

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40401
Docket No. MW-39975
10-3-NRAB-00003-070151
(07-3-151)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri
(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 ‘on-line’ employee R. Walker the proper travel allowance for the round trip he made from his ‘on-line’ work location at Houston, Texas to his residence at Camp Verde, Arizona and returning to his ‘on-line’ work location at Houston, Texas and the per diem allowance for the dates of December 23, 24, 25, 26, 27, 28, 29, 30, 31, 2005 and January 1 and 2, 2006 (System File T06-04/1444754 MPR).**
- 2) As a consequence of the violation referred to in Part (1) above, Claimant R. Walker shall now receive payment of three hundred twenty-five dollars (\$325.00) for the outstanding balance of the travel allowance for his aforesaid round trip and he shall receive payment of the per diem allowance for each of the aforesaid dates.”**

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 travel allowance for a round trip between the Claimant's work location and residence, as well as the per diem for certain dates in December 2005 and January 2006.

The Organization initially contends that in connection with the per diem issue, the Carrier's interpretation of Rules 17 and 36(b) is twisted. The Organization asserts that neither of these Rules can validly be used as a basis for refusing payment of the per diem allowance to the Claimant. The Organization argues that Rule 36 clearly stipulates that the per diem allowance will be paid for each day of the calendar week, including rest days, holidays, and personal leave days. This Rule further provides that the per diem 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 when work is available to the employee on the workday immediately preceding or following such rest days, holidays, or personal leave days.

The Organization emphasizes that there is no dispute that Gangs 9103 and 9101 were on-line gangs working the same compressed work schedule at the same locations during December 2005 and January 2006. The Organization maintains that the Claimant was assigned to an on-line gang at all times during the relevant time period, and there was no break in continuity. The Claimant worked on both the last workday preceding and the first workday following the accumulated rest day and holiday period extending from December 23, 2005, through January 1, 2006. The Organization points out that the Claimant became assigned to Gang 9101 effective January 3, 2006, and Gang 9101 was observing the same accumulated rest

days as Gang 9103. The Organization submits that under these circumstances, there was no break in continuity of assignment to an on-line gang.

The Organization contends that under these circumstances, it is clear that the Claimant was not “voluntarily” absent on any of the rest days/holidays involved here. Moreover, the Claimant worked on the workdays immediately preceding and following the rest day period. The Organization asserts that the Carrier cannot find support for its actions in Rule 36(b).

With regard to Rule 17, the Organization points out that it is clear that the Carrier is misplaced in attempting to apply it to the instant matter. Rule 17 states that an employee accepting a position through the exercise of seniority rights will do so without causing extra expense to the Carrier. The Organization insists that this is not a case in which extra expenses were caused by the Claimant’s accepting a position through the exercise of his seniority. The Organization submits that the expenses claimed are those which the Claimant already was entitled to receive as a member of an on-line gang. The Organization emphasizes that no extra expense was created by the Claimant’s situation, so Rule 17 is not applicable here.

Turning to the issue of the travel allowance, the Organization contends that since the inception of Rule 37, the Carrier has complied with this Rule by paying the appropriate travel allowance to employees making weekend round trips between the gang work location and their residences. The Organization asserts that this allowance has been paid whether the gang location changed or stayed the same during the travel period. Payment of this travel allowance never has been tied to whether the employee traveled to and from the same work or gang location over the rest day period. The Organization suggests that the Carrier’s position on this issue is a total red herring.

The Organization then argues that the Carrier’s attempt to suggest that the Organization acquiesced in the Carrier’s position must be rejected. The Organization points out that there are a number of reasons why a dispute may not be progressed to arbitration, and arbitral Boards therefore have eschewed arguments that abandoned claims represent acquiescence or that such actions have precedential value. The Organization emphasizes that one of the Carrier’s e-mail statements in connection with this matter acknowledges that the Carrier historically paid per diem and travel allowances in precisely the same situation as is involved

here. The Organization suggests that the Carrier embarked on its new assault on the Rules only a few years ago, and the Carrier's current position cannot be supported.

The Carrier initially contends that the Claimant voluntarily bid off, or vacated, his assignment on Gang 9103, and his last day worked on that Gang was December 22, 2005. Through a voluntary exercise of seniority, the Claimant bid to another assignment on a different gang, Gang 9101, with January 3, 2006, as the starting date of this new assignment.

The Carrier argues that the plain language of Rule 36(b) does not provide the per diem allowance to individuals who are in the process of exercising their seniority and who are not assigned to an on-line position at that particular time. The Carrier emphasizes that this position is consistent with the practice under the Agreement because the per diem allowance begins and ends with the first and last day of compensated service when different positions are obtained through the voluntary exercise of seniority.

