Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39298
Docket No. MW-38232
08-3-NRAB-00003-040130
(04-3-130)

The Third Division consisted of the regular members and in addition Referee Susan R. Brown 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 System Gang employe A. Carranza the per diem allowance for the dates of November 28, 29, 30 and December 1, 2 and 3, 2002 (System File J-0339-54/1358739).

(2) As a consequence of the violation referred to in Part (1) above, Claimant A. Carranza shall now receive the per diem allowance for the aforesaid dates for a total of three hundred twelve dollars ($312.00)."

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 worked a four ten-hour day schedule. He worked all assigned hours on November 27, 2002. November 28 and 29 were holidays and November 30 and December 1 were his designated rest days. He took authorized and compensated personal leave on Monday, December 2 and Tuesday, December 3 and a day of vacation on December 4, returning to work thereafter. He was initially paid per diem allowance for his holiday, personal days, and vacation, however, the Carrier subsequently recouped the payments.

Rule 39 (e) reads, in pertinent part, as follows:

> "On-line Service* - Employees assigned with headquarters on-line . . . will be allowed a daily per diem allowance of . . . $52.00 effective July 1, 2002 . . . to help defray expenses for lodging, meals and travel.
>
> 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."

Appendix X-1 (2) states:

> "For Monday through Friday vacations, employees will be granted per diem allowances for the weekend immediately preceding the start of the vacation period and no other per diem allowance will apply or commence until the employee returns to work."

The Organization argues that the Claimant is entitled to a per diem allowance for all days in question because he was not voluntarily absent from service when work was available to him on either the workday preceding or the workday immediately

following his holiday, rest days or personal leave days. According to the Organization, compensated personal leave days and single-day vacation days are not voluntary absences within the meaning of Rule 39 (e).

Both parties make equity arguments here: the Carrier asserts that per diem is meant to defray employees' expenses when they are working away from home and is not to be treated as ordinary income for periods when they are at home, whereas the Organization claims that the per diem allowance is not sufficient to cover daily expenses and employees should not be deprived of income merely because they take contractually-permitted personal days and vacations. Both arguments, while certainly important to the parties, are irrelevant here. The only issue before the Board is whether per diem payments for rest days and personal leave days are required by the Agreement when a vacation period of less than one week is taken adjacent to those rest days or personal leave days.

This issue has been adjudicated by several Section 3 tribunals. It was originally addressed in Award 14 of Public Board No. 6302 at a time when single-day vacations were not permitted under the Agreement but the parties had developed a practice of using them when convenient for both parties. PLB 6302 denied the claim based on an unrefuted practice that per diem allowances had not been paid for days preceding single-day vacations.

Subsequently, the parties negotiated single-day vacations into the Agreement but did not add any language to Appendix X-1 (2) regarding the payment of per diem allowances preceding such shortened vacation periods. Several Third Division Awards have since addressed this issue, mostly between these very parties, and each and every one has denied the Organization's claim, holding that per diem allowances are not paid for rest days, personal days or holidays that precede a single-day vacation. See Third Division Awards 37105, 37163, 37571, 37716, 37849, 39133, 39134, 39135, 39136, 39137, and 39277. Award 37105 also addresses and disposes of an issue raised here by the Organization, that there is a mixed practice of paying per diem allowances in this circumstance. Also see Public Law Board No. 6638, Awards 2, 4, 6, 8, 10, and 12.

Some of these Awards relied on the language of the Agreement, noting that while a contractual exception regarding per diem allowances has been made for 5-day vacations, no such exception exists for single-day vacations. Some of the Awards relied on the concept of stare decisis which holds that prior decisions regarding the same parties and similar facts are controlling precedent, ensuring that arbitration is truly final and binding. The Board agrees with both perspectives, i.e., that the language does not support the Organization's claim and that the issue has already been decided.

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 29th day of September 2008.