Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25160
Docket No. 44761
00-1-98-1-D-2077

The First Division consisted of the regular members and in addition Referee Robert Richter when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

"Claims of various engineers listed on Attachment "A" hereto, for payment of road overtime pursuant to Article IV, Section 2 of the 1986 BLE National Agreement and Article IV, Section 2 of the September 10, 1992 On-Property Agreement."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This is the fourth arbitration case involving the same issue. The UTU filed similar claims relating to identical language in their 1985 National Agreement. The claims were denied in Award No. 9 of Public Law Board 5638 (October 28, 1995). The BLE progressed claims to Public Law Board 5764 and in Award No. 2 they were sustained. Additional claims were progressed by the BLE to Public Law Board 6185 which were sustained in Award No. 1 dated November 29, 1999.

The parties are governed by Article IV PAY RULES of the 1986 National Agreement which reads in part:

"ARTICLE IV - PAY RULES

Section 1 - Mileage Rates

(a) Mileage rates of pay for miles run in excess of the number of miles comprising a basic day will not be subject to general, cost-of-living, or other forms of wage increases.

(b) Mileage rates of pay, as defined above, applicable to interdivisional, interseniority district, intradivisional and/or intraseniority district service runs now existing or to be established in the future shall not exceed the applicable rates as of June 30, 1986. Such rates shall be exempted from wage increases as provided in Section 1(a) of this Article. Weight-on-drivers additives will apply to mileage rates calculated in accordance with this provision.

Section 2 - Miles in Basic Day and Overtime Divisor

(a) The miles encompassed in the basic day in through freight and through passenger service and the divisor used to determine when overtime begins will be changed as provided below:

Effective Date of Change	Through Freight Service		Through Passenger Service	
	Miles in Basic Day	Overtime Divisor	Miles in Basic Day	Overtime Divisor
July 1, 1986	104	13.0	104	20.8
July 1, 1987	106	13.25	106	21.2
July 1, 1988	108	13.5	108	21.6

(b) Mileage rates will be paid only for miles run in excess of the minimum number specified in (a) above.

(c) The number of hours that must lapse before overtime begins on a trip in through freight or through passenger service is calculated by dividing the miles of the trip or the number of miles encompassed in a basis day in that class of service, whichever is greater, by the appropriate overtime divisor. Thus, after June 30, 1988, overtime will begin on a trip of 125 miles in through freight service after 125/13.5 – 9.26 hours or 9 hours and 16 minutes. In through freight service overtime will not be paid prior to the completion of 8 hours of service.

Section 3 - Conversion to Local Rate

. . .

Section 4 - Engine Exchange (including adding and subtracting of Units) and Other Related Arbitraries

. . .

Section 5 - Duplicate Time Payments

(a) Duplicate time payments, including arbitraries and special allowances that are expressed in time or miles or fixed amounts of money, shall not apply to employees whose seniority in engine or train service is established on or after November 1, 1985.

(b) Duplicate time payments, including arbitraries and special allowances that are expressed in time or miles or fixed amounts of money, not eliminated by this Agreement shall not be subject to general, cost-of-living or other forms of wage increases."

The BLE and the Carrier are also parties to a 1992 Mediation Agreement which adopts language of the 1991 BLE National Agreement that is the same as Article IV of

the 1986 National Agreement, but makes additional increases in the miles in a Basic Day.

Section 2 of the 1992 Mediation Agreement reads as follows:

"Section 2 - Miles in Basic Day and Overtime Divisor

(a) The miles encompassed in the basic day in through freight and through passenger service and the divisor used to determine when overtime will begin will be changed as provided below:

Effective Date of Change	Through Freight Service		Through Passenger Service	
	Miles in Basic Day	Overtime Divisor	Miles in Basic Day	Overtime Divisor
October 1, 1992	118	14.75	118	23.6
January 1, 1993	112	15.25	122	24.4
January 1, 1994	126	16.25	126	25.2
January 1, 1995	130	16.25	130	26.0

(b) Mileage rates will be paid only for miles run in excess of the minimum number specified in (a) above.

