

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 37163  
Docket No. MW-36953  
04-3-01-3-568

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(Union Pacific Railroad Company (former Southern  
( Pacific Transportation Company [Western Lines])

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier refused to allow Mr. R. L. Begay the payment of the per diem allowance for the dates of July 21, 22 and 23, 2000 (System File J-0039-59/1243992 SPW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. L. Begay shall now receive the per diem allowance payment of one hundred forty-five dollars [sic] (\$144.00) for the dates of July 21, 22 and 23, 2000.”

**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.

The Claimant was assigned to Gang 7912 with a Monday through Thursday workweek. The Claimant worked on Thursday, July 20, 2000; observed rest days on Friday through Sunday, July 21 - 23, 2000; and took a vacation day on Monday July, 24, 2000. The Organization argues that the Claimant is entitled to per diem allowance for his rest days of July 21-23, 2000.

Rule 37(4) provides:

“(4) The foregoing per diem meal allowance shall be paid for each day of the calendar week, including rest days and holidays, except that it shall not be payable for work days on which the employee is voluntarily absent from service, and it shall not be payable for rest days or holidays if the employee is voluntarily absent from service when work was available to him on the work day preceding or the work day following said rest days or holiday.”

Because the Claimant took a vacation day on the work day following his rest days, the Carrier focuses on the language that the per diem allowance for rest days “. . . shall not be payable for rest days . . . if the employee is voluntarily absent from service when work was available to him on the work day . . . following said rest days. . . .”

The Organization relies upon the July 19, 1967 Arbitration Board No. 298's Award which formulated Rule 37 and focuses upon the Questions and Answers which were formulated following that decision, particularly the following:

**"Section 1(B)**

\* \* \*

4. May we assume that absence on vacation is voluntary absence from service which would bar the employee from payment of the per diem meal allowance for certain days other than the vacation days? For example, an employee works Monday thru Friday headquartered in a camp car and is released for 1 week's vacation, would his per diem meal allowance be paid for the 5 days in the last week worked and then for the first day on which he return[s] to work following the vacation, eliminating the rest days before vacation and rest days after vacation in addition to the 5 vacation days? . . .

**Answer: Pay rest days last work week - no pay during vacation."**

The Organization further points out that under Article VIII of the 1996 National Mediation Agreement, employees are now permitted to take vacations in less than 40 hour increments:

**"Effective January 1, 1997, employees shall be permitted to take one week of their vacation allowance per year in less than 40 hour increments, provided that such vacation days will be scheduled in accordance with existing rules on the carrier applicable to the scheduling of personal leave days."**

Thus, according to the Organization, because the 1996 National Mediation Agreement now allows employees to take one day vacations as the Claimant did in this case, it follows that the question and answer to Arbitration Board No. 298 quoted above similarly requires that employees now receive per diem allowances for rest days immediately before a one day vacation.

The Carrier counters that assertion by pointing to Public Law Board No. 6302, Award 14 between the parties where the employee took a one day vacation in 1995 and was denied per diem allowance for the two preceding rest days on the

basis that a past practice existed where "per diem allowances for weekends preceding vacations of less than one full week" were not paid.

The Organization finds Award 14 distinguishable because the dispute in that case arose in 1995 and pre-dated the 1996 National Mediation Agreement amendment to the vacation provisions permitting less than 40 hour vacations.

The Organization's burden has not been carried. On its face, Rule 37(4) does not permit payment to the Claimant because per diem "... shall not be payable for rest days . . . if the employee is voluntarily absent from service when work was available to him on the work day . . . following said rest days. . . ." By taking a vacation day on Monday, July 24, 2000, the Claimant was "... voluntarily absent from service when work was available to him on the work day . . . following said rest days. . . ." Although the 1996 National Mediation Agreement now allows employees to take one day vacations, the specific example used in the question and answer to the July 19, 1967 Arbitration Board No. 298 Award addressed the situation where an employee took "1 week's vacation" - not "1 day's vacation." There is nothing to show that when the 1996 National Mediation Agreement permitted employees to take one week of their vacation allowance in less than 40 hour increments that the parties addressed the rest day per diem allowance question for those situations and agreed that the per diem provisions would be similarly modified. Instead, the language in Rule 37(4) remained and that language clearly favors the Carrier's position.

The Organization's argument is quite logical. But, because of the language in Rule 37(4) and the lack of a modification to the per diem allowance provisions after the 1996 National Mediation Agreement, at best, the Organization's argument is debatable that when the less than 40 hour per week provisions for vacations came into effect that the parties also intended to amend the per diem allowance provisions. Without more of a showing by the Organization that such was the parties' intent, we cannot sustain this claim.

**AWARD**

**Claim denied.**

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**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 28th day of September 2004.**