquarters crews before December 2023. It alleges that the Carrier is unilaterally attempting to avoid restrictions on such crews so they can be used on "mobile work" to reduce travel pay costs. The Organization argues the Carrier is violating the clear and unambiguous language of Rule 26(A) and (A)(5). It maintains that the contract provisions identify one single start and end point for each day from which travel pay is due the employee. Such single point applies to employees who are directed to report to another location other than the original headquarter for the following days assignment, which renders that location as the new starting and end point for the next day.

The Organization relies on arbitral precedent and a principle in contract interpretation to conclude that where there is no ambiguity in an applicable term of the Agreement, the intent of the clear and unambiguous language must be applied as written. It avers that Rule 26 clearly indicates that the reference to "time" equates compensation and such pay must be provided for travel back to the designated starting point where the crew begins its day. The Organization posits that the clear language of the Agreement was recognized by the Carrier's "Highest Designated Officer" ("HDO") during a meeting held on November 7, 2023. However, it highlights the Carrier reversal of its position when it later claimed that an existing past practice does not provide for pay back to the starting point when the crew returns to its fixed-headquarters or is sent to another starting point for the next day's work. The Organization argues that a past practice does not alter the meaning of a clear and unambiguous contract provision. Moreover, it asserts that up until January 2023, the Carrier paid mechanics' starting point pay as defined by the Organization. It also maintains that the Carrier continued to pay fixed headquarters crews its version of starting point pay after it stopped providing such pay to the mechanics. Two days after the Organization filed its claim on December 12, 2023, it was notified that the Carrier would also refuse to pay fixed-headquarters crews starting point pay.

In addition to the Organization's reliance on arbitral precedent, it provides numerous written statements from employees to support its claim that the Carrier has been applying the starting point pay to employees who go to another starting point for the next day's assignment since Rule 26 provided for a single point for starting and ending

the work day. According to the Organization, mechanics are entitled to starting point pay back to where they began their day even if they finish their workday at another location.

The Organization maintains the Carrier's reliance on Rule 26(B) is misguided. It argues that paragraph (B) does not alter the meaning of paragraphs (A) and (A)(5) wherein it specifies that paid time starts and ends at the same assembly point. The Organization contends that paragraph (B) addresses only the Carrier's ability to change the assembly point to another location, specifically a starting location identified as a railroad depot, section headquarters or motel accommodations. It concludes that Rule 26(B) does not modify the requirement that paid time starts and ends at the same assembly point. The Organization avers that to change a fixed-headquarters mechanic's starting point it must either bring the employee back to the same starting point or, if brought to another assembly point, must pay them for time back to that same starting point even if they do not physically return there. It posits that Rule 26(A) and (B) are "not mutually exclusive" and must be read together.

The Organization maintains the written statements submitted by the Carrier to establish a past practice are inapplicable to the dispute here. It contends that the alleged practice was only raised by the Carrier after the Engineering Department refuted the HDO's interpretation of the Agreement. The Organization argues it is misleading for the Carrier to claim that its payroll records prove it has not paid for a "fictitious trip back to headquarters" since there is no record of employees using pay code 16 for "travel during overtime". It asserts that employees did not use pay code 16 until recently instructed to do so and instead used pay code 12 which is used for overtime, including for travel time; therefore, the past payroll records are not relevant to the dispute and do not prove the

Organization is barred from making its claims for acquiescing as defined by the *doctrine of laches*. The Organization avers that the Carrier agrees that "headquartered employees who are sent away and return to their headquarter point that day remain eligible to submit for overtime travel pay until they get back." It cites payroll records and employee statements that indicate that such travel overtime was paid using pay code 12.

Carrier

The Carrier argues that the Organization is seeking a new benefit not provided for in the Agreement. It maintains the Organization is seeking pay for employees traveling between designated assembly points for a "fictitious return trip back to their headquarter point" when they leave the designated point and remain overnight at another. The Carrier asserts that Rule 26(B), which was made part of the Agreement in 1982, and the established past practice since it was first negotiated, governs the dispute. It contends that nothing in the Agreement or past practice entitles employees to compensation for a hypothetical return trip to the designated point where their day started.