The Carrier contends that given the fact that specific Agreement language provides that the per diem is allowed only to employees currently assigned to on-line positions, there can be no basis for the Organization's claim. The Carrier insists that there can be no dispute that the Claimant was not assigned to an on-line gang during the period from December 22, 2005, to January 3, 2006. The Claimant no longer was assigned to Gang 9103 after December 22, 2005, and he was not part of Gang 9101 until January 3, 2006.

The Carrier then points to evidence showing the practice regarding how the Agreement historically has been applied on the property. The Carrier asserts that payroll records from two employees who bid from one on-line gang to another demonstrate that such employees did not receive per diem or round-trip travel allowances. In addition, an auditor in charge of auditing the per diem and travel allowances documented this practice on the property. The Carrier contends that this factual documentation clearly demonstrates how the Agreement historically has been applied, and this practice controls the application of the Agreement.

The Carrier emphasizes that although the Organization disputed the existence of this practice, the Organization never supported its position with any evidence.

In connection with the Rule 37 travel allowance, the Carrier argues that the Organization interprets the instant situation as being a round trip because both the new gang and the former gang were, at the time, at the same location. The Carrier points out that work locations are subject to change, so the Carrier must treat these gangs separately. Otherwise, employees could be subject to disparate treatment if the gang locations happen to cross paths. The Carrier insists that it was not contemplated that travel pay would be allowed under these circumstances, and it would be incorrect for the Board to change or modify the language and practice on the property.

The Carrier additionally asserts that it is not responsible for employees who exercise their seniority pursuant to Rule 17. The Carrier contends that its interpretation of the Agreement Rules is based upon the practice and the specific Agreement language. Citing prior Awards, the Carrier argues that this applied practice follows the Agreement language and, therefore, governs the instant situation, and the instant claim must be denied.

The Carrier contends that the clear language of the per diem Rule consistently has been interpreted that an employee has to be assigned to the same on-line gang and work the first and last day available to receive per diem. The Carrier submits that an exercise of seniority removes an employee's Agreement right to receive per diem and travel allowances when moving between positions.

The Carrier insists that the Claimant was not assigned to an on-line gang during the claim period, but the Organization wants the Carrier to subsidize the Claimant's exercise of seniority by paying him per diem and travel allowances. The Carrier argues that there is nothing in the current Rules that allows an employee to be compensated as requested, and the Organization's position is a departure from those Rules.

The Carrier emphasizes that the Organization failed to point to any Agreement language supporting its position. There is no language that obligates the Carrier to pay per diem and travel allowances when an employee is not assigned to

an on-line gang and is exercising his seniority to another position. Citing prior Awards, the Carrier asserts that the claim should be denied because the Organization failed to prove how the Agreement has been violated.

The Board concludes that the Organization failed to meet its burden to prove that the Carrier violated the Agreement when it refused to allow the Claimant a travel allowance for a round-trip that he made from his work to his home and per diem allowance for several dates in December 2005 and January 2006. Therefore, the claim must be denied.

The Carrier presented substantial evidence that per diem and travel allowance payments are only applicable for employees who are actually assigned to gangs with an on-line headquarters. In this case, the Claimant was working on an on-line gang and he exercised his seniority to move to another on-line gang. There was a 12-day period when he was not assigned to any gang; and for those days, he was not paid per diem and he was not paid the travel allowance when he reported to the new gang. The reason for this was that the Claimant was not, at that point, assigned to a gang with an on-line headquarters.

The Carrier correctly points to Rule 36(b)(1) which states:

“Employees who are assigned headquarters of ‘on-line’ will be allowed a daily per diem allowance equal to that paid under award of Arbitration Board No. 298 to help defray expenses for lodging and meals subject to the qualifying provisions of Section (b)(2) of this Rule.”

The Claimant was not assigned headquarters of “on-line” because he had bid off of his former gang and had not yet been assigned to the new gang.

With respect to per diem payments, the Carrier points to Public Law Board No. 7156, Award 7, which states:

“By clear language of Rule 36(b)(1), employees must be ‘assigned’ to an on-line gang to receive the per diem benefit . . . Because the Claimant exercised his seniority from Gang 8896 to Gang 9161, the Claimant was no longer assigned to Gang 8896 on September 14 and 15, 2002, for which he claims per diem.”

That Award denied the claim.

The Organization bears the burden of proof in cases such as this and it failed to meet that burden in this case. Therefore, the claim must be 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 25th day of March 2010.