Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39503
Docket No. MW-38034
09-3-NRAB-00003-030489
(03-3-489)

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 Employes
(
(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 System Gang employe D. Castillo travel allowance for the trip he made from Denver, Colorado to Counselor, New Mexico following the break up of Gang 9064 on September 27, 2002 as provided in Rule 36 (System File C-0236-120/1342732).

(2) As a consequence of the violation referred to in Part (1) above, Mr. D. Castillo shall be allowed a travel allowance of one hundred dollars ($100.00)."

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.

Claimant D. Castillo has established and holds seniority in various classes within the Roadway Equipment Sub-department. On the dates pertinent hereto, he was regularly assigned as a Machine Operator on System Gang 9064. Gang 9064 was regularly assigned to work eight hours per day, Monday through Friday, with Saturday and Sunday as designated rest days.

On September 23, 2002, the Claimant received confirmation of an abolishment notice for his position on Gang 9064 effective at the close of work on September 27, 2002. In addition, 35 members of Gang 9064 received job abolishment notices effective September 27, thereby abolishing 36 of the 47 positions on Gang 9064 as of September 27, 2002. The Claimant traveled home from the assembly point in Denver, Colorado, to his residence in Counselor, New Mexico, a distance of 437 miles. The Claimant's request for a $100.00 travel allowance was denied by the Carrier. It is the Organization's position that Gang 9064 was abolished and, therefore, the Claimant is entitled to a $100.00 travel allowance based on Rule 36 Section 7(b).

The issue in this case is the interpretation of Section 7 (b) of Rule 36 that calls for the following:

> "Section 7.
>
> (b) At the start up and break up of a gang, an allowance will be paid after 50 miles, with a payment of $12.50 for the mileage between 51 and 100 miles."

It is uncontested that had the Claimant been entitled to a travel allowance based on the distance traveled, he would have received $100.00.

According to the Organization, the Carrier violated the Agreement when it did not pay the Claimant his travel allowance to return home when his position was abolished. In addition, the abolishment took place at the end of the Claimant's

season. The Organization contends that the plain language specifically allows that the $100.00 allowance shall be paid for his travel.

Conversely, the Carrier contends that the burden is on the Organization to prove that the Claimant's gang was abolished. The Carrier argues that only 75 percent of the gang was abolished and the remainder of the gang remained. Thus, because the gang was not abolished, a travel allowance was not required. In addition, while the Organization contends that the Claimant ended his season after the abolishment, the Carrier contends that the Claimant chose to self-furlough. In sum, the Carrier contends that the Organization cannot meet its burden of proof and the claim must be denied.

After a review of this evidence and positions of the parties, the Board cannot find that the Organization has been able to meet its burden of proof. We agree with the Carrier that the language of Rule 36 provides that a travel allowance need only be paid when a gang is abolished. In the instant case, the gang was not completely abolished. Therefore, the requirements of Rule 36 do not apply. See Third Division Award 36810. The claim is therefore denied.

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 2nd day of February 2009.

LABOR MEMBER'S DISSENT
TO
AWARD 39503, DOCKET MW-38034
(Referee Bierig)

The Majority clearly erred when it rendered its decision in this case and a dissent is therefore required.

This case involved the interpretation of Article XIV of the 1992 National Agreement, specifically to Section 1(b). In this case there was no dispute but that the Claimant's position was abolished and he was furloughed for the rest of the year. Section 7(b) of Article XIV clearly states "At the start up and **break up** of a gang, an allowance will be paid after 50 miles, with a payment of $12.50 for the mileage between 51 and 100 miles." His one-way travel from his work location to his home was four hundred thirty-seven (437) miles. The Claimant should have been afforded the **break up** amount of $100.00. The intent of Article XIV is to allow some monetary relief to employes, as the Claimant in this case, who travel "*** hundreds of miles from their residences. ***" as stated in Section 1 of Article XIV. Break up allowance, as is the subject of this claim, is to be paid each employe who began their work season "*** hundreds of miles away from home. ***" The very fact that the gang to which the Claimant was assigned consisted of forty-seven (47) positions that was reduced by thirty-six (36) positions should have been sufficient evidence that the gang broke up. What the Carrier has done here is to avoid paying break up allowance by asserting that the gang was not abolished but was merely reduced by more than 75%. Article XIV does not say that break up travel allowance is afforded the employes covered thereby when the gang is abolished, but when the gang breaks up. Such clear and simple language is hard to confuse, but the majority has seemed to mix "apples and oranges" by this awkward interpretation of Article XIV. This gang was a tie gang. After more than 75% of its members were abolished how can any reasonable person conclude that the gang did not break up. Again, Article XIV states that travel allowance will be paid at the end of the season when a gang **breaks up** not when the gang in total is abolished. Award **37053** was clearly on point here and should have been followed.

This award is palpably erroneous and I, therefore, dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member