(c) The number of hours that must lapse before overtime begins on a trip in through freight or through passenger service is calculated by dividing the miles of the trip or the number of miles encompassed in a basic day in that class of service, whichever is greater, by the appropriate overtime divisor. Thus after October 1, 1992, overtime will begin on a trip of 125 miles in through freight service after 8 hours and 28 minutes (125/14.75 = 8.47 hours). In through freight service, overtime will not be paid prior to the completion of 8 hours of service."

Prior to the 1986 Agreement the Carrier paid overtime after all miles paid as opposed to the distance of the trip ran by the engineer. However, the Carrier's engineers waited nine years to begin claiming overtime based on miles run as against miles paid.

Payments made by the DM&IR for preparation time, inspection time and initial terminal delay are converted into miles and the rate of these miles are frozen at the 1986 rate per Article IV, Section 5 of the 1986 National Agreement. Plus, these payments are made only to those engineers with seniority prior to November 1, 1985. The Carrier concedes that Engineers with seniority after November 1, 1985 are paid overtime based on miles run.

The claims presented to this Board turn on the meaning of ". . . miles of the trip" as used in Article IV, Section 2(c). Both parties have presented an extensive record to the Board as well as making an excellent presentation.

The Carrier argues that the Article IV, Section 2, did not change the method of calculating overtime for its engineers. Prior to 1986 Rule 7 of the Schedule Agreement covered overtime in Road Service. It stated:

"Rule 7

Overtime in Road Service

Overtime will be paid in all road service when the time on duty exceeds a time arrived at by dividing the miles paid on any trip by virtue of the various rules of this agreement by 12 and one-half (12-1/2). When overtime is paid on this basis, it will be paid on the minute basis at a rate of not less than three-sixteenths (3/16th) of the daily rate.

Interpretation:

The miles paid on any trip by virtue of the various rules of this agreement is understood to mean the miles run, and in addition the miles allowed for all allowances such as preparatory and inspection time, delay time, intermediate allowances and arbitraries."

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
Case No. 98-1-D-2077

CARRIER MEMBER'S DISSENT

The issue in this case is how to interpret the phrase "miles of the trip," which is the numerator in a formula that is used to determine how many hours an engineer in road service must be on duty in order to become eligible for overtime pay. The majority's award casts aside the method for determining overtime that has been in effect on the Duluth, Missabe and Iron Range Railway Company ("DM&IR") for more than seven decades -- under which the overtime numerator includes all of the miles for which an engineer is paid for his trip -- and finds instead that the numerator includes only the miles actually run by the engineer on the trip. The majority reaches this result on the basis of a supposed interpretation of the 1986 National Agreement with the Brotherhood of Locomotive Engineers ("BLE"), where the phrase "miles of the trip" was first used. The majority's understanding defies the plain language of the 1986 National Agreement, the decades of practice on this railroad, and common sense.

Even more importantly, the majority ignores the fact that the agreement governing the calculation of overtime on this railroad is the 1992 mediation agreement between DM&IR and BLE -- and that, as used in that agreement, "miles of the trip" indisputably means "miles paid," not "miles run." The award confers a windfall on employees and imposes an enormous, unbargained-for financial burden on DM&IR; it is not founded in the parties' actual agreement and can have no precedential effect.

A.

Locomotive engineers in the railroad industry traditionally have been paid on the basis of both mileage and time. Engineers earn premium pay for miles run beyond a certain contractually determined number (the "basic day"), and for time worked beyond a certain number of hours. As a general matter, the method for computing eligibility for time-based overtime ensures that engineers do not receive double premium pay: to the extent that an engineer receives mileage-based pay for his "overmiles" (the miles run on an assignment in excess of the basic day), he does not receive time-based overtime.

Until 1986, the basic day for engineers in through freight service was 100 miles, and also comprehended eight hours on duty. An engineer who ran more than 100 miles was paid at a per-mile rate for his overmiles. An engineer who was on duty more than eight hours and who ran only 100 (or fewer) miles received overtime on a per-minute basis beyond the eight-hour threshold. To prevent duplicate premium pay, however, as an engineer's miles run increased beyond 100 -- so that he received mileage-based payment for his overmiles -- the number of hours he had to be on duty before receiving time-based overtime increased in direct proportion. Overtime was paid only after a point (expressed in hours) that was determined by dividing the engineer's total miles run by a divisor of 12.5, the number derived by dividing the basic day of 100 miles by eight hours. So, for example, an engineer who was paid for 125 miles would receive overtime only if he worked for more than ten hours (125 miles divided by 12.5).

