Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39506
Docket No. MW-38080
09-3-NRAB-00003-030542
(03-3-542)

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna 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 allow System Gang 9066 employe T. Tsosie rest day per diem allowance for the dates of October 18, 19 and 20, 2002 and when it failed to provide travel allowance for his travel from work in North Platte, Nebraska to his residence in Chinle, Arizona and from his residence to his work in Phillipsburg, Colorado (System File J-0239-78/1345257).

(2) As a consequence of the violation referred to in Part (1) above, Claimant T. Tsosie shall now be allowed a total per diem allowance of one hundred fifty-six dollars ($156.00) for October 18, 19 and 20, 2002 and be paid three hundred twenty-five dollars ($325.00) for travel allowance that weekend."

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 facts giving rise to this dispute are as follows:

Prior to the commencement of Gang 9066's rest days, on October 17, 2002, the Claimant was displaced off of his Laborer's position on Gang 9066. Thereafter, the Claimant did not exercise his seniority until October 22 when he exercised his seniority to Gang 9012. The Claimant took October 18 through and including October 20 as rest days, followed by the use of a single vacation day on October 21.

As a result of the Claimant's acts described above, the Organization now seeks three days of per diem allowance covering a three rest day period (October 18, 19 & 20) and a single vacation day which the Claimant elected to take on October 21, 2002, immediately following this three rest day period, together with Travel Allowance monies. The Carrier viewed the Claimant's use of one single vacation day as akin to voluntarily absenting himself, thereby denying the 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 where the employee has taken less than 40-hour vacation increments, i.e., has taken "single-day vacations" on the work day immediately preceding or following the rest day period. In addition, the Carrier asserts that the Claimant is not entitled to the round-trip travel allowance he seeks because he did not meet the conditions of Rule 36, Section 7. In addition, the Carrier asserts that the claim for Travel Allowance should be summarily denied due to the fact that the Organization failed to raise this claim at any time during the on-property handling.

In support of the Claimants, the Organization asserts that the Carrier's action violated Rule 36 (Travel Allowance) 39(e) (Per Diem Allowance) Appendix X-1 (Side

Letter) and Article VIII of the 1996 National Vacation Agreement which provides for single-day vacations, the latter of which is currently incorporated into the Agreement as Rule 44(c). The Organization also asserted that the Claimant's 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 the fact that ". . . vacations of less than a full week are not always for the benefit of the employee but on many occasions the Carrier is happy to allow less than a full week of vacation so the position is not vacant for an entire week." Finally, the Organization maintains that Public Law Board No. 6302, Award 14 is not "directly on point" as the Carrier asserts because the facts in the instant matter are distinguishable from Award 14, and that the pertinent Agreement provisions involved herein did not exist at that time.

In addition to the foregoing arguments, both parties make equity arguments: the Carrier asserts that per diem was specifically designed to defray employees' expenses when they are working away from home and is not to be treated as ordinary income for periods when they are at home. For its part, the Organization maintains that the per diem allowance is not sufficient to cover daily expenses and employees should not be deprived of income merely because they take contractually-permitted vacations. Respectfully, the positions espoused by the Carrier and the Organization are irrelevant here. The only issue before the Board is whether per diem payments for rest days are required by the Agreement when a vacation period of less than one week is taken adjacent to those rest days.

Following a careful review of the record, 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 issue in the claims before us have been litigated by the Organization in the past without success.

As an initial note, it is apparent that the Claimant did not qualify for Gang 9066's rest days due to the fact that he had been displaced from Gang 9066 prior to the beginning of Gang 9066's rest days. Accordingly, at the time he was displaced, the Claimant forfeited all working conditions associated with Gang 9066, including its rest days. This point notwithstanding however, for the reasons noted and discussed below, even had the Claimant been entitled to Gang 9066 rest days, the fact that he took a

single-day vacation on October 21, 2002, immediately contiguous to the three rest days, made him ineligible for the per diem allowance he now seeks.

