Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36718
Docket No. MW-36233
03-3-00-3-439

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Santa Fe Railway
((former Burlington Northern 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 TC-01 Gang employee A.P. Mendoza the travel allowance as provided in Article XIV, Section 1 of the September 26, 1996 Mediation Agreement for the eight hundred seventy (870) mile round trip he made from his reporting site at Lincoln, Nebraska to his residence in Gering, Nebraska and returning to his reporting site at Lincoln, Nebraska over the weekend of April 25 and 26, 1998 (System File C-98-TO72-59/MWA-98-8-6AC BNR).

(2) As a consequence of the violation referred to in Part (1) above, A.P. Mendoza shall be paid the appropriate travel allowance for his aforesaid eight hundred seventy (870) mile round trip as outlined in Article XIV, Section 1 of the September 26, 1996 Mediation Agreement."

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.

A. P. Mendoza (Claimant) holds seniority in the Track Subdepartment on District 10. On the dates involved herein, the Claimant was regularly assigned to System Regional Gang TC-01 working in Lincoln, Nebraska, with a workweek consisting of Monday through Friday, with Saturday and Sunday designated as rest days.

The facts which led to this dispute are as follows: On Friday, April 24, 1998 the Claimant reported for duty and worked his regularly scheduled work period. At the conclusion of his workweek, the Claimant opted to travel to his home at Gering, Nebraska, where he spent his rest days of Saturday and Sunday. The Claimant alleges that he completed the 870 mile round trip and returned to Lincoln on Sunday evening, April 26, 1998. The Claimant maintains that he became ill thereafter, and was unable to work on Monday April 27, 1998, but he did not so advise the Carrier. As a result, the Carrier denied the Claimant's request for travel allowance for the April 24 - 26, 1998 roundtrip.

On May 11, 1998, the Organization submitted a claim on behalf of the Claimant asserting that the Carrier had violated Rules 1, 2, 5, and Article XIV, Section 1 of the 1996 National Agreement when the Carrier denied the Claimant travel allowance for the weekend of April 25 and 26, 1998. The Carrier denied the claim maintaining that:

> "It is Carrier's position that travel allowance will only be paid to employees present for work on the day before and the day following the weekend rest days for which the travel allowance is requested, with the exceptions being vacation and personal leave days."

The General Chairman replied to the Carrier's denial contending that:

> "There is nothing, either implicit or explicit, in Article XIV which even remotely suggests that its application is limited in such a manner. The Carrier cannot substitute its 'position' for a properly agreed to Agreement between the two parties herein concerned. The only restriction that is placed on this is that if the employee is over four hundred (400) miles from his home and requests transportation be paid by the Carrier, that he be available for work: 'on at least ninety percent of the regularly scheduled work days during the three week period.'"

The General Chairman went on to assert that the Claimant was "contractually entitled" to at least partial reimbursement, and that the Carrier had "unreasonably withheld" the Claimant's money for "an extended period of time." Thereafter, the Claimant provided the Organization with a statement that he had stayed in corporate lodging on April 26, 1999, and that he was "too ill" to work on Monday, April 27, 1998.

Premised upon the evidence of record, this claim must be denied. The Claimant alleges that he returned to the Carrier designated motel on April 26, 1998, but was "too ill" to work the following morning, Monday, April 27. However, there is no evidence which supports the Claimant's story. The only documentation which the Claimant proffered was a gasoline receipt showing that he had, on Sunday, April 26, purchased $10.00 worth of fuel. There is simply no other evidence which supports the Claimant's claim that he returned to Carrier lodging on Sunday, April 26, 1998. Review of the Carrier payroll records shows that the Claimant stayed in corporate lodging on Sunday April 19, 1998, the night preceding the workweek which began on Monday, April 20, 1998. However, the same payroll records indicate that on Sunday April 26, 1998, the Claimant did not stay in the Carrier provided lodging as he alleged. The record does indicate however, that the Claimant spent the night of Monday, April 27, 1998 at the Carrier lodging.