As a result of technological improvements, by the early 1980s it was no longer appropriate to consider the basic day to be only 100 miles. The railroads, through negotiations with BLE, obtained gradual increases in the miles of the basic day in through freight service, up to the current 130 miles; however, the time comprehended in the basic day remained at eight hours. Correspondingly, the divisor for determining the overtime threshold in through freight service likewise increased, and is now 16.25 (the basic day of 130 miles divided by eight hours).

B.

DM&IR has always had its own variation on the method of compensating engineers, reflecting its status as a short-haul railroad. Because most road runs (other than interdivisional runs) on DM&IR are typically only about 110 miles, engineers would earn less than their counterparts on other railroads if their pay was based solely on actual miles run. Accordingly, since at least 1923, the DM&IR working agreements have provided that the pay of locomotive engineers will be calculated on the basis of their miles actually run, plus constructive "miles" paid for arbitraries, such as initial terminal delay, intermediate delay, and final terminal delay incurred on the run.

As a corollary to this method of compensation, DM&IR has necessarily determined the overtime threshold for pre-1986 road engineers by dividing total miles paid, not the distance run, by the contractual divisor. DM&IR's "miles paid" formula was originally set out in a working agreement dated July 1, 1923 and continued into Rule 7 of the working agreement with BLE dated April 1, 1973.

DM&IR's "miles paid" formula has ensured that engineers do not receive duplicate payment for time worked beyond an expected standard day. Specifically, it has ensured that DM&IR's engineers would not realize a windfall by receiving premium time-based overtime pay when they have already received constructive overtime in the form of miles they did not actually run. Indeed, because pre-1986 road engineers ordinarily earn such a large number of constructive miles in road service, as a practical matter these engineers are not eligible to receive any time-based overtime. A typical DM&IR run, as I have said, is about 110 miles; the engineer on such a run currently will receive pay for the basic day of 130 miles. DM&IR then adds to this all pay miles the engineer earned for allowances and arbitraries; this typically brings the "miles paid" to 210 or more for pre-1986 engineers.[1] In determining the overtime threshold, DM&IR divides total miles paid by the appropriate divisor, now 16.25 -- which, in this instance, would yield an overtime threshold of 12.9 hours. This means that the engineer would not receive overtime (as he cannot perform more than 12 hours of service), befitting the fact that he has already been paid once for delay time, in "miles."

[1] Most of the constructive miles paid to a pre-1986 engineer are for intermediate delay – for example, the time spent at an iron ore pellet production plant while a train is being loaded. In some types of road service, such delay time averages as many as 5 hours per trip, which equals 62.5 pay miles.

The 1986 BLE National Agreement, to which DM&IR was a party, increased the miles in the basic day in through freight service beyond 100, and revised the overtime threshold calculation correspondingly. Article IV, Section 2(c) of the agreement provides (emphasis added):

> (c) The number of hours that must lapse before overtime begins on a trip in through freight . . . service is calculated by dividing the miles of the trip or the number of miles encompassed in a basic day in that class of service, whichever is greater, by the appropriate overtime divisor. Thus after June 30, 1988, overtime will begin on a trip of 125 miles in through freight service after 125/13.5 = 9.26 hour or 9 hours and 16 minutes. In through freight service, overtime will not be paid prior to the completion of 8 hours of service.

Most railroads apply Article IV, Section 2(c) by using "miles run" as the numerator in the overtime formula, which is a reasonable way to measure overtime when the number of actual miles traveled is reflective of a day's work.

