

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41563
Docket No. MW-41352
13-3-NRAB-00003-100187**

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 refused to allow employees D. Aguilar and R. Barron to report and perform duties associated with their respective assignments on Gangs 9073 and 9075 on December 21, 2008 (System File D-0926U-201/1516599).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Aguilar and R. Barron shall now each ‘*** be compensated six (6) straight time hours they were denied on December 21st and in addition, they shall be allowed eleven (11) days per diem, or six hundred twenty seven (627) dollars for per diem allowances they would have otherwise been entitled to on December 21st through December 31, 2008. ***’ and ‘*** eight (8) more days (January 1 through 8, 2009) of per diem allowance at fifty seven (57) dollars per day. This equates to a total per diem allowance for claim at bar of one thousand eighty three (1083) dollars in non-tax allowance in accordance with Rule 39(e).’”**

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 evidence establishes that the Claimants were working on compressed halves Gangs 9073 and 9075. They each had 66 hours of available vacation and submitted timely vacation requests in October 2008, to use 60 hours of vacation from December 16 through December 20, 2008 (60 hours of vacation represents five days on the compressed half schedule of 12 hour days). The Claimants' statements indicate that it was a practice to pay employees for remaining vacation time that amounted to less than a full day. The Claimants intended to return to work on December 21, 2008 – the last workday of the compressed half prior to the rest break. They did not return to work on December 21, 2008.

According to the Organization, the Claimants were advised on or about December 1, 2008, that they would be required to observe all of their vacation time pursuant to Carrier directive. The Claimants' statements indicate that they planned on returning to work for the remaining six hours on the last day of the compressed half, i.e. December 21, 2008. On December 7, they were advised that their respective gangs would not be working on December 21. Those statements also indicate that the Claimants learned on December 16 that the gangs would be working on December 21, 2008. They contacted the Organization which, in turn, contacted the Carrier.

The Organization contends that the Agreement guarantees 40 hours per week. Requiring the Claimants to take all of their vacation time and then denying them the opportunity to return to work for the remaining six hours on December 21, 2008, violated the guarantee. Further, the Carrier's action improperly prohibited the Claimants from being paid per diem, because they were kept from working the last day of the half prior to the rest period. They returned to work following the rest period, but were not paid per diem. They should be paid the per diem that the Carrier's action thwarted.

The Carrier countered that the Claimants learned that they would not be working on December 21, 2008, but delayed contacting the Carrier until December 17

and thereby “laid behind the log.” They were aware of the issue with their vacation approvals, yet did not contact the Carrier until it was too late for the Carrier to accommodate their vacation issue. They should not be allowed to benefit from delaying resolution of the issue.

The Carrier further contends that the Agreement does not provide for employees to work partial days. However, the Carrier sought to accommodate the employees and they did not agree. Further, the Claimants are not entitled to the per diem allowance because they did not meet the predicate requirement of working the last day of the compressed half. Per diem allowances are for expenses associated with the assignment. The Claimants had no expenses associated with the assignment because they were on vacation and did not work on December 21, 2008. Therefore, they are not entitled to per diem.

The Board carefully reviewed the record evidence and finds that the Organization proved a violation of the Agreement. The Carrier failed to contest the Claimants’ statements that it was a practice on the compressed half gangs to pay the remaining vacation time that amounted to less than a day in the following year, or that when the Carrier required the employees to take all of their time, the Claimants had a portion of a vacation day remaining. The Carrier also failed to contest the Claimants’ statements that a Supervisor told them that no gangs would be working on December 21 and then the Claimants learned that there would be gangs working on December 21.

The evidence establishes that the Claimants’ vacation requests were approved in October. Those requests clearly indicate that the Claimants would have six hours of vacation remaining on December 20. When the Carrier required them to exhaust all of their vacation, they nonetheless believed that the Carrier would allow them to return to work for the remaining six hours on December 21. The Carrier notified them that they would not be working on December 21. Accordingly, there was nothing for them to do until they learned on December 17 that the Gangs would be working. The Carrier decided not to pay them for the portion of the remaining vacation day, yet seeks both to require them to exhaust the portion of the remaining vacation day while refusing to allow them to return for the remainder of that workday. The Organization established that the Carrier violated the Agreement with these actions.

The Carrier points to Third Division Award 40379 in support of the argument that the Claimants are not entitled to the per diem payment because they did not work the predicate day prior to the compressed half rest period. The Organization counters that it was the Carrier’s improper action that prohibited the Claimants from working

on December 21. The Organization contends that the Carrier cannot be allowed to violate the Agreement and then defend on the basis of no qualifying service – when the Carrier caused the service interruption.

The Board reviewed the cited Award and finds that it is clearly distinguishable because it dealt with a failure to comply with the time requirements for an abolishment notice. Because that claimant's position was abolished, he could not meet one of the requirements of per diem qualification – returning on the first work day following the rest period. That is not the situation in the instant matter. Here, the Claimants returned to their respective gangs in January 2009.

The Board finds that the Organization met its burden of proof. Accordingly, the claim is sustained.

AWARD

Claim sustained.

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 18th day of March 2013.