The Carrier avers that it was only on or about the beginning of 2023 that employees, at the urging of the Organization, began to add time for starting point pay back to the designated headquarters when they were assigned to travel for an overnight stay at another designated point. It maintains that the practice of not paying the "fictious" starting point pay claimed by the Organization has existed for 40 years without objection and therefore, the instant claim is barred by the *doctrine of laches*. It cites arbitral precedent, including one addressing a dispute between the same parties, where a two-prong test is applied to determine whether the claim should be barred. One is evidence of an unreasonable delay in filing a claim and second, whether the delay prejudiced the

Carrier's ability to properly address the claim. The Carrier contends that no claims have been submitted since 1982 when Rule 26(B) was added to the Agreement to enable it to send employees away overnight from one headquarter to another designated point. It contends the Organization's untimely claim deprives it the ability to present its best defense, which has been impeded by the length of time elapsed between the rule's implementation and the filing of the claims.

Moreover, the Carrier asserts the Organization cannot meet its burden of proof to set aside a 40-year-old past practice. It maintains that Rule 26(B) does not contain language requiring employees who travel away from their headquarters for an overnight stay to start and end at one sole location. Alternatively, the Carrier argues that if the provision is found to be ambiguous, the mutually accepted past practice supports a conclusion that the Organization's claim should be rejected.

According to the Carrier, Rule 26(B) does not contain any reference to a specific benefit such as a per diem or travel pay. It contends that the rule addresses "workplace efficiencies" where employees start and end their workday at different locations from day to day or from one assignment to another. The Carrier provides a historical summary of the changes in Rule 26 from which it asserts that Section (A) of the rule applies to certain categories of employees who by virtue of their work location return to the same location each day. The Carrier maintains that Rule 26(B) was negotiated into the Agreement in 1982 to address the workday of fixed-headquartered employees who travel away overnight and therefore cannot have a single point where they begin and end their day as is the case for employees covered by Rule 26(A) and its subsections.

According to the Carrier, beginning in 1971, Rule 26 read as follows:

RULE 26. STARTING POINT

> Time of employes will start and end at designated assembling point. Designated assembling or starting point will be interpreted as follows:
>
> A. Section Forces: - At tool house.
>
> B. Employes in camp or outfit cars: - Such camp or outfit cars will be the assembling point.
>
> C. Employes in terminals or fixed headquarters: - Employes other than those covered in Sections A and B hereof will have one designated assembling point where they will start and end their day's work, except that in Chicago and St. Louis Terminals there may not be more than two such assembling points designated for each gang.

The Carrier maintains that in 1982, Rule 26 was changed by creating new sections (A) and (B). The new section (A) enumerated subsections 1 through 5 and a new section (B) was added to the rule. In 2002, a new section (C) was added addressing paid time for production crews. These provisions constitute Rule 26 which is restated above in its entirety.

The Carrier avers that paragraph Rule 26 (A)(5) addresses those employees in terminal and fixed headquarters who "have one assembly point where they will start and end their day" except for two terminals that cannot have more than "two such assembling points designated for each gang." The Carrier maintains that Section (B) was added to the rule in 1982 to address employees "who *cannot* have a single point where they begin and end their day." [Carrier emphasis] It compares Section (A)(5), which it concludes provides for travel pay until employees return to their designated assembly point, to Section (B) which applies to those who are sent away from their headquarters overnight and therefore, do not have a single point where they begin and start their day. The

Carrier avers that the addition of Section (B) represents the parties understanding that those employees traveling overnight were to be treated differently than those covered by Section A(5). Otherwise, argues the Carrier, the parties would have included headquartered employees traveling overnight to another assembly point in Section (A)(5) when it was revised in 1982. By not doing so, it claims the parties recognized the distinction between employees with a single starting and ending point and the Claimants here who are required to have two points where they begin and start their day.

The Carrier contends that any reference to Rule 26 (A)(2), (3), (4), and Rule 26(C) by the Organization is irrelevant to the dispute here as they pertain to mobile employees who are not claimants. It avers that the Organization's reliance on Third Division Award Nos. 40789 and 44526, both of which address Rule 26(C), are inapplicable to the dispute here.