But on DM&IR, such an approach would be nonsensical, as engineers are not paid solely on the basis of actual miles run. DM&IR therefore never understood Article IV, Section 2(c) of the 1986 National Agreement as being intended to modify the railroad's decades old rules and practices respecting the computation of overtime. Furthermore, nothing in the bargaining history of the 1986 National Agreement suggests that such a sweeping change was intended. Accordingly, after the 1986 National Agreement became effective, DM&IR continued its established practice of using "miles paid" as the numerator in the overtime formula. And for eight years thereafter, neither BLE nor any engineer ever submitted a claim disputing this practice.

Rather, in 1992 -- in the light of DM&IR's having used "miles paid" as the overtime numerator throughout the six years that Article IV, Section 2(c) had been in effect, without objection from BLE -- DM&IR and BLE entered into a mediation agreement readopting the same Article IV, Section 2(c) "miles of the trip" language. The effect of the parties' doing so was to ratify DM&IR's practice of using "miles paid" as the "miles of the trip" numerator.[2]

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[2] See, e.g., Teamsters Industrial Employees Welfare Fund v. Rolls-Royce Motor Cars, 989 F.2d 132, 137 (3d Cir. 1993) ("The past dealings of contracting parties pursuant to an agreement are probative of the parties' intent. . . . [The union] renegotiated the collective bargaining agreement on two separate occasions during this [five-year] period and never mentioned that [the company] should make such [pension] contributions. The actions of both contracting parties are consistent with a mutual intention" that the company was not required to make such contributions); Travellers International AG v. Trans World Airlines, Inc., 772 F. Supp. 1087, 1102-03 (S.D.N.Y. 1989) (TWA had "never complained to Travellers about its pricing practices" prior to the instant litigation, but, rather, "had ratified this practice by periodically entering into new agreements which contained the identical pricing provision"), aff'd, 41 F.3d 1570 (2d Cir. 1994); NRAB 1st Div., Award 11583, Brotherhood of Railroad Trainmen and Northern Pacific Ry., June 13, 1947, at 623 (Scott, Arb.) ("The practice complained of is one of longstanding. . . . During the (continued . . .)

Consequently, when BLE abruptly reversed course in 1994 and began filing overtime claims premised on the notion that the term "miles of the trip" really means "miles run," the claims were not founded on the parties' labor agreement.

What BLE seeks would be a sweeping, extremely costly change in the overtime system. BLE wants to calculate overtime on the fiction that DM&IR's engineers have been paid only for miles run, when in fact they have been paid for substantial "miles" that they have not actually run. In the example I give above -- in which an engineer ran only 110 miles, but was paid for 210 miles -- BLE would prefer simply to divide 130 miles (the basic day) by 16.25 to get an overtime threshold of eight hours. Using this methodology, virtually all road engineers would receive some overtime pay -- perhaps as much as four hours of overtime -- every day, even though these engineers had already been paid in "miles" for delay time.

BLE's desire for a new overtime pay system that results in employees' being paid twice for time worked beyond an expected standard day is contrary to the governing 1992 labor agreement, and the union's claims must therefore be denied.

C.

There is no logic in the majority's view that DM&IR is required to use "miles run" in calculating the overtime threshold. BLE never offered any valid argument in favor of this position during the Board's consideration of this case, and the majority provides none in its award.

Even if the 1986 National Agreement were what governed here, and it is not, the majority's decision would be insupportable. All the majority has to say in defense of its result is that the term "'[m]iles of the run' is clear and unambiguous" (Award at 6). If Article IV, Section 2(c) actually said what the majority recites, this might be a different case. But the critical language is "miles of the trip" – and that language certainly does not clearly and unambiguously mean "miles run." The majority cites to Brotherhood of Locomotive Engineers and DM&IR, PLB No. 6185, Case No. 1, Award No. 1, November 21, 1999 (Twomey, Arb.) in support of the proposition that "miles of the trip" as used in Article IV, Section 2(c) of the 1986 National Agreement clearly means "miles run." But PLB 6185 offered no justification for this assertion either; it simply announced the proposition as ipse dixit.

