

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39328
Docket No. MW-38097
08-3-NRAB-00003-030558
(03-3-558)

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman 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 failed and refused to allow Mr. M. J. Coan the per diem allowance for the dates October 18, 19 and 20, 2002 (System File W-0239-154/1347730).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. J. Coan shall now receive the per diem allowance for the aforesaid dates for a total per diem allowance of one hundred fifty-six dollars (\$156.00).”**

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 claim here is for the payment of a per diem allowance for October 18, 19 and 20, 2002. The Claimant elected to use a vacation day on October 20, immediately following his scheduled rest days of October 18 and October 19, 2002.

The Organization contends that Rule 39(e) coupled with a 1988 Letter of Understanding, Article VIII of the 1996 National Agreement, and agreed upon "questions and answers" arising from the 1996 National Agreement provide for the payment at issue. Rule 39(e) specifically provides, in relevant part:

"On-Line Service* - Employees assigned with headquarters on-line, as referenced in Rule 29, will be allowed a daily per diem allowance of \$48.00 (\$52.00 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. . . ."

The Carrier contends that the Claimant's election to take a single-day vacation on the workday immediately following his rest days rendered him "voluntarily absent" and, based upon Rule 39(e) extinguished any entitlement to the per diem payment for the two scheduled rest days that immediately preceded the single-day vacation.

The Organization relies, in part, on Appendix X-1(2) of the 1988 Letter of Understanding that provides: "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 Carrier contends that this language solely covers individuals who take full Monday - Friday weeks of vacation, but that it does not apply to this circumstance – a single-day vacation taken immediately following rest days.

The crucial question is whether the Claimant was “voluntarily absent from service when work [was] available to him on the workday immediately preceding or the workday immediately following said rest days. . . .”

In Award 14, Public Law Board No. 6302 involving the parties to this dispute, the claimant took a single-day vacation on Monday, February 6, 1995 and was not paid a per-diem allowance for Saturday and Sunday. The PLB found that the claim turned on the interpretation of Rule 39(e) and held that “. . . per diem allowances where a one day vacation is taken must . . . be governed by the practice on the property. During handling on the property, the Carrier maintained that the consistent practice was not to pay per diem allowances for weekends preceding vacations of less than one full week. . . .” The PLB noted the practice assertion was not challenged by the Organization and denied the claim.

In order to overcome this clear precedent, the Organization bears a heavy burden to demonstrate that the Agreement itself was explicitly modified or that the practice has so overwhelmingly changed to support its interpretation of what “voluntarily absent from service” means, particularly in the context of a single-day vacation. The record developed here does not demonstrate such a change. Accordingly, the Board follows the result in Award 14, Public Law Board No. 6302 and denies the claim. 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.

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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 29th day of September 2008.