The Carrier asserts that the dispute here should be decided on the clear and unambiguous language of Rule 26(B). It also maintains that, should an ambiguity be found in the provision, an established binding past practice confirms that employees traveling overnight are paid for time between where they start their day - such as a section headquarters or railroad depot - and where they end their day such as a lodging location as described in Rule 26(B). The Carrier provides over 20 declarations from supervisors and former employees represented by the Organization, which it claims were made under the penalty of perjury when presented to the Court in the initial legal proceeding. It asserts those written statements support its claim of the customary practice on its property when paying travel for those employees on an overnight stay at another location. The Carrier also cites employee statements submitted by the Organization in a

previous dispute which declared that as headquarters employees who were sent away overnight, they were paid from time on duty at the headquarters to the motel used for lodging employees.

The Carrier claims nothing in the on-property record supports the Organization's assertion that a headquartered employee was paid a "fictious trip" back to the starting point when traveling overnight. The Carrier argues that the 28 written statements from employees submitted by the Organization are primarily related to travel payments made under Rule 26(A) and not Rule 26(B).

The Carrier maintains that the Organization mistakenly relies on Rule 26(A) in its claim. It avers that Rule 26(B) governs the dispute since it specifically addresses those employees who are sent away overnight. The Carrier argues that the Organization is mistaken when it claims Rule 26 (A) and (B) are not mutually exclusive. It summarizes the Organization's view of Rule 26(B) as applying only to traveling headquartered employees when they spend the entire day away from their headquarters and not traveling. The Carrier asserts that the Organization's interpretation of Rule 26(B) is flawed and inconsistent with the clear language of the provision.

Lastly, the Carrier argues the arbitral precedent relied upon by the Organization is inapplicable to the dispute here. It claims the contract language and conditions in those awards are fundamentally distinguishable from the facts presented.

FINDINGS

After hearing upon the whole and all evidence as developed on the property, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute

involved herein; and that the parties were given due notice of the hearing thereon. The Claimants were ably represented by the Organization.

The first paragraph of the parties' "Board Agreement", dated June 18, 2024, defines the Board's jurisdiction. Accordingly, our role is to address disputes arising from the interpretation of Rule 26 of the Agreement.

The Board finds, upon a review of the record in its entirety and our interpretation of Rule 26, that the Agreement was not violated when the Carrier denied the claims filed by the Organization on December 12, 2023, January 19, 2024, March 11, 2024, and April 24, 2024. The answer to the issue presented in the "Board Agreement" is that the Carrier is required to pay headquarter employees for time to return to their same designated assembly starting point where they begin their day except when they are traveling away from their headquarters overnight and report to one of the locations set forth in Rule 26(B). The claims submitted describe the alleged violation of Rule 26(A) and (A)(5) when mechanics were sent away from their headquarters but not paid back to their starting point. It is unclear from the record whether all employees were required to have an overnight stay. However, we find that Rule 26(B) governs those claims where an employee was required to travel away from their headquarters for an overnight stay at "a designated point such as a railroad depot, section headquarters or motel-hotel accommodations".

Before going further in our review of the merits of the dispute, the Board addresses the Carrier's assertion that the Organization's claims are not subject to review under the *doctrine of laches*. We reject the Carrier's claim in that the "Board

Agreement" specifically limited the review of the dispute to its merits. Paragraph "1" reads as follows:

> It is agreed that such claims are properly before the Board and to be decided on the merits by the Board, and neither party will interpose any procedural or other arbitrability objection (such as timeliness, sufficiency of specificity, sufficient identification of claimants) to the Board's ability to decide the claims on their merits. The claims decided by this Board are deemed "lead" cases and will control the resolution of the Dispute for all future similar claims.

We find that the *doctrine of laches*, a principle in contract interpretation pertaining for the most part on the timeliness of a claim and whether the Organization's failure to raise the dispute in a timely manner constitutes acquiescence. Based on the parties' "Board Agreement" such a review of the procedural objection is barred.

Our review indicates that the Organization has the burden of proving that Rule 26(A) and (A)(5), and not 26(B), are the sole governing provisions. We find it does not meet that burden. Arbitral precedent involving the same the parties confirms that the Organization must meet the "threshold" requirements to support "the elements of its claim" which it fails to do here. *See Third Division Award No. 36208*. While we agree with the Organization the burden can shift to the Carrier, as the moving party it is required to first provide reliable evidence to meet its burden of proof. Nonetheless, we find the Carrier does provide sufficient evidence that Rule 26(B) applies to the dispute.

The Board rejects the Organization's conclusion that Rule 26(A) and 26(B) are not mutually exclusive. We do not find, as suggested by the Organization, that if the parties intended for Rule 26(B) to be excluded from the starting and ending points

defined in Rule 26(A), they would have used specific language to do so, and it would have been redundant to include such language in Rule 26(B).