(. . . continued)
continuance of this practice there had been at least one revision of the schedule without correction. That is evidentiary of the mutual understanding which the parties themselves had placed upon their agreement"); NRAB, 1st Div., Award 8249, Order of Railway Conductors and The Pittsburgh & Lake Erie R.R., June 19, 1943, at 310 (Simmons, Arb.) ("We think the proper rule is that where existing rules are readopted without change in a subsequent agreement, in the absence of contrary intent shown the construction, and application of the rule, had before the revisions applies to the rule after revision").

Moreover, PLB 6185 did not even discuss the directly contradictory award on this property in United Transportation Union, Missabe Division and DM&IR, PLB No. 5368, Case No. 17, Award No. 9, October 28, 1995 (Malin, Arb.). That award considered identical language originating in the 1985 United Transportation Union national agreement, found the term "miles of the trip" to be ambiguous, and held that on DM&IR, the term means "miles paid." The failure of PLB 6185 to consider the UTU award was particularly significant, given that the award of PLB 6185 would create a wide disparity in overtime pay between DM&IR's trainmen (represented by UTU) and engineers, a result directly at odds with the aim of the 1986 BLE National Agreement.[3] Although the majority here labels the award of PLB 5368 "palpably erroneous" (Award at 6), it provides no justification for that intemperate characterization.[4]

In all events, the fact is that the 1986 National Agreement merely states that the numerator in the overtime formula shall be the "miles of the trip," without expressly saying what that phrase means. Nothing in the literal terms of the 1986 National Agreement dictates that the numerator in the overtime formula, on DM&IR, must be "miles run."

As used in Article IV of the 1986 National Agreement, the phrase "miles of the trip" is not self-defining. The plain terms of the National Agreement, however, reveal that "miles of the trip" does not mean "miles run." Article IV uses the term "miles run" in Section 1(a) and again in Section 2(b).[5] If the parties to the agreement had meant to tie the overtime threshold computation of Section 2(c) of the same Article IV exclusively to "miles run," they surely would have used that term for a third time, rather than inventing a new term. It defies logic and ordinary principles of contract interpretation to suppose that by choosing not to use the established term "miles run," the parties intended to convey the meaning "miles run."

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[3] The 1986 BLE National Agreement was imposed by Arbitration Board No 458 (Dennis, Arb.). In its award, Board No. 458 emphasized that the "principal consideration" informing its decision to adopt the tentative agreement that had been arrived at by BLE and the carriers as the national agreement was the 1985 UTU national agreement (which was later construed by PLB 5638), and that it was imperative that there be "harmony among the pay and work rules governing" trainmen and engineers.

[4] The majority (Award at 1) also refers to Brotherhood of Locomotive Engineers and DM&IR, PLB No. 5764, Case No. 2, Award No. 2, September 26, 1997 (Vernon, Arb.), but that award was vacated and set aside by an Order entered on August 31, 2000 in Duluth, Missabe & Iron Range Ry. v. Brotherhood of Locomotive Engineers, C.A. No. 99-467 (D. Minn.). Accordingly, there are only two, not three, prior arbitration awards on this matter: the award of PLB 5368 (Malin, Arb.) and that of PLB 6185 (Twomey, Arb.).

[5] Section 1(a) provides: "Mileage rates of pay for miles run in excess of the number of miles comprising a basic day will not be subject to general, cost-of-living, or other forms of wage increases" (emphasis added). Section 2(b) provides: "Mile rates will be paid only for miles run in excess of the minimum number specified in (a) above" (emphasis added).

The only plausible reading is that the parties chose a different phrase, "miles of the trip," to achieve a meaning different from the twice-used phrase "miles run."[6]

The best reading of the agreement is that the phrase "miles of the trip" refers to whatever mileage (or constructive mileage) total is used as the threshold for earning time-based overtime compensation on a particular carrier.

Although most railroads apply Article IV by using running miles as the "miles of the trip" numerator, this is because that is the mileage total that comports with those railroads' compensation structure and practices. But on DM&IR, the term has a different meaning, which reflects the parties' consistent practice over seven decades and the requirements of the parties' local working agreement.

So the majority is wrong about the meaning of the phrase "miles of the trip" in the 1986 National Agreement itself.

