Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38028
Docket No. MW-36742
06-3-01-3-263

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 Carrier violated the Agreement when it failed to allow Mr. V. E. O'Toole the ability to return to work after a return to work order following a legal strike on February 24, 2000, when it failed and refused to allow him compensation for said date and when it failed and refused to allow him the per diem allowance for February 24, 25, 26 and 27, 2000 and the Article XIV travel allowance (System File W-0033-153/1231546).

(2) As a consequence of the violation referred to in Part (1) above, Claimant V. E. O'Toole shall now be '*** allowed five (5) hours pay at his respective straight time rate of pay, his per-diem expense of forty eight ($48.00) dollars per day for four (4) days and his Article XIV travel allowance of twenty five ($25.00) dollars as total compensation for this violation of the Agreement and return to work court order.'"

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 facts of this claim are essentially undisputed, but they are unusual. Although the Carrier's Submission included new information and argument, we confined our analysis of the claim to consideration of only those facts that were established by careful review of the on-property record.

The Claimant was a member of System Gang 9061 working in the vicinity of Manhattan, Kansas, during the relevant time frame. The gang worked a compressed workweek, i.e., Monday through Thursday with ten hours of work per day. The Claimant also served as a Local Chairman for the Organization.

On Thursday, February 24, 2000, most of the gang members were assembled at the Manhattan work site for what was to be their last planned work day for the week. However, no work was performed that day. According to the record, the Organization authorized a strike.

The Claimant was not present at the work site at any time on Thursday, February 24, 2000. According to unrefuted Carrier assertions, the Claimant was in Marysville, Kansas, which was some 45 minutes drive time away from the work site. The record suggests that the Claimant was performing some strike-related union business at that location.

The Carrier obtained a Temporary Restraining Order (TRO) to enjoin the strike at approximately 10:45 A.M. on the day in question. Word eventually spread among the employees and supervisors that the strike was over for the time being. When the employees who were present at the work site inquired about going back to work, they were told by a person identified as Supervisor Stewart that there would be no work for the remainder of the day. Although the Claimant learned of the information provided by Stewart to the employees at the work site, the record does not establish how and when he learned of it.

The Claimant's signed statement shows that he ". . . paged [Supervisor Brenke] after the strike was over about coming back to work, . . ." but the record does not establish that the Claimant and Brenke actually spoke, nor does it establish what message the Claimant might have left for Brenke, if any, beyond a return phone number.

Although the Carrier initially denied pay, per diem, and travel allowances to all members of the gang who participated in the short strike, it eventually paid those employees who had actually reported to the work site on February 24 and remained at the site until the strike was over.

In disputes of this kind, it is the Organization's sole burden of proof to establish what Rules were intended to apply to the facts at hand and how those Rules are to be applied to those facts. Although the Organization relies for part of its claim on Rule 39(e) which provides for per diem allowances for on-line service, the Rule explicitly excludes payment for workdays on which the employe is voluntarily absent. The parties also entered into a Letter of Agreement dated October 31, 1998, which is part of the Agreement as Appendix W-1, that provided clarification for when an employee is deemed to be absent. The Appendix specifies that work must have been available to the employee on the day of absence. Thus, for the Claimant to escape the operation of the per diem payment exclusion, the Organization and the Claimant must establish that work would not have been available for him on February 24, 2000. But for the strike, the record shows that the day would have been the last regular work day for the workweek. In the absence of evidence to the contrary, and there is none, we must conclude that February 24, 2000 was a normal workday on which work would have been available to the Claimant. It follows, therefore, that the Organization has not successfully proven that the Claimant was entitled to the per diem claimed.

Similar analysis applies to that aspect of the claim pertaining to travel allowance. A Letter of Agreement between the parties dated September 8, 1998 disqualifies an employee from receiving the travel allowance provided by Article XIV when ". . . the employee is absent without authorization on a work day immediately preceding and/or following the rest days during which the round trip was made; . . ." The facts of record show that the Claimant's situation fits this disqualification.

Finally, the Organization failed to cite any Rule that requires payment to an employee for the partial hours that might have been worked if he had actually reported to the job site, which he did not, in the scenario before us. Absent such a Rule citation, we have no proper basis for sustaining such a claim. Moreover, the Claimant cannot claim disparate treatment because the facts of his situation are different from the employees who did report to the work site and remained there until after the strike was over.

Given the foregoing circumstances, we find that the Organization has not satisfied its burden of proof to establish either an Agreement violation or the Claimant's entitlement to all or any portion of the remedy requested.

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 7th day of December 2006.