We find that Rule 26(A) is inapplicable to the dispute as presented in the record. Rule 26(A)(1)(2)(3)(4) and (5) are mutually exclusive from Rule 26(B). Each section addresses separate and distinct activity. Where the parties disagree on the meaning of the provision – and its language is clear and unambiguous – the Board must give effect to the plain meaning of the terms as written, the history of the provision as established by the record, and relevant arbitral precedent. *See Third Division Award No. 24306. See also* *In the Matter of Arbitration, Seniority District Consolidation Issue*, (Suntrup 1999), *and Third Division Award No. 18423*. A standard of contract construction, when interpreting specific words or phrases in the Agreement, provides that the meaning and intent of clear and unambiguous language must be drawn from the instrument as a whole after analyzing how the different sections relate to one another in defining the subject matter. A reading of Rule 26 in its entirety reveals that Rule 26(A) and its subparagraphs do not apply to circumstances referenced in Rule 26(B). Rule 26(A) begins with "Time of employees will start and end" and applies it to all its subsequent paragraphs. Rule 26(B) does not address "time of employees" but indicates that "the beginning and ending of the day's work shall be at a designated point such as a railroad depot, section headquarters or motel-hotel accommodations". Such a distinction indicates that the two sections of Rule 26 have two separate meanings.

Sections (A), (B), and (C) of Rule 26 contain clear language to represent the parties' intentions and address specific scenarios independent of the other. It is well settled arbitral precedent that where there is no ambiguity the parties cannot seek to add

to or alter the stated text or its reasonable implication. If a matter is not covered in the provision, then it must be treated as inapplicable to the dispute. The distinctions between Rule 26(A) and (A)(5) and section (B) are clearly defined. This conclusion was previously reached by *Public Law Board No. 4768, Award No. 32* (Marx 1994) wherein it addresses the difference between Rule 26(B) and the subparagraphs in Rule 26(A) where it states as follows:

> Reference to other portions of Rule 26, as well as to other related rules, demonstrates that the parties to the Agreement deliberately made varying arrangements as to reporting times for employees under different circumstances. Note for example, the quite different arrangement in Rule 26.A(3). Thus, the language of 26.B must be taken exactly as written, without providing additional benefit.

The Carrier's General Director of Labor Relations – Engineering Crafts, Joe Heenan, attached two employee statements to his sworn declaration submitted to the Court in the legal proceedings regarding this dispute brought by the Organization. The employee statements were submitted by the Organization in a previous dispute over the meaning of Rule 26(B) addressed by *Public Law Board No. 4768, Award No. 32* referenced above. A review of those statements indicates not only that Rule 26(B) has been previously reviewed by a neutral but that the employees' statements confirm that the provision applies to "an away-from-home headquartered employee starting their day at a railroad yard office and ending it at a motel". Another statement submitted by the Organization in that dispute noted that when the employee "left his headquarters in Sheridan, Wyoming for an overnight trip his day ended at the out-of-town motel." The statements presented by Mr. Heenan support the Carrier's assertion that Rule 26(B) applies to the dispute here and that the day's pay for time worked for those traveling from

their headquarters to work overnight and stay at one of the locations cited in the rule does not include pay back to one of the identified locations not physically traveled to after moving to another designated assembly point.

The Board has reviewed *Third Division Award Nos. 40789* and *44526* which addressed on-property disputes that the Organization asserts provides guidance for the Board in its review of Rule 26. The Board finds that neither award provides any precedential status for the dispute addressed here. Nothing in those decisions apply to employees who "are sent away from headquarters and remain away overnight" as stated in Rule 26(B). *Award No. 40789* addresses the application of Rule 26(C) which is separate and distinct from 26(B). *Award No. 44526* cites numerous rules including Rule 26(A) and (C)[2]. Nothing in the dispute addressed therein involves employees who traveled away overnight and therefore, is also inapplicable here.

