

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40403
Docket No. MW-40083
10-3-NRAB-00003-070292
(07-3-292)**

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

**(Brotherhood of Maintenance of Way Employees 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 W. Thomas the per diem allowance for October 31, 2005 and the travel allowance for the round trip that he made from his work location at Livingston, Illinois to his residence at Arkadelphia, Arkansas and returning to his work location at Livingston, Illinois (Carrier’s File 1448626 MPR).**
- 2) As a consequence of the violation referred to in Part (1) above, Claimant W. Thomas shall now receive payment of the per diem allowance for the aforesaid date in the amount of fifty-seven dollars (\$57.00) and he shall receive payment of the travel allowance for the aforesaid round trip in the amount of two hundred dollars (\$200.00).”**

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 Organization filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the parties' Agreement when it denied/recovered per diem allowance payable to the Claimant for his rest day, and when it improperly recovered the travel allowance for the round trip that was traveled by the Claimant between his assigned work location and his residence.

The Organization initially contends that the Claimant was displaced when he reported for duty on November 4, 2005, and not on October 30, as the Carrier contends. The Organization asserts that the Carrier's May 11, 2006 denial confirmed that the Claimant was displaced on November 4, 2005. The Organization argues that without regard for the date on which the Claimant was displaced, there is no dispute that the Claimant was denied per diem by the Carrier on October 31, 2005, as set forth in the initial claim.

The Organization maintains that there is no support for the Carrier's reliance on Rules 17 and 36(b)(1) in this matter because neither of these Rules may be validly used as a basis for refusing payment of per diem to the Claimant. The Organization points out that the Claimant was assigned to an on-line gang at all times during the relevant period, and there was no break in continuity. The Organization asserts that Gangs 9163 and 9194 were working together at the same locations during October and November 2005, and they were working the same compressed work schedule. The Organization submits that the Claimant reported for duty on Gang 9163 on November 4, 2005, the first workday for this gang in November 2005, and that he was displaced by a senior employee prior to the beginning of the shift. The Claimant, in turn, displaced a junior employee on Gang 9194 prior to the beginning of the shift that same day. The Organization argues that under these circumstances, there was no break in continuity of assignment to an on-line gang.

The Organization contends that under Rule 36(b)(2) per diem will be paid for each day of the calendar week, including rest days, holidays, and personal leave days. The Claimant was not “voluntarily” absent from duty on any of these rest days, and he worked on the workdays immediately preceding and following the rest day period. The Organization asserts that Rule 36(b)(2) therefore does not support the Carrier’s position.

As for Rule 17, the Organization insists that the Carrier’s attempt to apply this Rule to the instant matter is misplaced. The Organization maintains that the Claimant’s exercise of seniority from Gang 9163 to Gang 9194 did not create any “extra expense” to the Carrier. The Organization submits that the expenses claimed here are those the Claimant already was entitled to receive as a member of an on-line gang.

Turning to the travel allowance, the Organization contends that since its inception, the Carrier has complied with Rule 37 by paying the appropriate weekend travel allowance to employees making weekend trips from the gang work location and returning to the designated gang location at the beginning of the next scheduled work period. The Organization points out that this allowance is paid whether the gang location changed or stayed the same during the travel period. The Organization submits that it is common for on-line gangs to change locations over the rest-day period, and this usually is the most convenient time to do so. The Organization insists that the Rule 37 travel allowance never has been tied to whether the individual traveled to and from the same work or gang location over the rest day period.

The Organization characterizes the Carrier’s position on this issue as a total red herring. As for any argument relating to non-payment of per diem on November 1 - 3, 2005, the Organization emphasizes that the Carrier’s time roll document does not include a category for rest day per diem. Moreover, the instant dispute involves per diem properly paid to the Claimant for his rest day of October 31, 2005, which then was improperly recovered by the Carrier.

The Organization submits that there is no basis for the Carrier’s argument that the Organization acquiesced to the Carrier’s position. The Organization argues that the additional time roll documents provided by the Carrier are for an employee other than the Claimant, and are irrelevant to this matter. The

Organization further asserts that there is no dispute that it filed claims whenever it has been made aware of Agreement violations. Moreover, arbitral Boards have eschewed arguments that abandoned claims represent acquiescence or have precedential value.

The Organization goes on to assert that in an e-mail statement, the Carrier acknowledged that it historically paid per diem and travel allowances in precisely the same situation as is involved here. The Organization suggests that only a few years ago, the Carrier embarked on its new, misplaced assault on non-compliance with the Rules, and this position simply cannot be supported.

