

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40870
Docket No. MW-40985
11-3-NRAB-00003-090282**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 M. Crossley the per diem for December 18, 2007 (System File MW-08-21/1496192 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Crossley shall now receive fifty-seven dollars (\$57.00) for the aforesaid per diem.”**

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.

This is a dispute involving the Claimant's entitlement to a per diem allowance for a personal leave day (following observed vacation days) taken on the final scheduled work day of his gang's compressed month during December 2007, and involves the interpretation of the following provisions in Rule 36, Travel Time - Bunk Cars or Trailers:

“(b) (1) Employees who are assigned headquarters of ‘on-line’ (without outfit cars) 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.

(2) The per diem allowance will be paid for each day of the calendar week, including rest days, holidays and personal leave days. It, however, will not be payable for workdays that 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 such rest days, holidays, or personal leave days. The per diem allowance will not be reduced due to an employee working a work week arrangement of other than normal assignment contemplated in Rule 25 of this Agreement.”

At the time of this dispute, the Claimant was a Trackman assigned to on-line production Gang No. 9313, with a schedule of a consecutive work month (21 days on and the remainder of the month as assigned rest days). December 18, 2007, was the last scheduled work day in the month for that gang, because December 19 and 20 were used in lieu of the Christmas holidays, which fell on rest days. The Claimant was instructed by his Supervisor to take his unused five-day vacation between December 13 and 17, and he used his remaining personal leave day on December 18, 2007. During the gang's assigned rest days, the Claimant was advised that he was the successful bidder for a job on a different gang, which commenced its work period on January 3, 2008, as did Gang No. 9313. The Claimant reported to Gang

No. 9313 on January 3, 2008, and was released to report to his new assignment, which he did on January 4, 2008. This claim was initiated when the Carrier refused to pay the Claimant per diem for his December 18, 2007, personal leave day.

The Organization argues that the Claimant was not voluntarily absent on December 17, 2007, prior to his personal leave day because he was forced by his supervisor to take his vacation between December 13 and 17, 2007. It also asserts that he did report to work on the first work day after his assigned rest period of his old gang, because he had not been released. Having met all conditions set forth in Rule 36(b)(2) the Organization contends that the Claimant is entitled to the per diem payment for December 18, 2007, citing Public Law Board No. 7156, Awards 3, 4 and 5. The Carrier argues that the holding in Public Law Board No. 7156, Award 2 - that taking vacation constitutes a voluntary absence disqualifying an employee from the per diem payment for an adjacent personal leave day under Rule 36(b)(2) - is dispositive of the issue in this case and is binding on the parties herein, relying on Third Division Awards 27810, 37163, and 37716; Public Law Board No. 4768, Award 7.

A careful review of the record convinces the Board that, regardless of whether the Carrier requires employees to utilize their vacation prior to the end of the year, thus instructing the Claimant to take his remaining unused 2007 vacation prior to his gang's last work day of the year, the language of Rule 36(b)(2) has been interpreted to mean that an employee who takes a vacation day immediately prior to (or after) a personal leave day, has voluntarily absented himself on the work day immediately preceding (or following) that personal leave day, thereby disqualifying him from entitlement to per diem for the personal leave day. See, Public Law Board No. 7156, Award 2; compare Third Division Awards 37163 and 37716. Considering that the purpose of per diem is to defray expenses for lodging and meals for an on-line gang, we do not deem such interpretation to be palpably erroneous, and will follow it in this case. Thus, we conclude that the Claimant did not meet the requirements for payment of per diem for his personal leave day on December 18, 2007, and the Organization failed to meet its burden of proving a violation of the Agreement.

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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 February 2011.