

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39323
Docket No. MW-37950
08-3-NRAB-00003-030355
(03-3-355)

The Third Division consisted of the regular members and in addition Referee Robert E. Peterson 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 Agreement was violated when the Carrier refused to allow System Gang employe R. Hosteen the per diem allowance for the dates of May 31, June 1, 2, 3, 4, 5, 6 and 7, 2002. (System File J-0239-64/132942)
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Hosteen shall now be paid the “*** per diem allowance of three hundred eighty four dollars (\$384.00) for May 31, June 1, 2, 3, 4, 5, 6 and 7, 2002.”

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 dispute here at issue is not unlike that in a number of other cases previously appealed to the Board involving the interpretation and application of Rule 39(e) of the current Agreement as concerns payment of a per diem allowance when an employee is "voluntarily absent" on the workday immediately before, or after, rest days.

Rule 39(e) as modified by an On-Line Service Agreement (OLSA) of October 31, 1988, reads in part here pertinent as follows, with underscoring added by the Board:

- "(e) Employees assigned with headquarters on-line, as referenced in Rule 29, will be allowed a daily per diem allowance of \$48.00 (\$52 effective July 1, 2002 and \$57.00 effective July 1, 2005) 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. No elimination of days for per diem allowances or vacation credits will occur when a gang is assigned a compressed work week, such as four (4) ten-hour days."

The Claimant was regularly assigned to a gang that pursuant to Rules of the Agreement allows members of the gang to work compressed work periods and accumulate their rest days so as to take them at one time for a prolonged return home. In this respect, the Claimant did not perform work for the Carrier on the Memorial Day Holiday (May 31, 2002) or seven accumulated rest days (June 1 through June 7, 2002) which he elected to take immediately contiguous to the holiday. The Claimant also elected to take two single-day vacation days on June 8 and 9, 2002 immediately following his being off work for the aforementioned holiday and accumulated rest day period.

In electing to absent himself on workdays immediately succeeding the Memorial Day Holiday (May 31, 2002) and in also electing to take two single-day vacation days (June 8 and 9) following his being off work for accumulated rest days (June 1 through

June 7) the Claimant triggered application of the exceptions provided in Rule 39(e) for which per diem allowances will not be paid.

While Rule 39(e) explicitly provides payment of a per diem allowance for rest days and holidays, it also clearly and explicitly proscribes that a per diem allowance will not be payable for, among other exclusions, workdays on which an employee is voluntarily absent from service when work is available on the workday immediately following a holiday or rest day(s).

It being well settled that the Board must apply Agreements as written, and it being evident that controlling Rule 39(e) supports a finding that the Claimant was not entitled to a per diem allowance as here claimed, the Board has no alternative but to conclude, as many prior Awards of the Board have found, that the claim lacks Agreement support. See Third Division Awards 37105, 37163, 37571, 37716, 37849, 39133, 39134, 39135, 39136, 39137, 39277, as well as Public Law Board No. 6302, Award 14 and Public Law Board No. 6638, Awards 2, 4, 6, 8, 10, and 12.

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.