

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41503
Docket No. MW-41528
13-3-NRAB-00003-110130

The Third Division consisted of the regular members and in addition Referee Brian Clauss 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 pay System Gang employee J. Read the per diem allowance for October 1, 2, 3, 4, 5, 6 and 7, 2009 (System File J-0939U-253/1527224).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Read shall now ‘. . . be compensated for seven (7) days of non-taxable per diem allowance for a total of \$399.00 ***’”

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 record evidence establishes that the Claimant was working a compressed halves schedule in September 2009. He waived his right to a formal Investigation and received a three-day suspension for being absent without permission on September 27, 2009. Rest days were observed from October 1 through October 7, 2009. Upon return to work on October 8, the Claimant was notified that he was on suspension. He returned to work after the suspension period. The Carrier did not pay the Claimant per diem and the instant claim followed.

The Organization argues that the Claimant should be paid per diem despite not working the first day following the rest period. The Organization contends that the Claimant did not voluntarily absent himself from the workplace. Rather, the Claimant was excluded from the workplace when the Carrier decided that he should serve his suspension beginning on the first day following the rest period. According to the Organization, the Carrier is using the discipline system to avoid paying the Claimant per diem. In support of its position the Organization cites Second Division Award 13665, and its analysis of the effect of a suspension on holiday pay, as analogous to the instant matter.

The Carrier countered that the definition is clear and unambiguous. If an employee does not work on the day following the rest period, then the employee is not entitled to per diem. The Claimant did not work because he was suspended. He should not be paid per diem if he did not work the predicate days required under the Agreement. In support of its position the Carrier cites Public Law Board No. 6302, Award 14 and its discussion of a one-day vacation on the first work day after the rest period as analogous to the instant matter.

Rule 39(e) provides in pertinent part:

“The forgoing 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. . .”

Appendix “X-1” states:

“This is in reference to the amendments made this day to Agreement Rules 29, 30, 36 and 39. To help clarify some of the issues involved with the changes made, the following understandings will apply:

(1) The language of Rule 39(e) indicating ‘the employee is voluntarily absent’ means the employee has failed to render compensated service on a workday on which work was available to him.”

The Board reviewed the record evidence, as well as the parties’ Submissions. The burden is on the Organization to prove a violation of the Agreement. Both parties cite to Awards as providing the appropriate analysis for the instant matter. The analysis is determined by the definition of “voluntarily absent from service” on the workday immediately following a rest day. The definition is provided in Appendix X-1 and the definition is clear in that it states that a voluntary absence occurs when an “employee has failed to render compensated service on a workday on which work was available to him.”

Work was available to the Claimant on October 8, 2009. He could not work because he was on suspension. Accordingly, he was unable to meet the requirements of Rule 39(e). As a result, the Organization failed to meet its burden of proof and the claim must be denied.

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 19th day of February 2013.

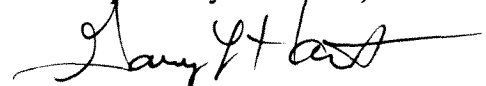
LABOR MEMBER'S DISSENT
TO
AWARD 41503, DOCKET MW- 41528
(Referee Clauss)

In Award 41503, the Majority correctly identified the question on which the claim should be decided: Was the Claimant voluntarily absent from service on October 8, 2009? Moreover, the Majority identified the definition of "voluntarily absent from service" as provided in the Agreement, i.e., a voluntary absence occurs when an "employee has failed to render compensated service on a workday on which work was available to him."

Given the facts, the answer to the question at the heart of the matter would seem to be simple. The Claimant was available to work on October 8, 2009 but the Carrier prohibited him from working. Thus, no work was available to him. However, instead of applying straightforward and plain meaning to the words, the Majority ducked through the looking glass where the Carrier's decision not to make work available to an employee means that work was available and an employee involuntarily prohibited from working means the employee was voluntarily absent.

The award is palpably erroneous and should be given no consideration in future cases.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary L. Hart", with a long horizontal flourish extending to the right.

Gary L. Hart
Labor Member