Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39136
Docket No. MW-37964
08-3-NRAB-00003-030367
(03-3-367)

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
( IBT Rail Conference
PARTIES TO DISPUTE: (
(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. D. L. Wallis the per diem allowance for the dates of February 9, 10, 11, 12, 13, 14 and 15, 2002 (System File C-0233-107/1330849).

(2) The Agreement was violated when the Carrier refused to allow Mr. R. G. Grueb the per diem allowance for the rest dates of March 1 through 7, March 16 through 22, the safety day of March 23 and the Holiday of March 31, 2002 (System File C-0233-109/1333181).

(3) The Agreement was violated when the Carrier refused to allow Mr. D. L. Wallis the per diem allowance for the dates of March 9, 10, 11, 12, 13, 14 and 15, 2002 (System File C-0233-110/1335699).

(4) The Agreement was violated when the Carrier failed and refused to allow System Gang employe R. Benally the per diem allowance for the dates of July 26, 27 and 28, 2002 (System File C-0239-114/1337652).

(5) As a consequence of the violation referred to in Part (1) above, Claimant D. L. Wallis shall now receive payment of three hundred thirty-six dollars ($336.00) that was improperly deducted from his paycheck.

(6) As a consequence of the violation referred to in Part (2) above, Claimant R. G. Grueb shall now receive payment of each of the three (3) consecutive installments of two hundred fifty-six dollars ($256.00) that were improperly deducted from his paychecks.

(7) As a consequence of the violation referred to in Part (3) above, Claimant D. L. Wallis shall now receive payment of the three hundred thirty-six dollars ($336.00) that was improperly deducted from his paycheck.

(8) As a consequence of the violation referred to in Part (4) above, Claimant R. Benally shall now '. . . be compensated for three (3) days per diem allowance at $52.00 per day for a total of $156.00.'"

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.

While this case represents the claims of three different Claimants, the issue is substantially identical for treatment by the Board. In each case, the Claimant took a single day of vacation on the workday immediately following the weekend rest day(s) and claimed the per diem allowance for each set of rest days. In one case, the Claimant took a safety day immediately following his rest days. In either event, the Carrier viewed each such instance as akin to voluntarily absenting himself, thereby denying each Claimant the per diem amount for his rest days as well as the single day of vacation taken. In support of this position, the Carrier asserts that historically, it has not paid the per diem allowance for rest days, personal leave days and holidays where the employee has taken less than 40-hour vacation increments, i.e., "single-day vacations" on the work day immediately preceding or following the rest day period. The Carrier asserts that the use of a safety day should not be treated any differently.

In support of the Claimants, the Organization asserts that it has been its consistent position that the Claimants' observance of scheduled vacation does not reasonably fit the express exceptions set forth in Rule 39(e) and accordingly, the Carrier's decision to withhold the per diem allowances at issue violates the Agreement. This is so, the Organization maintains, due to the fact that an employee has no option to take a vacation or remain at work if he/she chooses and accordingly, it cannot be asserted, as the Carrier does in this case, that a vacation is a voluntary absence within the meaning of Rule 39(e). Finally, the Organization maintains that Public Law Board No. 6302, Award 14 is not "directly on point" as the Carrier contends because the facts in the instant matter are distinguishable from Award 14, and the pertinent Agreement provisions involved herein did not exist at that time.

We begin our discussion by noting that the Organization carries the burden of proof. In other words, the Organization must demonstrate that it is more likely than not that each Claimant is entitled to the per diem payment sought either by the clear wording of a Rule(s) or past practice or both. Following a careful review of the record in this case, with particular attention paid to the cases cited by the Carrier as well as the Organization in support of their respective positions, and for the reasons that follow, we find that the Organization has not carried its burden of persuasion in this matter, primarily because the issue in the claims before us has been litigated by the Organization numerous times in the past without success.