The Claimant did not report for work on Monday, April 27, nor did he contact the Carrier to report or explain his absence. In that connection, the Claimant did not contact the Carrier at any time on Monday, April 27 to explain his

absence or get permission to be absent. Nor did the Claimant offer a doctor's excuse or any other documentation with respect to his alleged illness. (It is unrefuted that the Claimant did not report for work on April 27, but according to the Carrier, "someone" entered the Claimant's time for Monday April 27, 1998, including 30 minutes travel time).

In the final analysis, the claim must be denied for failure of the Organization and the Claimant to prove a material fact which was a prerequisite of establishing a prima facie case.

AWARD

Claim denied.

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 17th day of September 2003.

LABOR MEMBER'S DISSENT
TO
AWARD 36718, DOCKET MW-36233
(Referee Nancy F. Eischen)

The findings in the award are so egregious that fervent dissent is required. The facts of this record were undisputed between the parties. The Claimant traveled from his work location to his home on the weekend of April 25 and 26, 1998. In doing so he was entitled to compensation for the eight hundred seventy (870) mile round trip. Upon returning to his work location on Sunday evening he checked into the Carrier designated lodging facility. Later in the evening, the Claimant became ill and he was unable to report for work the following day.

Throughout the entire handling of this dispute, the Carrier's position was that the Claimant was not entitled to the travel allowance because he did not work the workday following the trip home. Indeed, if it was the Carrier's position that the Claimant did not make the trip, it would have charged him with falsifying his travel allowance form and held an investigation seeking his termination. The record is clear the Carrier knew the Claimant made the round trip, but was merely attempting to weasel out of paying him based on a contrived and absurd interpretation of the Agreement. The Majority assisted the Carrier in depriving the Claimant of his travel allowance.

The Majority takes issue with "*** The only documentation which the Claimant proffered was a gasoline receipt showing that he had, on Sunday, April 26, purchased $10.00 worth of fuel. ***" The receipt indicated that it was from a Mini Mart in Gering, Nebraska, the Claimant's hometown. The receipt is required by the Carrier to be attached to the travel allowance form to prove that a trip was actually made. The Carrier took no exception whatsoever to the receipt or its authenticity. Nor did the Carrier ever take exception to the Claimant's written statement wherein he attests that he fell ill on the evening of April 26, 1998 and stayed in the Carrier's designated lodging facility. The Majority asserts that "*** payroll records indicate that on Sunday April 26, 1998, the Claimant did not stay in the Carrier provided lodging as he alleged. ***" The problem with that assertion is that it was never raised by the Carrier during the handling of this dispute on the property. The Carrier did raise it in its submission to the Board, but because it is new argument, it should have been rejected as such. Moreover, the time roll records submitted make absolutely no reference whatsoever to whether lodging was used or not. Hence, because the only evidence of probative value concerning lodging on April 26, 1998 was presented by the Claimant, it should have been given credence above a contrived assertion. Nevertheless, it continues to be the position of the Organization that whether an employe stays in Carrier provided lodging the day prior to or after a trip home is immaterial. There are many of our members that travel back to the job location just prior to the days work and would not be shown to have stayed in Carrier provided lodging. Hence, the Majority's comments relative thereto are immaterial.

No argument was made during the on-property handling concerning whether he was required to present a "*** doctor's excuse or any other documentation with respect to his alleged illness. ***" Again, if the Carrier believed that the Claimant was fraudulently attempting to claim

travel allowance for travel he did not make, it would have charged him accordingly. The reason it did not do so was because it knew he made the round trip and was denying him his travel allowance based on a different theory.

Clearly, the Majority did not decide the issue as it was argued on the property, i.e., is an employe obligated to work the day prior to or after a weekend wherein travel allowance is claimed. It continues to be the Organization's position that there is no such requirement within the clear and unambiguous language of Article XIV of the 1996 National Agreement.

The Majority repeatedly erred in its determination to deny this case, therefor I Dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member - NRAB