

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40229
Docket No. MW-40522
09-3-NRAB-00003-080306**

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(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 System Gang 9080 employe J. Osberg the three (3) days of ‘deferred starting time,’ as required by Rule 30, in connection with his assigned gang’s move of assembly point from Omaha, Nebraska to Colton, California (System File R-0730U-301/1469141).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Osberg shall now be compensated for the three (3) days of deferred starting time at the applicable daily rate of pay.”**

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.

Claimant J. Osberg, who holds seniority in various classifications in the Maintenance of Way and Structures Department. He was assigned and working a compressed half on-line System Gang 9080 in December 2006 as a Roadway Equipment Operator (REO). He worked through December 8. The Gang's rest days extended from December 9 through December 15. The Gang moved 1,509 miles from Omaha, to Colton, California, over the deferred start days, December 16, 17 and 18. On December 19, 20 and 21, Gang 9080 reported and worked out of Colton. The Gang resumed work out of Colton on January 2, 2007.

The Claimant took authorized vacation time for December 16, 17, 18, 19, 20, and 21. When the Gang started to work on January 2, 2007, the Claimant continued to take vacation on January 2 and 3. He reported to Colton for work and performed service on January 4, 2007. The Claimant seeks deferred starting time pay for three days at his regular straight time rate.

The Carrier argues that the Claimant received the same amount of pay as the rest of the employees on the Gang for the entire time at issue. He received vacation pay for the time that he did not work. He was on vacation during the move. The purpose of the deferred start benefit is to insure that employee's get adequate rest before they are required to report to work after a change in the designated assembly point, which in this case exceeded 1,500 miles.

The Carrier argues that it asserted without rebuttal that no deferred start time payments had ever been made when an employee was on vacation at the time that a designated assembly point was moved. If this claim is sustained, then the Claimant would fare better than the rest of the employees in the Gang. He would receive three days more than the rest of the Gang. The Carrier argues that the Organization failed to meet its burden of proof by demonstrating the Carrier violated any Rule.

The Organization's case centers on the language of the third paragraph of Rule 30(a) which reads, in pertinent part, as follows:

"For the purpose of insuring that traveling on-line employees are afforded an opportunity to secure adequate rest, it is agreed that the distance traveled between a former assembly point and a new

assembly point during any 24-hour period will not normally exceed four hundred and fifty (450) miles. Likewise, traveling on-line employees will not normally be expected to travel in excess of one hundred fifty (150) miles in moving from the former assembly point to the new assembly point during the unassigned hours between two consecutive workdays.”

The Organization cautions that the Board is without authority to change the Agreement. It must construe and apply the Agreement as written, citing Third Division Awards 1248 and 18423. The Board observed in Third Division Award 20276:

“It is axiomatic that this Board does not make new Agreements for the parties. It is well settled that this Board must accept Agreements as made by the parties and must not insert or delete words under the guise of construing unambiguous provisions.”

The Organization finds support for its position in Public Law Board No. 6244, Award 1.

The Carrier responds to the Organization’s argument by asserting that in many cases the Organization has attempted, but failed to collect per diem payments under circumstances when employees take vacation after completing the work days of a compressed half, and they claim per diem under Rule 39 (e) citing Public Law Board No. 6638, Awards 2, 6 and 10, as well as Third Division Awards 37163 and 36811. In each of these cases, vacation was treated as a voluntary absence that prevents the employee from complying with the requirement that the employee work the day preceding and the day after the compressed half rest days to collect per diem for the rest days.

The Board notes the significant difference in language between Rule 39 (e) and the third paragraph of Rule 30 (a). The per diem Rule 39 (e) specifies that the employee claiming per diem must be present on the day preceding and following the rest day. Appendix X establishes that a vacation day represents a voluntary absence that defeats the payment of per diem during the rest days that precede the vacation.

Rule 30 (a) does not require employee attendance on the day before or after a move. There is no specific reference in the language or the Appendix to the impact,

if any, that employee vacations have on the payment of deferred start straight time pay. There is no language in the Rule or in Appendix X-2 that suggests that taking a vacation when the Gang executes a move defeats a claim for deferred start pay to an employee on vacation at the time of the move.

The Carrier notes the purpose of the deferred start is to insure employees have sufficient rest before reporting to work after the move. Because the Claimant took vacation, the deferred start did not serve the purpose intended. The Claimant received the same pay as the employees who participated in the move. To pay the three days deferred start pay gives the Claimant three days' pay more than the employees on the Gang.

The Claimant had to physically get from Omaha, Nebraska, to Colton, California. He had to move the 1,509 miles from Omaha to Colton just as Gang 9080 did. The Carrier's argument that the Claimant will benefit from a windfall ignores the Claimant's use of vacation to warrant the receipt of pay over December 16-21, 2006 and January 2 and 3, 2007.

The Carrier argues that its assertion on the property that it has never paid deferred start pay to employees on vacation at the time of the move went un rebutted. There is no evidence in the record that establishes the factual predicate that instances of employees on vacation at the time of a move in excess of 450 miles had previously occurred. Without evidence that the factual pattern at issue here had previously occurred and that it occurred with sufficient frequency so as to warrant the finding of a practice, the Carrier failed to establish this evidentiary point. What occurred in the past may be the result of the absence of the factual pattern that brought about the claim, and nothing more.

The Carrier's argument has logical force, but to find for the Carrier, the Board would have create an exception not contemplated by the clear language of the Rule.

AWARD

Claim sustained.

**Form 1
Page 5**

**Award No. 40229
Docket No. MW-40522
09-3-NRAB-00003-080306**

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 21st day of December 2009.