Rule 39 – PER DIEM ALLOWANCES, which was agreed to as part of the October 31, 1988 On-Line Service Agreement, reads, in relevant part, as follows:

> "(e) On-line Service* – Employees assigned with headquarters on-line, as referenced in Rule 29, will be allowed a daily per diem allowance of $48.00 ($52.00 effective July 1, 2002 and $57.00 effective July 1, 2005) to help defray expenses for lodging, meals and travel.
>
> The foregoing per diem allowance will be paid for each day of the calendar week, including rest days, holidays and personal leave days, except it will not be payable for workdays on which the employee is voluntarily absent from service, or for rest days, holidays or personal leave days when the employee is voluntarily absent from service when work is available to him on the workday immediately preceding or the workday immediately following said rest days, holidays or personal leave days. No elimination of days for per diem allowances or vacation credits will occur when a gang is assigned a compressed work week, such as four (4) ten-hour days."

On October 31, 1988, the parties concurrently entered into a Side Letter for the purpose of clarifying certain aspects of the On-Line Service Agreement's provisions. It provides, in relevant part:

> "This is in reference to the amendments made this day to Agreement Rules 29, 30, 36 and 39. To help clarify some of the issues involved with the changes made, the following understandings will apply:
>
> (1) The language of Rule 39(e) indicating 'the employee is voluntarily absent' means the employee has failed to render compensated service on a workday on which work was available to him.
>
> (2) For Monday through Friday vacations, employees will be granted per diem allowances for the weekend immediately preceding the start of the vacation period and no other per

diem allowance will apply or commence until the employee returns to work."

During the on-property handling of this matter, as well as in its arguments before the Board, the Carrier asserted that recent on-property Third Division Awards 37849, 37716, 37571, 37163 and 37105 have upheld the Carrier's recoupment and/or denial of rest day per diem allowances under substantially identical circumstances as present herein. Invoking the affirmative defense of collateral estoppel, the Carrier argues that the above Awards are controlling precedent which the Board is compelled to follow. It therefore urges that the Board deny the instant claim.

Following our review of the facts and arguments in the parties' Submissions to the Board, we find from our close review of the entire record that the instant claims are indeed substantially identical to the cases considered by the Board as noted above. It is significant in reaching our decision in this case that the instant matter as well as those Third Division cases noted above are governed by the identical Agreement Rules. It is also significant that each of these decisions carefully considered the findings and conclusions in Award 14 of Public Law Board No. 6302 and, having done so, incorporated Award 14, thereby concluding that Award 14 was controlling precedent. Indeed, the Board in Award 37105 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. Each of the above cited Third Division Awards has consistently 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. Respectfully, the Organization has not provided persuasive evidence as to why the use of a safety day should be treated differently. Indeed, whether a Claimant used a vacation day, personal day or safety day, the fact remains that in each such instance, the Claimant failed to render compensated service on any such leave day and was therefore "voluntarily absent" under Rule 39(e). Given the Board's holdings in these substantially similar Awards together with the factual record before us, we rule that the Board must follow that line of established precedent as applied to the instant case pursuant to the doctrine of collateral estoppel. Collateral

estoppel or issue preclusion, bars a party from relitigating an issue determined against that party in an earlier action, even if the subsequent action differs significantly from the prior one. Under collateral estoppel, findings of fact in a previous forum involving the same parties, the same issue of fact, and the same fact pattern will be given effect in later proceedings involving the same issues between the same parties. The application of this doctrine makes sense given the desire for stability in the Labor-Management relationship. Were the parties free to repeatedly submit the same issue to arbitral resolution, thereby essentially "shopping" for a different result, the common rule of the workplace would be destroyed. Contractual Rules are expected to be applied uniformly to all similarly situated employees.

In conclusion therefore, we hold that given the factual record before the Board, the Third Division Awards noted above are controlling precedent, and pursuant to the doctrine of collateral estoppel, these cases do 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 the parties, facts and Rules, the Board finds that the above cited Third Division Awards together with Award 14 of Public Law Board No. 6302 are controlling, as the Carrier has contended, and the holdings of each must be followed in the instant matters.

## 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 7th day of July 2008.