

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39717
Docket No. MW-37564
09-3-NRAB-00003-020667
(02-3-667)

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to pay System Gang employe R. Hutchinson the per diem allowance for the dates of August 24, 25, 26, 27, 28, 29, 30, 31 and September 1, 2001 (System File RJ-0139-102/1289769).**
- (2) As a consequence of the violation of the Agreement referred to in Part (1) above, Claimant R. Hutchinson shall now receive payment of the per diem allowance for the dates of August 24, 25, 26, 27, 28, 29, 30, 31 and September 1, 2001.”**

FINDINGS:

The Third 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.

Claimant R. Hutchinson worked on August 23, observed eight rest days from August 24 through August 31, observed the Labor Day Holiday on September 1, observed a personal leave day on September 2, took vacation on September 3, and performed compensated service on September 4, 2001. According to the Organization, because the dates of August 24 through August 31 were rest days preceding the holiday, a personal day and a vacation day taken by the Claimant, he should have been allowed per diem for his rest days and the Gang's observed holiday, Friday, August 24 through September 1, 2001.

The Organization submitted a claim contending that the Carrier violated the Agreement by not granting the Claimant per diem allowance following his rest days, holiday and personal leave day. According to the Organization, it was improper to deny the Claimant's per diem for these dates. The Organization requests that the Claimant be granted per diem allowance for August 24 through September 1, 2001.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier first contends that this matter has previously been resolved by Public Law Board No. 6302, Award 14. Further, the Carrier asserts that the Agreement does not provide for the remedy the Organization has requested.

Rule 39 (e) provides:

“The foregoing per diem allowance will be paid for each day of the calendar week, including rest days, holidays and personal leave days, except it will not be payable for workdays on which the employee is voluntarily absent from service, or for rest days, holidays or personal leave days when the employee is voluntarily absent from service when work is available to him on the workday immediately preceding or the workday immediately following said rest days, holidays or personal leave days. . . .”

In the instant case, the Board cannot find that the Organization has been able to meet its burden of proof to show that the Claimant should have been awarded per diem for the relevant dates. We conclude that this matter has already been resolved by Public Law Board No. 6302, Award 14 decided by Referee Martin Malin. In that case, Referee Malin determined that pursuant to Rule 39, when an employee is voluntarily absent on the workday immediately following rest days, holidays or personal leave days, he is not entitled to the relevant per diem. In the instant case, we have determined that the Claimant was voluntarily absent on September 3, 2001, and therefore, is not entitled to per diem.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of June 2009.