

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37571
Docket No. MW-36524
05-3-01-3-9

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 Employees
(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 Mr. K. M. Weber the payment of per diem allowance for the dates of June 22, August 28, 29, 30, November 6, 7, 8, December 18, 19, 20, 25, 26 and 27, 1998 (System File J-9939-57/1213029).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. M. Weber shall now ' . . be allowed a total per diem allowance of six hundred thirty three dollars (\$633.00) for June 22, August 28, 29, 30, November 6, 7, 8, December 18, 19, 20, 25, 26 and 27, 1998.'"**

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 factual record in this case is essentially not in dispute. According to the record, the Claimant was assigned to an on-line Bridge and Building (B&B) Subdepartment gang on the Carrier's Kansas Division. From our review of the record, the claim date of June 22, 1998 was cited in error; the initial claim did not include any per diem claim for that date, we note.

On the claim dates, as correctly cited, the Claimant's B&B position was advertised to work four (10-hour) days per week, from Monday through Thursday. Friday, Saturday and Sunday were designated as weekend rest days. The record confirms that on the Mondays and Tuesdays immediately following the Sunday rest days of August 30, November 8, December 20 and December 27, the Claimant observed two consecutive vacation days, requested and granted on a "single-day" basis.

According to the Organization, the Claimant was inappropriately denied per diem expenses on the four claim occasions (August 28-30; November 6-8; December 18-20; and December 25-27) pursuant to its interpretation of Article VIII, Rule 39(e) and Appendix W-1(2) of the Agreement. The Organization points out that on the last regularly scheduled workday (Thursday) preceding each three-day rest period and subsequent two-day vacation period, the Claimant performed service on his assigned position. He furthermore immediately returned to service on the first assigned workday (Wednesday) following each two-day vacation period, the Organization further notes.

The Carrier contends that because the Claimant observed only two days of vacation, as opposed to a full week of vacation, Monday through Thursday, given his four-day assigned workweek, it correctly recouped the per diem allowances previously paid on each of the rest days enumerated above. In its on-property correspondence, the Carrier stressed that its treatment of the Claimant as regards its refusal to allow rest day per diem allowances was consistent with its handling of a nearly identical situation ultimately adjudicated in the Carrier's favor in Award 14

of Public Law Board No. 6302 involving these same parties. Thus, it argued that the Board should apply the reasoning in that case to the instant case and thereby deny the current claim.

Subsequently, during the Hearing of this matter before the Board, the Carrier asserted that recent on-property Third Division Awards 37105 and 37163 upheld the Carrier's recoupment and/or denial of rest day per diem allowances under the same circumstances as present herein. Invoking the affirmative defense of res judicata, the Carrier argued that the three above Awards are controlling precedent which the Board is compelled to follow. It therefore urged that the Board deny the instant claim.

We reviewed the facts and arguments in the parties' Submissions to the Board. We find from our close review of the entire record that this claim indeed is factually identical to the case considered by the Board in Award 37105, which addressed claim dates that had arisen just months before those involved in the instant case. Both this case and that considered in Award 37105 are governed by the identical Agreement Rules, we furthermore note. In addition, we recognize that the Board in Award 37105 carefully considered the findings and conclusions in Award 14 of Public Law Board No. 6302 and, having done so, incorporated them within that Award and hence deemed Award 14 as controlling. Indeed, the Board specifically concluded that there was "no proper basis for departing from the rationale and findings of Award 14 of Public Law Board No. 6302," given the "identical fact patterns" underlying both cases.

Moreover, we note that, although Third Division Award 37163 addressed yet the same fact pattern but under the parties' similar Rule 37(4) as opposed to Rule 39, together, Awards 37105 and 37163 have clearly upheld the Carrier's practice of withholding per diem allowances on rest days when less than a full week's vacation is taken in conjunction therewith, given the existing Rules and practices on the Carrier's property. Given the Board's holdings in these three highly similar Awards, and the factual record before us, we rule that the Board must follow that line of established precedent as regards the instant case. By so doing, we reject the Organization's argument that the Claimant was somehow entitled to the rest day per diem allowances simply because he had protected his assignment on the Thursday workday prior to each set of rest days and on each Wednesday following

the Monday-Tuesday vacation days he had observed. The logic of the controlling precedent overcomes that specific contention, we rule.

To sum up, we conclude that given the factual record before the Board, the three Awards identified above are controlling precedent and pursuant to the doctrine of stare decisis, this case does not merit a sustaining award. There is no evidence in the record that the above Awards, deemed relevant by the Board, are palpably erroneous, thus warranting their rejection by the Board. Given the identity of parties, facts and Rules, the Board finds that Awards 37105, 37163 and Award 14 of Public Law Board No. 6302 are controlling, as the Carrier has maintained, and the holdings of each must be followed in the present 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 24th day of August 2005.