The Carrier initially contends that employees are not entitled to per diem and round trip travel allowances when they are exercising their seniority. The Carrier asserts that the Claimant exercised his seniority and no longer was assigned to Gang 9163. The last day of the Claimant's assignment on Gang 9163 was October 30, 2005, and the starting day of the Claimant's new assignment on Gang 9194, through a voluntary exercise of seniority, was November 4, 2005.

The Carrier argues that the plain language of Rule 36(b) does not provide per diem to employees who are in the process of exercising their seniority and who, therefore, are not assigned to an on-line position. The Carrier contends that this is consistent with the practice under the parties' Agreement in that per diem begins and ends with the first and last day of compensated service when different positions are obtained through a voluntary exercise of seniority.

The Carrier emphasizes that Rule 36(b)(1) provides that per diem is only allowed to employees currently assigned to on-line positions, so there can be no basis for the Organization's claim. The Carrier insists that there can be no dispute that the Claimant was not assigned to an on-line gang during the period from October 30 to November 4, 2005. The Claimant no longer was assigned to Gang 9163 after October 30, and he was not part of Gang 9194 until November 4, 2005.

The Carrier goes on to argue that it provided evidence regarding how the Agreement historically has been applied on the property. The Carrier asserts that payroll records show examples of how the Carrier treated other employees who bid from one on-line gang to another; these employees did not receive per diem or round trip travel allowances. Moreover, an auditor who audits per diem and travel

allowances also documented this practice on the property. The Carrier contends that given the ambiguous language of Rule 36, the practice controls the application of the Agreement.

The Carrier submits that although the Organization disputed the practice on the property, the Organization failed to support its position with any evidence. The Carrier suggests that one General Chairman saying it is so does not make it so. The Carrier contends that it was not contemplated to allow travel pay under the circumstances at issue, and the Board would be incorrect in changing or modifying the language and practice on the property. The Carrier accordingly argues that the instant claim therefore should be denied.

The Carrier cites prior Awards supporting its position that because there is specific Agreement language, the practice that supports the language would be controlling. The Carrier steadfastly has maintained that there is no practice providing per diem or travel allowance payments as alleged.

The Carrier insists that the language in the per diem Rule consistently has been deciphered that an employee has to be assigned to the same on-line gang and work the first and last day available to receive per diem. The exercise of seniority removes an employee's Agreement right to receive per diem and travel allowances when moving between positions.

The Carrier points out that the Claimant was not assigned to an on-line gang during the claim period, and the Organization wants the Carrier to subsidize his exercise of seniority by paying him per diem and the travel allowance. The Carrier emphasizes that there is nothing in the current Rules that allows an employee to be compensated as requested, and the instant claim seeks a departure from the intent of the per diem and travel Rules created for employees while assigned to an on-line gang. The Carrier insists that it is applying the per diem and travel allowance Rules as dictated by the Agreement and in the same manner as it has in the past.

The Carrier goes on to contend that the Organization failed to substantiate its claim that the Agreement has been violated. The Carrier asserts that a mere citation of a Rule from an Agreement does not constitute a violation of the Agreement. The Carrier argues that there is no language obligating the Carrier to

pay per diem or a travel allowance when an employee is not assigned to an on-line gang and is exercising his or her seniority to another position.

The Carrier contends that the Organization failed to present any evidence to support its position of a practice on the property. Citing prior Awards, the Carrier submits that the instant claim should be denied because the Organization failed to prove how the Agreement has been violated.

The Board concludes that the Organization failed to meet its burden to prove that the Carrier violated the Agreement when it refused to pay the Claimant per diem for October 31, 2005, and the travel allowance for the roundtrip he made from his work location to his residence. Therefore, the claim must be denied.

The record reveals that per diem payments are only applicable when employees are assigned to gangs with “on-line” headquarters. The Claimant in this case was not assigned to an “on-line” gang on the dates that he traveled or seeks per diem.

The Travel Allowance Rule states:

“Employees who are assigned headquarters of ‘on-line’ will be allowed a daily per diem allowance equal to that paid under Award of Arbitration Board No. 298 to help defray expenses for lodging and meals subject to the qualifying provisions of Section (b)(2) of this Rule.”

It is clear from the record evidence that the Claimant was not assigned headquarters of an “on-line” gang on the date for which per diem is being sought because he had been displaced from his position prior to that time. Because the Claimant had been displaced and was not assigned to an on-line gang, he was not entitled to per diem or the travel allowance. See Third Division Awards 39532 and 40401.

Because the Organization failed to meet its burden to prove that there was a violation of the Agreement, the claim must be denied.

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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 25th day of March 2010.