But, even more significantly, what the majority overlooks entirely is that DM&IR and BLE themselves gave meaning to the phrase "miles of the trip" on this railroad when they readopted the language in their 1992 mediation agreement after six years of experience with it. For the reasons I have already explained, there simply is no doubt that, as used in the 1992 DM&IR/BLE mediation agreement, the phrase "miles of the trip" means "miles paid." It is therefore not relevant whether the phrase is construed as meaning "miles run" on other railroads.

By concluding that "miles run" must be used to compute overtime on DM&IR, the majority's award would have the perverse effect of causing this railroad's locomotive engineers to receive double pay for overtime. Under the majority's view, not only would DM&IR's engineers be paid under the standard "miles paid" formula, which incorporates constructive overtime in the form of miles not actually run, but they would get a second overtime payment using just actual running miles to calculate the overtime threshold.

It is axiomatic that contractual language should not be construed to produce results not likely to have been intended by the parties.[7] The parties' experience with the "miles of the trip" provision for the first six years following entry into the 1986 National Agreement,

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[6]See, e.g., Award No. 6, Public Law Board No. 2012, Burlington Northern and United Transportation Union, April 8, 1978 (Twomey, Arb.) (use of the different terms "time slip" and "claims" in an agreement indicated the parties' intent to achieve different meanings); Teracorp, Inc. v. NL Industries, Inc., 73 F.3d 738, 744 (7th Cir. 1996) (when interpreting a contract, "we assume that the same words . . . have the same meaning . . . and that the choice of substantially different words to address analogous issues signifies a different approach"; when contracting parties use "different language to address parallel issues . . . it is reasonable to infer that they intend this language to mean different things").

[7]E.g., NRAB 1st Div., Award 15013, Order of Railway Conductors and Western Pacific R.R., December 5, 1951 (Colby, Arb.).

and their readoption of that provision in the 1992 mediation agreement, confirms that DM&IR did not intend the self-defeating arrangement of paying its employees twice for overtime -- and that BLE itself knows this full well.[8]

The wrong-headedness of the majority's view that the overtime threshold on DM&IR must be calculated on the basis of "miles run" is further demonstrated by its being hopelessly in conflict with BLE's own interpretation of Article IV of the 1986 National Agreement as regards the payment of compensation on a mileage basis. Section 2(b) of Article IV provides: "Mileage rates will be paid only for miles run in excess of the minimum number specified in [Section] (a) above," i.e., the number of miles in the basic day. This plainly means that an engineer may not receive compensation on a mileage-rate basis for miles in excess of 130 unless he has actually run those miles. Yet DM&IR's engineers are routinely paid a mileage rate for "miles" above 130 that they have not actually run.

The majority in this case has rendered an unreasoned, aberrant award. The award is refuted by the language in the parties' actual agreements, and by more than 70 years of carrier practices consistently agreed to and acquiesced in by the organization. The majority's award results in substantial windfall compensation never intended by the parties in their agreements. It is wrong and without precedential value.

John F. Ingham
Carrier Member

[8]The majority's award flies in the face of the longstanding rule against construing labor agreements as conferring duplicate overtime payments for the same service. This rule has been affirmed over and over again in arbitration awards dating back to at least 1915 -- awards that have specifically rejected computing overtime on the basis of running miles when this method would produce double payments to employees because paid delay time already compensated employees for overtime. E.g., Rulings As To Meaning or Application of Award, In the Matter of Arbitration Between the Western Railroads and Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen & Enginemen, Submitted to Arbitration Under Act of Congress (1915); NRAB 1st Div., Award 6280, Brotherhood of Locomotive Engineers and Southern Pacific Lines, December 11, 1941 (Mabry, Arb.); NRAB 1st Div., Award 19407, Brotherhood of Locomotive Engineers and Jt. Texas Division of Chicago, Rock Island & Pacific R.R. et al., February 17, 1960 (Coburn, Arb.); NRAB 1st Division, Award 8104, Order of Railway Conductor and Minneapolis, St. Paul & Sault Ste. Marie Ry., May 26, 1943; NRAB 1st Division, Award 20420, Order of Railway Conductors & Brakemen and Louisville & Nashville R.R., April 1, 1964 (Moore, Arb.).