Rule 26(A) addresses the "Time of employees will start and end at designated assembling or starting point. . .". It defines the situation where such "time" is applied in its subparagraphs (1) through (5). Rule 26(B) has no such language. Subparagraph (5) specifically distinguishes itself from subparagraphs (1) through (4). The plain meaning of Rule 26(A) and its subparagraphs fall within the standard canon of contract construction which holds that indented subparts relate only to that subpart and therefore, the distinction between the subparts of Rule 26(A) with 26(B) is clearly defined in the Agreement. The often-cited principle of contract construction holding that the expression of one thing implies the exclusion of others indicates that the parties' intended that Rule 26(B), and not Rule 26(A) or (A)(5), governs occurrences where employees travel away

[2] Page 6 of *Third Division Award No. 44526* mistakenly identifies the Rule 26(C) as Rule 26(B).

from headquarters overnight to ". . . a designated point such as a railroad depot, section headquarters, or motel-hotel accommodations . . .".

To buttress its assertion that the clear and unambiguous language in Rule 26(A) and (A)(5) governs the dispute the Organization presents scores of employees' statements. We need not review parol evidence where we find clear and unambiguous language, but such documentation can provide an understanding of how the provisions have been applied. The statements do not provide a sufficient basis to support the Organization's assertions. There is little evidence in the employees' statements that connects them to activity covered by Rule 26(B).

The Carrier also provides numerous written statements that are specific to employees who were sent away from their headquarters overnight and had "a designated point" referenced in Rule 26(B). The sworn declarations, made under the penalty of perjury, were first included in the Carrier's Motion to Dismiss filed in response to the Organization's court action. The reliability of the statements underscores the meaning of Rule 26(B) which provides that the workday for employees who are "sent away from headquarters and remain away overnight" begins and ends at "a designate point such as a railroad depot, section headquarters or motel-hotel accommodations" and does not include pay for a return trip that is not actually traversed, defined by the Carrier as a "fictious" trip.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record but have found that it is not necessary to address each facet in these Findings. We find that the issue presented in the Statement of Claim does not apply to employees who are sent away from their headquarters and remain away overnight and

whose workday begins and ends at "a designated point such as a railroad depot, section headquarters or motel-hotel accommodations at the nearest town where such lodging and meal accommodations are available" as required by Rule 26(B).

AWARD

Claim denied

Date: October 14, 2024

Michael Capone, Chair and Neutral Member

Kevin D. Evanski, Employee Member (Dissent Attached)

Joe R. Heenan, Carrier Member

Labor Members Dissent
TO
Rule 26 Starting Point Award
(Referee Michael Capone)

An arbitration board must resist the desire to fiddle with clear Agreement language and the parties' intent, regardless of the reason. Unfortunately, the Majority in this case could not restrain itself, so I must vigorously dissent.

Noticeably absent from the Award findings is that nearly one year before the Organization filed the claim and lawsuit, the dispute was brought up with the Carrier. After approximately ten months of looking into the issue, the Carrier's Highest Designated Officer agreed with the General Chairpersons that the subject language was "clear" and provided that fixed headquarters positions could only have one designated point per workday in which their paid time started and ended. After all that time, one would think those individuals responsible for enforcing and interpreting the agreement could tell clear language when they see it.

Indeed, it was the Carrier's Engineering Department that was unsatisfied with this interpretation because it did not fit its plans, and that is when the formal handling of the dispute started. In this connection, Carrier's legal declarations attest that fixed headquarter positions do not primarily require travel, as Ms. Samantha Rogers stated: "*However, from time to time, headquartered employees may be assigned to work away from home on a temporary basis. These situations typically arise on an ad hoc basis, and may involve a derailment, flooding, or some other unanticipated event*" (Page 3 Rogers Declaration). Nevertheless, the Carrier's April 2024 Business Update (Employes' Exhibit "G") shows the Carrier boasting about converting traditionally mobile positions to fixed headquarters to save millions of dollars. Consequently, the Highest Designated Officer's interpretation did not fit the Carrier's bottom line, and that is when the clear language was not so clear anymore, at least as far as the Carrier was concerned.

