

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26357
Docket Number MW-26141

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to allow Machine Operator J. E. Baker per diem allowance of \$21.41 per day while filling the position of SPO-137 Gradall Operator at Oakridge, Oregon on October 4, 5, 6, 7 and 8, 1982 (Carrier's File MofW 46-161).

(2) Machine Operator J. E. Baker shall be allowed per diem allowance at \$21.41 per day for each of the afore-mentioned days because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: The central issue at bar is the interpretation and meaning of the language negotiated by the parties in Rule 29(c). That Rule states in pertinent part:

"Per Diem. - (c) An employe called to protect a position undergoing advertisement and assignment or a vacancy of thirty (30) calendar days or less duration under the provisions of Items (2) or (3) of Rule 12, other than an employe in the gang or at same location used under these items shall be allowed a per diem of \$21.41 each day on which any service is performed in lieu of actual necessary expenses for meals and lodging;..."

The Claimant was headquartered at Fields, Oregon. Claimant performed vacation relief for five days from October 4 through October 8, 1982, some twenty six miles away at Oakridge, Oregon. The Organization maintains that since Claimant was called under the provisions of Rule 12 and was neither in the gang nor headquartered at the Oakridge location, the Rule must be applied. That Rule allows "a per diem of \$21.41 each day on which any service is performed in lieu of actual necessary expenses for meals and lodging...." Claimant is therefore entitled to five days per diem.

The Carrier denies such entitlement pointing out that the Claimant lived in Oakridge and eats his meals at home. Therefore, no actual expenses were incurred. It is the Carrier's view that Rule 29(c) references Rule 12 which holds that the employe "be reimbursed for expenses incurred in accordance with Rule 29(c)." As stated by the Carrier on property:

"his personal residence is at Oakridge and during the week he was relieving on the SP0-137 he lived at home and did not incur any actual expenses. Rule 29 (c) states that an employee will be paid a per diem of \$21.41 each day 'in lieu of actual necessary expenses for meals and lodging.' Since Mr. Baker did not incur expenses, we do not feel that he is entitled to per diem allowance."

The Carrier raises in its Submission other arguments, including the applicability of the provisions of the National Vacation Agreement. This argument is new and not properly before this Board. Nowhere in the record as discussed on property were such issues raised and we are required to reject arguments raised for the first time in ex parte submissions and rebuttals.

Both parties to this dispute have presented to the Board those Awards which they argue are germane and relevant. A review of those Awards show that none stands on the contract language and circumstances presently at bar. As an example, the Organization cites Third Division Award 20011, which supports entitlement for actual necessary expenses and does not consider the Claimant's home as controlling. The Carrier cites Third Division Award 12030 which denies entitlement of "actual necessary expenses" when meals and lodging are taken in the Claimant's home.

In the instant case the record supports the fact that the Claimant fulfilled the requirements of the Rule and as such was allowed the per diem "in lieu of actual necessary expenses for meals and lodging." Nowhere in the Rule is there any mention of an employee's home or residence and it is not relevant to the Board's consideration. What is relevant and central to a resolution is the phrase "in lieu of actual necessary expenses."

Unlike Award 20011, where expense reports were submitted by the Claimant whose work location allowed him to eat and sleep at home, the case at bar shows no probative evidence of incurred expenses. This Board reads necessary expenses to mean expenses for food and lodging which were required and essential and "actual necessary" (emphasis added) to mean real or genuinely required expenses. Under the Rule, if such expenses were genuinely required expenses for meals and lodging, then and only then would the per diem be paid "in lieu of" the expenses.

In the record before this Board there is no evidence whatsoever of any "actual necessary expenses." The Organization's position is that the Board does not have to rule at all on whether expenses were incurred. Our reading is that only if there were "actual necessary expenses" could a payment be made "in lieu of" them. If there were not essential expenses, there could be no per diem.

This Board recognizes the well-argued logic of the Organization's position that per diem would be paid for any amount of "actual necessary expenses." As such, eating at home costs something and therefore should result in the per diem "in lieu of" that cost. In the circumstances of the instant case, such expenses are not viewed as "necessary" in the performance of the assignment, and as such we must deny the Claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

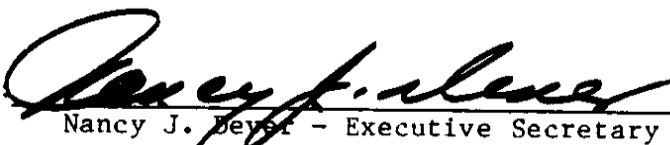
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of June 1987.