

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39330
Docket No. MW-38175
08-3-NRAB-00003-040043
(04-3-43)

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 (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier included November 22 and 23, 2002 (observed Thanksgiving holidays) in the required not less than five (5) working days’ advance notice of job abolishment of all positions on Tie Gang 9166 (System Files MW-03-62/1349041, M3-MOP007/1357489 and M3-MOP008/1357490 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimants (all employes assigned to Tie Gang 9166 on November 19, 2002) shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and the fifty-two (\$52.00) per diem allowance for each date of November 22, 23, 24, 25, 26, 27, 28, 29, 30, December 1 and 2, 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.

First, a procedural note. In its Submission to the Board, the Organization asserts that the instant case is essentially a consolidation of three separate claims that were heretofore handled separately through the grievance process on the property. Specifically, the Organization requests that it be permitted to amend and for the Board to include, along with Texas District Tie Gang 9166, Texas District Tie Gangs working with Tie Gang 9166 on the dates relevant to the claim. The Carrier opposes the amendment of the claim. The Organization cited to no authority that would permit the amendment. Because the Organization is the moving party and the Carrier opposes the amendment, this Award is limited to the claim as presented in the Statement of Claim – i.e., Texas District Tie Gang 9166 members who were assigned to that gang on November 19, 2002.

The instant dispute concerns whether the Carrier gave sufficient notice of the abolishment of system gangs working a “compressed half” schedule, specifically, whether holidays on which the employees worked are properly counted as “working days” for the purpose of computing the number of advance work days for notice purposes. Also in dispute is whether the Claimants are entitled to per-diem payments for all or part of the claimed period.

It is undisputed that at the times relevant to the claim, the Claimants held seniority in a variety of classifications on the Texas District Tie Gang Seniority Roster. On November 19, 2002, they were verbally informed that their positions associated with Gang 9166 were abolished effective November 23, 2002.

As of November 19, the Claimants worked a “compressed work half” which began on November 16 and was scheduled to continue for eight consecutive days through November 23, 2002. The Thanksgiving holidays were scheduled for

November 22 and 23. In lieu of time off, they were entitled to be paid 16 hours' straight time for those two days.

The parties' dispute was whether Thanksgiving holidays could be counted for abolishment notice purposes where the Claimants were required to and actually did work on those holidays. In Third Division Award 19226, the Board found "... the real question ... is whether a holiday is a working day or work day within the meaning of the five day notice provision in the parties' Agreement. Looking at the agreement as a whole, we find that holidays are put in a separate category ..." and concluded that the Carrier could not count the Thanksgiving holidays against the required five-day notice of abolishment.

The Board adopts the reasoning and result in the above cited Award as it relates to notice requirements and, accordingly, finds that the Claimants are entitled to an additional two days' pay.

The second issue involves the entitlement, if any, to per diem payments. It is already established 1) there was insufficient notice of the abolishment of the positions and 2) the Claimants either took vacation or bid onto other assignments (with or without per-diem payments attached to them).

Rule 36 (b)(2) cited by both parties, provides for a per-diem allowance "... for each day of the calendar week, including rest days, holidays and personal leave days. It, however, will not be payable for workdays 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 such rest days, holidays or personal leave days. ..."

In the instant case, the notice period improperly included the two holidays – November 22 and 23. As indicated by the Carrier, they were not assigned to any gang during the period of November 24-30, 2002 (rest days). Some employees recommenced work on December 1, 2002. Some Claimants were on vacation on December 1 and 2, returning to work on December 3.

Make whole relief requires the Claimants to be put in the same position as they would have been had the notice been properly effectuated – i.e., the Claimants

received five working days' notice on November 19, 2002. Because the employees were not working during the period of November 22 – 30, 2002, those days cannot be counted toward the five day requirement. Therefore, the two additional days necessary for proper notice are December 1 and 2, 2002.

Accordingly, for employees who were not on vacation and not working a job with per diem payments from November 22 - 30, 2002, they are entitled to be paid per diem payments for each of those days, less any per diem payments already received for that period.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 29th day of September 2008.