

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41596
Docket No. MW-41480
13-3-NRAB-00003-110041

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 allow System Gang employee S. Sudik the per diem allowance for the period beginning June 30, 2009 and continuing through July 7, 2009 (System File S-0939U-355/1525113).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Sudik shall now . . . be reimbursed the per diem allowance at fifty seven (57) dollars a day for the period of June 30, 2009 up to and including July 7, 2009.”

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 indicates that the Claimant was working a compressed half work schedule on a production gang pursuant to Rule 40. The Claimant had been serving a suspension and came off that suspension and was eligible for duty on June 30, 2009. The Claimant was incorrectly notified by his Supervisor that his suspension would conclude on July 12, 2009. The Carrier later paid the Claimant for the hours lost on June 30, 2009. The Carrier refused to pay the per diem payment for June 30 through July 7.

“Rule 39 – Per Diem Allowances provides, in pertinent part:

- (e) The foregoing 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 paid 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.”

The Organization claims that the Claimant was available to work but was improperly withheld from reporting. He made numerous attempts to resolve his Supervisor’s misconception about the return-to-work date. Only after the fact did the Carrier rectify the situation, in part, by paying the Claimant eight hours’ pay for the missed work on June 30. However, the Claimant was not voluntarily absent and should therefore be paid the per diem.

The Carrier counters that the Claimant was absent and did not perform any actual compensated service on June 30, the workday immediately preceding his rest days on the compressed half schedule.

The applicable Rule is clear in regards to when per diem will and should be paid. It is also clear that per diem will not be paid if “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.”

An examination of the record indicates that the Claimant did not merely file a claim after his Supervisor provided an improper return-to-work date. Rather, the Claimant sought to resolve this misunderstanding regarding his return-to-work date. The Carrier later paid him for the missed time on the last day of his compressed half. Had the Carrier not made a mistake, the Claimant would have been allowed to return to the gang and work the last day of the compressed half and, therefore, would have been entitled to the per diem for the rest days.

The fact that the Carrier incorrectly informed the Claimant as to when he could return to work cannot be termed a "voluntary absence" by the Claimant. Accordingly, the claim must be 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 24th day of April 2013.