

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40873
Docket No. MW-40989
11-3-NRAB-00003-090286**

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**

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 on-line employee C. Nickels the per diem for November 24, 25, 26, 27, 28, 29 and 30, 2007 (System File D-0739U-205/1494186).**
- (2) The Agreement was violated when the Carrier, following its letter dated December 6, 2007 to on-line employee C. Nickels, refused to allow and recovered his holiday pay for the day after Thanksgiving holiday and his per diem for Thanksgiving and the day after Thanksgiving holiday (System File D-0733U-206/1494185).**
- (3) As a consequence of the violation referred to in Part (1) above, Claimant C. Nickels shall now ‘. . . be compensated for seven (7) days of non-taxable per diem allowance for a total of \$399.00***’**
- (4) As a consequence of the violation referred to in Part (2) above, Claimant C. Nickels shall now ‘*** be reimbursed for the two (2) days of non-taxable per diem allowance, at \$57.00 per day for a total of \$114.00, and the eight (8) hours of holiday pay**

for the Day After Thanksgiving, totaling \$179.76. This is 'compensation that was correctly paid to Claimant and subsequently recollected.***'"

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 dispute involves the Claimant's entitlement to per diem allowance for November 22 - 30, 2007, rest days and holiday pay for the day after Thanksgiving holiday, and involves the interpretation of the following provisions of the Agreement:

"RULE 39 - PER DIEM ALLOWANCES

(e) 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.

The foregoing per diem 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 credit will occur when a gang is assigned a compressed work week, such as four (4) ten-hour days.

APPENDIX C - NATIONAL HOLIDAY AGREEMENT SYNTHESIS

Section 3.

A regularly assigned employee shall qualify for the holiday pay provided in Section 1 hereof if compensation paid him by the carrier is credited to the workdays immediately preceding and following such holiday or if the employee is not assigned to work but is available for service on such days. If the holiday falls on the last day of a regularly assigned employee's workweek, the first workday following his rest days shall be considered the workday immediately following. If the holiday falls on the first workday of his workweek, the last workday of the preceding workweek shall be considered the workday immediately preceding the holiday."

At the time of this dispute, the Claimant was working as a Crawler Backhoe Operator on on-line System Gang 8572 working a compressed work schedule, which included working 12-hour days from November 16 - 21 and receiving holiday pay on November 22 and 23, 2007, with scheduled accumulated rest days through November 30, 2007. The Claimant bid on, and was awarded a Semi Truck Driver position on System Gang 9368 effective November 26, 2007, which was the commencement of the work period for his new gang. System Gang 9368 was working a schedule of four ten-hour days with Friday, Saturday, and Sunday as rest days. Work was available for the Claimant between November 26 - 30, 2007. The Claimant called his former supervisor on November 29, 2007, and was released to report to his new gang, which he did on December 1, 2007 (a rest day for his new gang) at the request of his supervisor. It is the Carrier's refusal to pay the Claimant per diem on November 24 - 30, and its recoupment of per diem for November 22 and 23, as well as holiday pay for the day after Thanksgiving, that is the subject of the instant claim.

The Organization argues that the Claimant had a clear contractual right to the claimed rest day per diem and holiday pay. It asserts that the Claimant fulfilled the conditions for per diem payment set forth in Rule 39(e) because he admittedly performed service on the workday immediately preceding the holiday and rest days associated with Gang 8572, as well as the first workday available to him immediately after being released by his supervisor from that gang on November 29, 2007. The Organization notes that the Claimant was instructed by the supervisor of Gang 9368 to report on December 1, 2007, although it was a scheduled rest day for that gang, and he did so, satisfying the eligibility requirements for both rest day per diem and holiday pay for the day after Thanksgiving. It relies upon Public Law Board No. 6638, Award 2 for the proposition that it is a recognized past practice for the Carrier to bridge per diem between assignments when the employee has properly protected both assignments, as Claimant did here.

