Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37105
Docket No. MW-36523
04-3-01-3-4

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier refused to allow Mr. M. E. Schooler the payment of the per diem allowance for the dates of February 6, 7, 8, May 1, 2, and 3, 1998 (System File J-9939-58/1213036).

(2) As a consequence of the violation referred to in Part (1) above, Claimant M. E. Schooler shall now receive the per diem allowance payment for the dates of February 6, 7, 8, May 1, 2, and 3, 1998."

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.

This claim arose when the Carrier recouped per diem money previously paid to the Claimant for two sets of rest days per Rule 39. According to the Carrier, the payments were originally made in error. The recoupment occurred some 19 months and 15 months after the respective payments were received by the Claimant.

The Carrier's entitlement to correct a genuine error is not in controversy. Rather, it is the Claimant's right to the per diem money that forms the focus of this dispute. The issue is not one of first impression between these parties.

The Claimant worked a four-day workweek that entitled him to per diem under Rule 39 for his three consecutive rest days unless he was ". . . voluntarily absent from service . . ." on the workday immediately preceding or following his rest days. The Claimant took two days of vacation on February 9 - 10, 1998 and May 4 - 5, 1998 immediately following his three rest days on both occasions. In the Organization's view, the vacations of less than five consecutive days did not disqualify the Claimant from receiving per diem for his preceding rest days. The Carrier maintains the vacation days did.

Although there were insignificant factual differences, Award 14 of Public Law Board No. 6302 decided a dispute between these same parties over an identical fact pattern. The dispute there involved rest days in 1995. A five-day workweek was involved versus the four-day workweek here. The former controversy involved a single day of vacation on the Monday following Saturday - Sunday rest days as compared with two-day vacations on Monday - Tuesday following rest days of Friday - Sunday. Despite these differences, it can be seen that the pattern is identical: less than five days of vacation usage immediately follows a set of rest days for which per diem is denied.

At the time the former 1995 dispute arose, the applicable Agreement did not provide for usage of vacation time in less than 40-hour increments. Nonetheless, there was a practice of allowing the use of vacation time in single-day increments.

On the record before us, Public Law Board No. 6302 found, as a matter of fact, that the parties had developed a consistent practice of not paying ". . . per diem

allowances for weekends preceding vacations of less than one full week." Public Law Board No. 6302 denied that claim accordingly.

In 1996, the parties' Mediation Agreement changed the existing national vacation Rules and explicitly allowed for vacation credits to be used in increments of less than 40 hours. On this record, however, there is no evidence that Rule 39 was changed in any manner whatsoever. Thus, the operation of Rule 39 continued on as before 1996.

It is well settled that a past practice between the parties to a Labor Agreement can serve several important purposes. Among them is to provide specificity to general Agreement language and to provide clarification to language that is susceptible of two or more interpretations.

As we read Award 14, Public Law Board No. 6302 determined the parties' practice to be an interpretation of the proper application of Rule 39 and its associated Appendix W-1 to the fact pattern before it.

On this record, however, the Organization challenged the existence of the consistent practice advanced by the Carrier before, and so found by, Public Law Board No. 6302. Accordingly, the Carrier was tasked with the burden of proof here to once again establish the professed practice.

On this record, we find that the Carrier provided the requisite evidence to substantiate its asserted practice by two independent means: first, by injecting Award 14 of Public Law Board No. 6302 into the record and, second, by providing evidence with its December 28, 2000 letter on the property.

Regarding the Carrier's December 28, 2000 letter, we do not find that it was an impermissible addition to the on-property record. While it is true that the Organization mailed its Notice of Intent to the Board on the same date, December 28, 2000, it appears the letters crossed in the mail. Thus, the Carrier's letter was not sent after the record on the property was closed. We note also that the Carrier's letter was received, according to the Organization's date stamp, on December 29, 2000. Thus, there is no proper basis for suspecting the Carrier's letter was back-dated to circumvent the closure of the record.

Even if the Carrier's December 28, 2000 letter is ignored, the evidentiary effect of Award 14 of Public Law Board No. 6302 warrants discussion. That Award made a specific finding of fact regarding the existence of the consistent past practice asserted by the Carrier. Per the evidentiary doctrine of collateral estoppel, findings of fact in a previous forum involving the same parties, the same issue of fact, and the same fact pattern will be given effect in later proceedings involving the same issues between the same parties. Admittedly, collateral estoppel is a court-made doctrine designed to promote efficiency by eliminating re-litigation of the same questions of fact over and over again.

While the unique features of railroad arbitration may not warrant the application of the doctrine with the same force and effect it has in the courts, in our view, and we so determine, a finding of fact in a prior Award between the same parties that involves the same fact pattern does constitute evidence of that fact, beyond the level of mere assertion, when the issue is directly the subject of assertion and counter-assertion by both parties in a subsequent on-property record. Such is the case here.

On this record, both parties skirmished over the propriety of Award 14 of Public Law Board No. 6302 in their on-property correspondence. Given the bilateral exchange, we find the Award of Public Law Board No. 6302 to stand as evidence of the consistent practice relied upon by the Carrier.

By either means discussed above, the Carrier's evidence shifted the burden of proof back to the Organization to provide evidence, and not mere assertion, that no such practice existed. The two examples provided by the Organization are not apropos. The first was a settlement of a claim on a non-precedent setting basis that was also not to be cited in any future similar matter. As such, it carries no weight in the instant dispute. The second, as written, represents a situation where the affected employee secured agreement in advance from his supervisor that his use of a vacation day to resolve some personal business would not deprive him of per diem for the preceding weekend. The record herein does not show that such an agreement was obtained in advance in the present dispute. Thus, the Organization's second example is not on point.

Given the foregoing discussion, we do not find any proper basis for departing from the rationale and findings of Award 14 of Public Law Board No. 6302.

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 21st day of July 2004.