

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 G. G. Fischel and C. D. Steuben per diem allowance for August 18, 19, 25, 26, September 8, 9, 15, 16, 22, 23, 29, 30, October 6, 7, 13, 14, 20, 21, 27, 28, November 3, 4, 10, 11, 17, 18, 1984 and D. D. Dickinson per diem allowance for August 18, 19, 25, 26, September 15, 16, 22, 23, 29, 30, October 13, 14, 20, 21, 27, 28, November 3, 4, 10, 11, 17, 18, 1984 (System File M-76/013-210-36).

(2) Because of the aforesaid violation, each claimant shall be allowed a per diem allowance (eight dollars per day) for each date listed in Part (1) hereof following their respective names."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees 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 waived right of appearance at hearing thereon.

Claimants hold seniority as System Roadway Equipment Operators in Group 20 of the Roadway Equipment Subdepartment. At the time this dispute arose, they were assigned to System Gang X807. The Organization contends that Claimants were entitled to a per diem allowance for the claim dates in question under the provisions of Rule 39(c), which states:

"(c) District Outfit Car Service. Employees holding district seniority rights, including roadway equipment operators in Group 20, who are assigned headquarters outfit cars will be paid \$8.00 per day for each day service is performed when the outfit cars are located on their home division but away from their designated home station.

When the outfit cars are located away from their designated home station and off their home division, the employees will be paid \$8.00 per calendar day. The calendar day allowance will not be paid when an employee is voluntarily absent or does not perform compensated service, or on rest days and/or holidays when compensated service is not performed on the work days immediately preceding and following such rest days and/or holidays."

It is the Organization's position that the foregoing Rule clearly and unambiguously specifies that there is to be a per diem payment to System Roadway Equipment Operators in Group 20. Moreover, the Carrier has paid System Roadway Equipment Operators the per diem allowance in the past, the Organization asserts, and therefore the past practice of the parties is consistent with the literal language of the Agreement. In support thereof, the Organization has attached "Letter No. 2" to its Submission, in which Claimant Dickinson states that he was paid the per diem while working the System Unit gang in 1982 and again in 1983 and part of 1984 while working the Steel Gang. Carrier argues that this letter should not be considered because it was never presented on the property.

Carrier advances two arguments in support of its position that this Claim must be denied. First, it submits that the initial claim is dated November 14, 1984, and that, pursuant to Rule 49(a)(1) of the Agreement, claims cannot go back beyond sixty (60) days. Thus, all claim dates earlier than 60 days prior to November 14, 1984, must be dismissed.

Second, it is Carrier's view that the merits of this dispute center around whether a roadway equipment operator, while assigned to a system track gang, is entitled to a per diem allowance on days when all other members of the system track gang were not entitled to a per diem allowance. According to Carrier, Rule 39(e), entitled System Gang Service, is the applicable Rule here. The Rule states:

"(e) System Gang Service. Employees working on system track gangs who are headquartered in outfit cars will be paid \$8.00 per day for each day service is performed."

So stating, we find that a sustaining award shall issue to the extent that the claim falls within Rule 49(a)(1) of the Agreement, which provides:

"1. All claims or grievances must be presented in writing by or on behalf of the employee involved, to the office of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based.
***" (Emphasis added)

The initial Claim in this dispute was filed on November 14, 1984. No retroactive application extends prior to September 16, 1984, and, therefore, the claims for August 18, 19, 25, 26 and September 8, 9 and 15 must fail based on Rule 49(a)(1).


As a final matter, we note that there is considerable information contained in the Submissions which was not exchanged by the parties on the property. As firmly established by numerous Awards of the Board, we must reject arguments and evidence raised for the first time before the Board (Third Division Awards 25974, 20841, 21463, 22054).

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of December 1990.

Carrier further argues that Rule 39(e) as been applied by the Carrier in a manner consistent with Carrier's position in the instant case, including instances involving the Claimants, without protest by the Claimants or the Organization. For these reasons, Carrier contends that the Organization has failed to satisfy its burden of proof, and the Claim should be denied on that basis.

We disagree with Carrier's position and find that the clear and unambiguous language of the Agreement must be considered controlling. The fact that Claimants were working on a project that a system track gang also worked on does not render the Claimants system track gang employees nor does it bind them to the provisions of Rule 39(e). Claimants are part of the Roadway Equipment Subdepartment and are specifically included under Rule 39(c). We cannot ignore the explicit language provided therein.

Moreover, Carrier's contention that a past practice supports its position is unpersuasive. Apparently, Carrier relies on what it considers to be the Organization's failure to object to Carrier's payment under Rule 39(e) in the past as evidence constituting mutual acceptance of its interpretation. However, the record also reveals that the Organization has previously grieved this same issue, though the claim was not pursued before this Board. Under the circumstances, we are unwilling to find that there was acquiescence or assent by the Organization which would bind it to the practice claimed by the Carrier.

Carrier has also urged that the instant case is similar to Third Division Award 28620. In that case, the Claimants were working with system gangs which were headquartered in outfits, and dispute arose when Carrier refused to compensate the employees for travel time expended when their outfit was moved from one work point to another outside their regularly assigned hours. In denying the Claim, we concluded that Rule 36, Section 3, applicable to extra gang assignments, was the correct Agreement provision to be applied.

In the present case, of course, the parties have relied upon entirely different provisions of the Agreement, and after careful review of the language in dispute, we do not agree that Award 28620 has any applicability here, either directly or by analogy. Unlike that case, the provisions relied upon by the Organization set forth in Rule 39(c) specify the procedures to be followed for roadway equipment operators in Group 20, and as stated above, it is our view that this express language controls over the more general language relied upon by the Carrier in Rule 39(e). The specific reference to the particular seniority group to which the Claimants belong is the basis for our conclusion that a sustaining Award must be issued in this case.