NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6171

JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
GENE L. SHIRE, CARRIER MEMBER
RICHARD K. RADEK, EMPLOYEE MEMBER

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
BNSF SANTA FE, GENERAL COMMITTEE

and

THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY

Award No. 7
Case No. 7

Date of Hearing - May 26, 1999
Date of Award - August 31, 1999

Statement of Claim:

Claim CR 7794, dated 11-30-95, on behalf of Coast Line Engineer V. J. Witt, et. al., for a basic day penalty account Carrier not providing engineers with a lighted, paved, fenced parking lot, at Winslow, Arizona

FINDINGS:

Public Law Board No. 6171, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

In 1982, the parties negotiated a Memorandum of Agreement that provided, *inter alia*, that:

> (1) Any change in the location for going on and off duty within the present switching limits will be made by bulletin notice to the employees. A newly designated location for going on and off duty will provide the following:
>
> (a) Adequate fenced, lighted and paved parking facilities.

In the winter of 1992, Carrier's Division Superintendent approached the Organization's Local Chairman, indicating that Carrier desired to move the on/off duty location at Winslow, Arizona from the Division offices to the Round House, a point three

miles away. According to the Organization, even though the parking at the Round House was not adequately fenced, lighted and paved, it agreed to the change based on assurances that the lot would be improved in the coming spring. During the next two years the parties held meetings and exchanged correspondence on the problem, but it was not resolved to the Organization's satisfaction. Approximately three years after the on/off duty point was changed, the instant claim was filed, contending that the Winslow parking lot failed to meet the standards required by the 1982 Agreement. That claim, and others like it, remained unresolved after handling as provided in the parties Agreement, and was appealed to this Board for resolution.

The Organization contends that the claims have merit. It says Carrier made a commitment that if the Organization allowed it to move the on/off duty point from the Division offices to the Round House it would improve the parking lot. It states that it was told that the lot could not immediately be improved at the time of the move because it was winter and the paving material provider was closed for the season. However, when weather permitted, Carrier did nothing because funding for the improvement had been lost from the budget. Winter arrived again, the Organization says, and the Carrier did not attempt to honor its commitment that the lot be paved. The Organization contends that to this day Carrier has not honored its commitments, and the lot still does not meet the standards contemplated by the 1982 Agreement. It notes that engineers have had their vehicles vandalized and items stolen because of Carrier's failure to have a fenced paved lot. Carrier has willfully violated the Agreement, and a penalty is required for this violation, it is argued.

Carrier responds with an argument that it has complied with the 1982 Agreement. That agreement, it is acknowledged, requires that parking lots be paved. "Paving" contemplates a variety of materials, the Carrier says, and the gravel in the lot qualifies, as it "form[s] a firm and level surface for travel" - the dictionary definition for paving. Carrier notes that the Organization has asked to have the lot paved with blacktoping. The Agreement, Carrier says, does not require that engineer parking lots be paved with asphalt. And, "today," even though the lot has now been paved with asphalt, "it was done to improve the employees' quality of life" and not because it was required by the BLE Agreement.

With respect to the reparations claimed, Carrier insists that they are excessive and frivolous. It notes that the pilot claim before this Board seeks penalty payments for 322 basic days, or about 38,640 miles for 11 Claimants. Some of the claims are for a single basic day for the month, others are for a basic day for each calendar day in the month, whether the engineer worked or not. Even if the Agreement some how or other were considered to have been violated, Claimant's are not entitled to any reparations, Carrier says.

In spite of Carrier's relying on a dictionary definition of the term "paved," which it argues includes gravel if it forms a firm and level surface for travel, the Board is not persuaded that the parties, when they adopted the 1982 Memorandum of Agreement, intended a gravel lot to be considered a "paved parking facility." In the Board's experience, the commonly accepted definition of a paved parking facility is one that is paved with asphalt or concrete. This definition is consistent with designations given roads and highways by every State Highway Department in the country. On their official maps, each State makes a distinction between its paved and unpaved roads. Paved roads are asphalt or concrete, and unpaved roads are gravel or crushed rock. Often times, where concrete or asphalt paving ends and a gravel or crushed rock surface starts, these maps

carry an indication that "paving ends" even though the gravel or crushed rock "forms a firm and level surface for travel." Also, at that point there often times is a road sign warning motorists that the pavement ends. Gravel or crushed rock is not considered paving in these circumstances and it is doubted that it was considered paving by the negotiators of the 1982 Agreement.

Moreover, the Division Superintendent in his January 11, 1995 letter, explaining why the lot had not been paved, stated, "[t]his meant getting [the project] bid again, ... it then became late in the year and the asphalt people quit making that product ... ." This comment indicates that he too, understood that the lot needed to be paved with asphalt and not gravel to meet the standards established by the 1982 Agreement. Accordingly, it is the opinion of the Board that a gravel parking lot is not to be considered a "paved parking facility" as contemplated in the Agreement. The grievance has merit. It will be sustained.

Carrier has argued that the remedy sought in this matter is excessive and frivolous. The Board does not agree. In First Division Award 24770, the National Railroad Adjustment Board was faced with a claim where the Carrier failed to provide trainmen with proper locker and washroom facilities. Citing Award 99 of PLB 3985,which held:

> The payment of a day's pay is proper for the violation of the rule not as a penalty, but compensatory damages which will deter the Carrier from complete disregard of its obligation. In the instant case, the Carrier has deprived Claimants of their rights under the contract rule and thus a literal non-compliance with the express terms of the contract warrants the payment under the minimum day rule.

the First Division awarded a day's pay to the Claimants involved, because the Carrier did not comply with the precise terms of the Agreement. This Board will do the same, but only for days in which an engineer Claimant actually was on duty and actually parked his vehicle in the parking lot.

A W A R D

Claim sustained, as indicated in the Findings of the Board.

O R D E R

The Board concludes that an award favorable to Claimant shall be made. Carrier is directed to comply with the Findings of the Board, and make full payment due within 60 days of the date indicated below.

John C. Fletcher, Chairman & Neutral Member

Gene L. Shire, Carrier Member

Richard K. Radek, Employee Member

Dated at Mount Prospect, Illinois., August 31, 1999