The Carrier contends that the Claimant did not meet the qualifying requirements for either rest day per diem or the day after Thanksgiving holiday pay because he failed to work on the first workday available on his new assignment - November 26, 2007. It submits that the Claimant was well aware of the bulletining cycle when he bid for the Truck Driver position on Gang 9368, as well as the November 26, 2007 effective date of the position, and chose to wait at home and observe the rest days of his old assignment prior to calling his old supervisor on November 29, 2007, to be released from his prior gang. Because work was available to the Claimant on November 26, 2007, in the position with the new gang he bid on and was awarded effective November 26, 2007, the Carrier argues that he voluntarily absented himself from work until December 1, 2007, and thus did not work on the first workday available to him immediately following his rest days and holiday. It also relies upon Public Law Board No. 6638, Award 2 as dispositive of the issue in this case.

A careful review of the record convinces the Board that the issue presented in this case falls squarely within the holding of Public Law Board No. 6638, Award 2 with respect to its interpretation of the language of Rule 39(e) and an employee's entitlement to rest day per diem when he is awarded a new assignment prior to (or during) the accumulated rest period of the old assignment and chooses to enjoy the rest days of his prior assignment before reporting to his new assignment where that assignment has available work during such rest day period. As noted by the

Organization, there is no dispute that the Claimant would have been entitled to rest day per diem if he had remained on System Gang 8572 and/or reported back to it on December 1, 2007, and then been released. The following comments of Public Law Board No. 6638, Award 2 are appropriate to this dispute.

“The parties disagree about whether the per diem eligibility requirement to work the last day immediately preceding and the first day immediately following ‘said rest days’ refers to the rest days of the old assignment or the new one. By its language Rule 39(e) does not clearly explain whether an employee exercising seniority to change gangs prior to the end of the half, ‘voluntarily absents himself’ from service by opting not to report to the new assignment until after the accumulated rest day period of the compressed half. . . .

Thus, the Board finds that Carrier has shown that a plausible explanation for the intention of the parties in bridging rest day per diem contained in Rule 39(e) for employees moving from gangs working compressed halves is that the rest days contemplated for purposes of that provision are defined as those in effect for the gang to which Claimants were newly assigned as of the first day of the new position. . . . It is not unreasonable for Carrier to look at the rest day assignments of the position held by the employee as of the effective date of the new job award. . . .

Accepting the Organization’s argument would also make the effective date of a job assignment for purposes of entitlement to rest day per diem up to the option of the employee. The Board cannot accept that the parties contemplated two possible different effective dates for converting an employee over to the terms and conditions of a job assignment after being declared the successful applicant to a position, at the employee’s option. . . .”

While the Organization focuses on the fact that the Claimant was not released from his prior position until November 29, 2007, when he contacted his supervisor, and notes that Public Law Board No. 6638, Award 2 indicates that the Carrier’s

records revealed that the effective date for assignment to new jobs in that case was the date the Claimants were released from their old gangs (which was the last day of the work period of the compressed half of the prior gang) the facts of the instant case are distinguishable in this regard. The Claimant bid on the bulletin for his new job (which was posted between November 15 and 19, 2007) during his compressed half work cycle, and the bulletin indicated both the gang schedule, the effective date of the assignment (November 22, 2007) and the effective date of the job (November 26, 2007). The fact that the Claimant last worked on November 21 and did not call his supervisor to seek release from his old job until November 29, 2007, indicates that he opted to observe the rest days of his prior position rather than seeking release from it before the first scheduled workday of his new assignment - November 26, 2007. For that reason, we find that the Carrier was correct in determining that the Claimant was voluntarily absent from service when work was available to him on the first workday immediately following both his rest days and the holiday.

For these reasons we conclude that the Claimant did not meet the requirements for payment of per diem for his rest days between November 22 - 30, 2007, under Rule 39(e) or holiday pay for the day after Thanksgiving under Appendix C, Section 3, and that the Organization failed to meet its burden of proving a violation of the Agreement.

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.