Rule 39(e) as modified by the October 31, 1988 On-Line Service Agreement (OLSA) provides:

> "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.
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> The foregoing meal 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."

Concurrent with the signing of the OLSA, the parties entered into a Side Letter for the purpose of clarifying certain aspects of the OLSA's provisions. This Side Letter provides, in relevant part:

> "[I]n 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:
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> (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."

The Carrier asserts that most recent on-property Third Division Awards 39294, 39298, 39323, 39324, 39328, and 39331 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 claim is 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 is 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, in Awards 39328 and 39331, the Board concluded:

"In Award 14, Public Law Board No. 6302 involving the parties to this dispute, the claimant took a single-day vacation on Monday, February 6, 1995 and was not paid a per-diem allowance for Saturday and Sunday. The PLB found that the claim turned on the interpretation of Rule 39(e) and held that '. . . per diem allowances where a one day vacation is taken must . . . be governed by the practice on the property. During handling on the property, the Carrier maintained that the consistent practice was not to pay per diem allowances for weekends preceding vacations of less than one full week. . . .' The PLB noted the practice assertion was not challenged by the Organization and denied the claim.

> In order to overcome this clear precedent, the Organization bears a heavy burden to demonstrate that the Agreement itself was explicitly modified or that the practice has so overwhelmingly changed to support its interpretation of what 'voluntarily absent from service' means, particularly in the context of a single-day vacation. The record developed here does not demonstrate such a change. Accordingly, the Board follows the result in Award 14, Public Law Board No. 6302 and denies the claim. See Third Division Awards 37105, 37163, 37571, 37716, 37849, 39133, 39134, 39135, 39136, 39137, 39277, as well as Public Law Board No. 6302, Award 14 and Public Law Board No. 6638, Awards 2, 4, 6, 8, 10, and 12."

We find the Board's stated conclusion applicable to this case and we therefore adopt it. In addition, it is noteworthy that 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. Accordingly, 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.

As an initial note, the Claimant is not entitled to his demand for Travel Allowance due to the fact that the Board can find no evidence that the Organization

pursued this aspect of the case. However, this point notwithstanding, for the reasons noted and discussed below, we find that under the terms of the Agreement, the Claimant would not be entitled to Travel Allowance. In this regard, we note that a prior case involving these same parties under substantially identical circumstances was litigated before Public Law Board No. 6638, Award 12 without success. In that case, the Board determined that the claim for Travel Allowance should be denied, noting in relevant part:

> "Claimant knew early on January 3 that he had been displaced and needed to exercise his seniority to displace onto another gang if he wanted to maintain certain contractual rights and benefits.
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> * * *
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> This Board has found that once a displacement occurs, the rights attendant to the position previously held are terminated, and it is the timely exercise of seniority that determines whether certain contractual benefits are payable."

In the instant matter, the Claimant was notified of his displacement from Gang 9066 on October 17, but chose not to exercise his seniority until October 22, 2002 when he exercised his seniority to Gang 9012. Given this scenario, it is clear that the Claimant's delay in exercising his seniority rights deprived him of the Travel Allowance he now seeks.

Finally, and totally apart from the reasoning noted above, the Claimant is not entitled to the round-trip allowance claimed because he did not meet the conditions of Rule 36 (Travel Allowance) at Section 7 (End of Work Week Travel Allowance for Traveling Gangs) in that his reporting to Gang 9012 was not for the start-up of that Gang, his departure from Gang 9066 was not occasioned by the shut-down of that Gang, and the Claimant did not make a round-trip leaving Gang 9066 and returning to Gang 9066. Instead, the Claimant, through his exercise of seniority, moved from Gang 9066 to Gang 9012, an act for which the Carrier bears no expense under Rule 18(b).

In conclusion, relative to the claim for per diem allowance, 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 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 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 asserted, and the holdings of each must be followed in the instant cases.

Relative to the claim for Travel Allowance, whereas the Claimant has not met the conditions outlined in Rule 36, Section 7, this fact, together with case precedent, must result in the denial of this portion of the Organization's claim.

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.