

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40334
Docket No. MW-40219
10-3-NRAB-00003-070446
(07-3-446)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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 recovered and refused to allow System Gang employee J. Drury the per diem allowance for April 8, 9, 10, 11, 12, 13, 14, 15 and 16, 2006 (System File S-0639-53/1454887).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Drury shall have the per diem allowance for April 8, 9, 10, 11, 12, 13, 14, 15 and 16, 2006 reinstated and he shall be compensated for a total of five hundred thirteen dollars (\$513.00).”

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.

The Organization filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it failed to allow the Claimant the per diem allowance for the period from April 8 through 16, 2006.

The Organization initially contends that because the facts essentially are undisputed and the referenced Agreement language is clear, this dispute turns on the validity of the Carrier's defense. The Organization asserts that there is no validity to the Carrier's defense that the Claimant was "voluntarily absent" when work was available to him following the rest period after his vacation.

The Organization argues that the Claimant's observance of the designated rest days did not serve to disqualify him for the per diem allowances to which he was entitled by his assignment to on-line Gang 9012. The Organization emphasizes that this dispute focuses on whether scheduled vacation fits the Rule 39(e) exception for when per diem allowances will not be payable. The Organization points out that Rule 39(e) specifically provides that per diem allowances 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 the employee on the workday immediately preceding or following the rest days, holidays, or personal leave days.

The Organization maintains that the Claimant's observance of scheduled vacation does not reasonably fit the express exceptions set forth in Rule 39(e) and the Carrier's decision to recoup/withhold the per diem allowances at issue plainly violated the Agreement. The Organization asserts that although vacation periods initially are timed by the employee, the critical fact is that the employee has no option to take a vacation or remain at work, so it cannot validly be concluded that a vacation is a "voluntary absence" within the meaning of Rule 39(e) or that work was available to the Claimant during his vacation. The Organization emphasizes that

under the National Vacation Agreement, an employee may not, at his own option, forego the taking of vacation, remain at work, and accept pay in lieu thereof.

The Organization insists that because the Carrier controlled this aspect of vacations, work an employee normally would perform is not available to the employee while on scheduled vacation. The Organization asserts that the Claimant could not be considered as absent from work when work was available, as found in prior Awards.

The Organization submits that the Claimant did not return to work immediately following his vacation. Instead, he requested and was granted a medical leave commencing May 1, 2006. The Organization points out that based on this leave, the Carrier improperly applied Rule 39 and determined that the Claimant was not entitled to the per diem for the claimed dates. The Organization suggests that the Carrier is attempting to apply new meaning to Rule 39. It emphasizes that Rule 39 makes no reference to vacation, and the Claimant was not voluntarily absent "on the workday immediately preceding or the workday immediately following said rest days, holidays or personal leave days" at issue. The Organization insists that vacation is not a voluntary absence, so Rule 39 does not apply to the instant dispute.

The Organization contends that if the parties intended not to allow per diem allowances for rest days prior to a vacation, then the parties would have included such language in the Agreement. The Organization points out that the Board repeatedly has held that agreements must be applied as written. The Organization argues that the Agreement does not provide for the Carrier's decision to deprive the Claimant of his per diem allowance for the cited dates. The Organization suggests that to subscribe to the Carrier's reasoning in this matter would be to apply new meaning to the Agreement.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that no Agreement violation occurred because the Claimant did not perform compensated service on the first available work day,

so he is not entitled to the requested per diem. The Carrier asserts that the clear language of Rule 39(e) states that when an employee is voluntarily absent following scheduled rest days, the employee is not entitled to per diem for the rest days before his absence.

Combining this provision with the clear language of Appendix X-1, which defines “voluntary absence” as a failure to render compensated service on a workday on which work was available to the employee, the Carrier argues that any time an employee fails to render compensated service either before or after rest days, except for holidays or personal leave days, an employee is considered “voluntarily absent.”

The Carrier insists that this language was negotiated by the parties in good faith, but the Organization apparently now regrets its negotiations and is attempting to re-write the Agreement language through arbitration. The Carrier contends that during the on-property handling, the Organization never denied that failing to render compensated service is fatal when determining whether the per diem will be paid for rest days preceding the absence. The Organization also did not deny that the Claimant failed to render compensated service on May 1, 2006. The Carrier points out that the Organization instead based its case on the pretense that the Claimant somehow was withheld from service, although the Organization never asserted a loss of work opportunity. The Carrier emphasizes that if the Claimant actually had been withheld from service, the Organization would have sought compensation for May 1, 2006.

The Carrier suggests that the Organization is treating the per diem as income and not as an allowance to help defray expenses. The Carrier argues that the Claimant was not paid the per diem because he did not incur expenses in accordance with Rule 39(e).

The Carrier asserts that the Organization failed to present any evidence to support its position or to deny the practice on the property. Citing prior Awards, the Carrier submits that the instant claim should be denied because the Organization has been unable to prove a legitimate violation of the Agreement.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden to prove that the Carrier violated the Agreement when it refused to allow Claimant Drury a per diem allowance for the work days April 8, 9, 10, 11, 12, 13, 14, 15, and 16, 2006. Therefore, the claim must be denied.

The per diem Rule at issue states, in part:

“ . . . it will not be payable . . . for rest days, holidays, or personal leave days when the employee is voluntarily absent from service when work is available to him on the work day immediately preceding or the work day immediately following said rest days, holidays, or personal leave days.”

There was work available to the Claimant on the day that he was supposed to return to service after his rest days. The Claimant did not come to work and, therefore, he was ineligible to receive the rest day per diem.

There are a number of previous Awards of this Board that have upheld the Carrier's application of the per diem Rule in similar circumstances. (See Third Division Awards 39133, 39505, and the six Awards cited in 39133.) All of those Awards interpret Rule 39 and upheld the eligibility requirement.

Because the Organization failed to meet its burden of proof, the claim must be denied.

AWARD

Claim denied.

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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 1st day of March 2010.