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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37716
Docket No. MW-36579
06-3-01-3-57

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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 failed and refused to pay Mr. M. W. O'Toole the per diem allowance for the dates of August 28, 29 and 30, 1998 (System File J-9939-56/1212995).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. W. O'Toole shall now receive payment of the per diem allowance for the dates of August 28, 29 and 30, 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 Claimant, who holds seniority in the Bridge and Building (B&B) Subdepartment, was regularly assigned to the Kansas Division with an assigned work week of Monday through Thursday, with Friday, Saturday, and Sunday designated as weekend rest days.

The facts of this matter are uncontested. The Claimant took a single day of vacation on Monday, August 31, 1998 immediately following his rest days. As a result, the Claimant was not paid the per diem allowance for his rest days.

Pursuant to this action, the Organization submitted a claim contending that the Carrier violated the Agreement when it did not compensate the Claimant for his designated weekend rest days of August 28, 29 and 30. According to the Organization, it is undisputed that in accordance with Article VIII of the September 26, 1996 Mediation Agreement, the Claimant was permitted to observe vacation in increments of less than 40 hours and, therefore, he should have been paid his per diem allowance for August 28, 29 and 30, 1998.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. It contends that under Rule 37(4) the Claimant is not entitled to be paid per diem when he takes a vacation day immediately succeeding his rest days. Further, it contends that this position is supported by Third Division Award 37163, which is directly on point.

The Board finds that the Organization has not been able to meet its burden of proof to show that the Claimant was improperly denied his per diem payment. We note that the language of Rule 37(4) as well as Award 37163 support this position.

Rule 37 (4) provides:

"The foregoing per diem meal allowance shall be paid for each day of the calendar week, including rest days and holidays, except that it shall not be payable for work days on which the employee is voluntarily absent from service, and it shall not be payable for rest days or holidays if the employee is voluntarily absent from service when work was available to him on the work day preceding or the work day following said rest days or holidays."

The Board directly addressed this same issue in Award 37163:

"The Organization's burden has not been carried. On its face, Rule 37(4) does not permit payment to the Claimant because per diem "... shall not be payable for rest days ... if the employee is voluntarily absent from service when work was available to him on the work day ... following said rest days. ..." By taking a vacation day on Monday, July 24, 2000, the Claimant was "... voluntarily absent from service when work was available to him on the work day ... following said rest days. ..." Although the 1996 National Mediation Agreement now allows employees to take one day vacations, the specific example used in the question and answer to the July 19, 1967 Arbitration Board No. 298 Award addressed the situation where an employee took "1 week's vacation" – not "1 day's vacation." There is nothing to show that when the 1996 National Mediation Agreement permitted employees to take one week of their vacation allowance in less than 40 hour increments that the parties addressed the rest day per diem allowance question for those situations and agreed that the per diem provisions would be similarly modified. Instead, the language in Rule 37(4) remained and that language clearly favors the Carrier's position.

The Organization's argument is quite logical. But, because of the language in Rule 37(4) and the lack of a modification to the per diem allowance provisions after the 1996 National Mediation Agreement, at best, the Organization's argument is debatable that when the less than 40 hour per week provisions for vacation came into effect that the parties also intended to amend the per diem allowance provisions. Without more of a showing by the Organization that such was the parties' intent, we cannot sustain this claim."

In sum, the Board finds that the language of Rule 37 and Award 37163 are controlling. It is clear that this matter has been directly adjudicated and resolved in the Carrier's favor. Thus the claim is denied.

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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 23rd day of February 2006.