

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37990
Docket No. MW-36916
06-3-01-3-532**

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

The Agreement was violated when the Carrier refused to allow personal vehicle mileage expenses submitted by Mr. J. D. Rosenberg in connection with the use of his personal vehicle for transportation between his designated assembly point and his work point on December 1, 2, 3, 6, 7, 8, 9, and 10, 1999 and when it failed and refused to properly reimburse him for the use of his personal vehicle for such purpose in accordance with Rule 35 (System File R1.577/8-00319-367).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. D. Rosenberg shall now receive one hundred one dollars and ten cents (\$101.10).”

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 established and holds seniority dating from July 15, 1991 within the Roadway Equipment Sub-department. During the month of December 1999, he was regularly assigned to the position of Brush Cutter Operator on the Detroit Lakes Subdivision. He lived away from home during the workweek, using his personal vehicle to commute between his lodging facility and work site each day. Under these circumstances, the Claimant was subject to Rule 35, which provides as follows, in relevant part:

“(C) Travel from One Work Point to Another

* * *

(5) An employee who is not furnished means of transportation by the railroad company between designated assembling points and work point and who is authorized and willing to use his personal vehicle for such purpose shall be reimbursed for such use of his vehicle at the rate of seventeen (17) cents per mile, or applicable company policy.

The designated assembling point of machine operators who are away from their outfit and not able to return the same day or who have no outfit cars, and who must obtain lodging, the nearest available suitable lodging facility to the machine operator's work point (machine location) will be considered his designated assembling point.”

On the dates pertinent hereto, the applicable mileage rate was 30 cents per mile traveled.

The instant dispute arose because the Claimant was required to obtain lodging at a Carrier approved facility on December 1, 2, 3, 6, 7, 8, 9, and 10, 1999. He elected to stay at an approved Corporate Lodging facility located in Fosston, Minnesota, and at the end of the month, he submitted the required monthly expense report identifying the mileage he incurred. Upon receiving this report, Track Maintenance Supervisor C. D. Schmidtgal reduced the Claimant's mileage by 337 miles because, in his opinion, the Claimant did not stay at the nearest suitable and available lodging facility, which was in Erskine, Minnesota. As a result of Schmidtgal's action, the Claimant's mileage allowance was reduced by \$101.10 (337 miles x \$.30 per mile).

A claim was submitted by the Organization on February 8, 2000. Correspondence was exchanged by the parties during the handling on the property, but a settlement was not achieved, and this matter now comes before the Board for adjudication.

The Carrier contends that Supervisor Schmidtgal was justified in cutting the Claimant's mileage because the Claimant did not stay at the nearest, suitable and available lodging. Rather, he stayed at a facility further away from his work location because it was a Corporate Lodging facility, and the closer suitable and available lodging facility did not accept Corporate Lodging cards. According to the Carrier, the Organization presented no evidence to dispute Schmidtgal's assertion that suitable lodging was available and closer to the work location.

While the Carrier acknowledges that during conference, it committed to seek additional information from Schmidtgal and/or other lodging facilities as to their availability on the dates in question, the Carrier asserts that, contrary to the Organization's contention, it never agreed to pay the claim if it failed to get a response by June 1, 2001. Schmidtgal retired by that date, and as a result, the Carrier was unable to secure additional statements from him concerning the dispute.

The Organization contends that the Claimant was authorized to use his personal vehicle for travel between his designated assembling point and his work point on the dates in question. There is no doubt that he actually incurred the mileage claimed and that he accurately identified this mileage on his expense report. He lodged at a Carrier approved lodging facility, and, according to the Organization, it was the closest suitable and available lodging to his work site. While Schmidtgal wanted the Claimant to have stayed at a facility in Erskine, that lodging did not provide Corporate Lodging; nor did it have open rooms.

In response to the Carrier's assertion that Schmidtgal's retirement after this claim arose made it impossible to get a written statement from him, the Organization argues that regardless of Schmidtgal's personal status, the Carrier was required to prove its affirmative defense. In this case, the Carrier failed to prove that there were any suitable, available lodging facilities closer to the work site. Absent evidence to that effect, the Organization contends that the claim must be sustained.

It is undisputed that the Claimant actually incurred the mileage he claimed on the dates of December 1, 2, 3, 6, 7, 8, 9, and 10; that he was authorized to use his personal vehicle for travel between his designated assembling point and the work point

on each day claimed; and that he lodged at a Carrier approved lodging facility. The only issue in dispute is whether he stayed at the nearest available, suitable lodging facility.

The Board reviewed the record at length and has concluded that neither party established a controlling credibility as to the central issue in dispute. It appears that certain portions of the Organization's claim are supported in the record, while aspects of the Carrier's defense likewise are persuasive.

Therefore, in the interest of resolving this matter fairly and expeditiously, the Board has determined to award one-half of the claim. Inasmuch as the total claim was for \$101.10, the Claimant shall be paid \$50.55.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of October 2006.