Next, the Majority focused on the Organization's position that Rule 26 (A) and (B) were not mutually exclusive. However, the Organization also clearly pointed out that even if one were to take Rule 26(B) by itself, it still supported the requirement that the day started and ended at a single point, and the Majority failed to address this. We direct attention to Page 7 of BMWED's Rebuttal submission, which in pertinent part reads:

> *"In any case, Carrier's argument that Rule 26.B provides for two (2) different points to start and end the workday cannot win the day. BMWED does not argue that the Carrier cannot change the starting point from one day to the next; instead, we argue that the employee must be paid back to the designated point where the day began. In this regard, even if this Board were to focus on Rule 26.B alone, there can be no question that the rule only contemplates a single point to start and end the day. The easiest way to demonstrate this is to look at the rule and how the Carrier attempts to modify it. This comparison*

makes what the Carrier is attempting to do self-evident. First, we have Rule 26.B, which reads:

> *'When employes are sent away from headquarters and remain away overnight, the beginning and ending of day's work shall be at a designated point such as a railroad depot, section headquarters or motel-hotel accommodations at the nearest town where such lodging and meal accommodations are available.'*

The Carrier's interpretation of Rule 26.B in its submission on Page 2, reads:

> *'Rule 26.B states that headquartered crews that travel and remain overnight shall have 'a designated point' where they begin their day and a point at which they end their day, which can be any one of three different locations. ***'*

The Carrier's portrayal of the provision is concise and clear. BMWED is sure that is precisely how the parties would have written the agreement language had they meant to allow paid time to start and end at different points on the same day. ***But that is not what the language says.*** *On the contrary, the provision uses the single tense to refer to the beginning and end of the day's work. Remember, basic grammar requires us to use the article "a" or "an" to indicate one in number (as opposed to more than one). Moreover, correct grammar requires that we use 'a' before a singular noun beginning with a consonant sound (as opposed to 'an,' which we use before a singular noun beginning with a vowel sound). Therefore, the beginning and end of the day's work must be at 'a' designated point. If that was not enough to indicate that the parties meant one (1) designated point, we emphasize that the provision says designated 'point' and not 'points'." (Emphasis in Italics added, Bold and underscore in Original)*

Again, sometimes, the language just means what it says, and readers of the agreement should not interpret things that are not there.

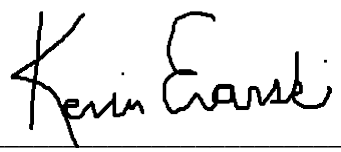
Another apparent problem for the Majority was the BMWED Employe statements that supported the Organization's position. The Majority describes the Carrier Manager Statements as "reliable" but finds that "*there is little evidence in the employees' statements that connects them to activity by Rule 26(B).*" (Award page 18). I will be the first to admit that the scores of employe statements did not detail Rule 26B specifically, but they did talk about being paid back to the point where they began their day even when held overnight or away from their headquarter.

For example, Brian Edwards writes: "*When working Camas section **** We stayed overnight in the Dalles OR and were paid back to our starting point*." Charles Enselein wrote: "*I have worked whether they (sic) are headquartered or mobile, the crew was paid from where they started in the morning and back to the same location even if they were told to stay in a different location overnight or for longer durations*." Steve Hitzke wrote: "****my time started and ended at the same location each day regardless of different moves instructed by BNSF or being sent away from my Headquarters/starting point. ***"*. This is just a tiny sampling from Employes' Submission Employes' Exhibit "L".

It appears that the BMWED members' statements must reference each rule and sub-provision. Yet, the Carriers' Highest Designated Officer gets total deference while shaking and moving through the Agreement language depending on whether the Engineering Department approves. Also getting deference are the carefully crafted Supervisor statements manufactured under close supervision of the Carrier's Labor Relations teams. The Majority considers these statements "reliable". Ironically, it was later pointed out to the Organization that at least two of the statements provided under "penalty of perjury" came from supervisors who have never worked under, or supervised employes under, the agreement controlling this dispute. Also, the Majority seemed to be smitten with employe statements written for a completely different case and taken out of context here. The Award on page 16 refers to the statement of one employe talking about starting his day in Sheridan, Wyoming, and his day ended at the out-of-town motel. But that case was about whether the Carrier could make the designated point a tool house instead of a motel, and that employe was writing how his designated point was a motel. Had the employe been aware that his statement would be taken out of context 35 years later, he could have easily added how he was paid back to his headquarter point.

Also, there was one critical undisputed fact that the Majority just glossed over. This dispute initially only involved traveling mechanics. However, the Organization's December 12, 2023 claim argued that it made no sense that fixed headquarters traveling mechanics should not be treated differently than any other fixed headquarters positions. The Carrier responded to the Organization on December 14, 2024, that going forward no fixed headquarter positions would be paid back to the starting point where they began their day unless they made the trip back.

For all of the reasons outlined above, I dissent.



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