

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40336
Docket No. MW-40243
10-3-NRAB-00003-080027**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 recovered and refused to allow ‘on-line’ employe J. Myers the per diem allowance for June 9, 10, 11, 12, 13, 14 and 15, 2006 (System File MW-06-102/1459744 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Myers shall now receive payment in the amount of three hundred ninety-nine dollars (\$399.00) for the per diem allowance for each of the aforesaid dates.”**

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 Organization filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it failed to allow the Claimant the per diem allowance for the period from June 9 through June 15, 2006.

The Organization initially contends that because the facts essentially are undisputed and the referenced Agreement language is clear, this dispute turns on the validity of the Carrier's defense. It asserts that there is no validity to the Carrier's defense that the Claimant was "voluntarily absent" when work was available to him following the rest period after his vacation.

The Organization argues that the Claimant's observance of the designated rest days did not serve to disqualify him for the per diem allowances to which he was entitled by his assignment to on-line Gang 9168. It emphasizes that this dispute focuses on whether scheduled vacation fits the Rule 39(e) exception for when per diem allowances will not be payable. The Organization points out that Rule 39(e) specifically provides that per diem allowances 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 the employee on the workday immediately preceding or following the rest days, holidays, or personal leave days.

The Organization maintains that the Claimant's observance of scheduled vacation does not reasonably fit the express exceptions set forth in Rule 39(e) and the Carrier's decision to recoup/withhold the per diem allowances at issue plainly violated the Agreement. The Organization asserts that although vacation periods initially are timed by the employee, the critical fact is that the employee has no option to take a vacation or remain at work, so it cannot validly be concluded that a vacation is a "voluntary absence" within the meaning of Rule 39(e) or that work was available to the Claimant during his vacation. The Organization emphasizes that under the National Vacation Agreement, an employee may not, at his own option, forego the taking of vacation, remain at work, and accept pay in lieu thereof.

The Organization insists that because the Carrier controlled this aspect of vacations, work an employee normally would perform is not available to the employee while on scheduled vacation. The Organization asserts that the Claimant could not be considered as absent from work when work was available, as found in prior Awards.

The Organization submits that the Claimant did not return to work immediately following his vacation. Instead, he requested and was granted a leave for union business. The Organization points out that based on this leave, the Carrier improperly applied Rule 39 and determined that the Claimant was not entitled to the per diem for the claimed dates. The Organization suggests that the Carrier is attempting to apply new meaning to Rule 39. It emphasizes that Rule 39 makes no reference to vacation, and the Claimant was not voluntarily absent “on the workday immediately preceding or the workday immediately following said rest days, holidays or personal leave days” at issue. The Organization insists that vacation is not a voluntary absence, so Rule 39 does not apply to the instant dispute.

The Organization contends that if the parties intended not to allow per diem allowances for rest days prior to a vacation, then the parties would have included such language in the Agreement. The Organization points out that the Board repeatedly has held that agreements must be applied as written. The Organization argues that the Agreement does not provide for the Carrier’s decision to deprive the Claimant of his per diem allowance for the cited dates. The Organization suggests that to subscribe to the Carrier’s reasoning in this matter would be to apply new meaning to the Agreement.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the plain language of Rule 36 does not provide the allowance of per diem to individuals who voluntarily are absent from service. It asserts that this position is consistent with the practice under the Agreement because the per diem allowance begins and ends with the first and last day of compensated service when an employee voluntarily is absent from service. The Carrier argues that this claim therefore must be denied.

Addressing the principle that an employee receives per diem for the rest day of the last workweek when that employee takes a Monday through Friday vacation, the Carrier contends that the Claimant did not return to work following his vacation. The Carrier acknowledges that it historically has allowed per diem when an employee takes 40 hours of vacation and then returns to service on the first day that work is available to him. The Carrier insists that the Claimant did not return to perform compensated service following his rest days or his 40-hour vacation, and the Claimant thus was considered voluntarily absent on the first available day following the vacation. The Claimant therefore was not entitled to the per diem allowance.

The Carrier goes on to contend that the language of Rule 36 does not support the Organization's position. Moreover, the record demonstrates that the practice on this property is to require that employees return immediately following their 40-hour vacations.

The Carrier submits that the Claimant opted to voluntarily absent himself from service for 22 days, yet he seeks to have the Carrier subsidize his vacation and union business by paying him the per diem allowance. The Carrier suggests that it simply applied the per diem provision as dictated by the Agreement and in the same manner as it has in the past. The Carrier argues that this practice of not paying the per diem is not contrary to any Agreement language, and it would govern.

The Carrier asserts that nothing in Rule 36 supports the Organization's position. The Organization has not shown any Agreement language supporting the instant claim. The Carrier emphasizes that there is no language that obligates the Carrier to pay the per diem when the employee voluntarily is absent from service when work is available to the employee following vacation. The Carrier argues that because the Organization failed to show how the Agreement was violated, it failed to meet its burden of proof.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board finds that the Organization failed to meet its burden to prove that the Carrier violated the Agreement when it failed to allow the Claimant per diem allowance for a number of days in June 2006. It is fundamental that the Claimant was ineligible for the per diem payments, because he did not render compensated service when work was available to him on the date that he was scheduled to return to work. Numerous Awards have found that per diem payments for days on which an employee does not work are conditioned on the employee working the day before and the day after the off days. In this case, the Claimant failed to work the day following his off days and, consequently, was not eligible for the per diem payment. (See Third Division Awards 39133 and 39505.)

For all of the above reasons, the claim must be denied.

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 1st day of March 2010.