

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41185
Docket No. MW-40982
11-3-NRAB-00003-090276**

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud 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 refused to allow ‘on-line’ employe M. Crossley to work on January 3, 2008 and when it failed and refused to allow him the per diem for the dates beginning December 19, 2007 and continuing through January 3, 2008 or the travel allowance for his round trip made from his work location at Rosenberg, Texas to his residence at Fort Worth, Texas and returning to his work location at Rosenberg, Texas and continuing on to Canadian, Texas (System File MW-08-25/1496193 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Crossley shall now be compensated for eight (8) hours at his respective straight time rate of pay and he shall receive a total of eight hundred fifty-five dollars (\$855.00) for the aforesaid per diem and receive the travel allowance for the aforesaid round trip.”**

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.

Claimant M. Crossley was a Trackman assigned to on-line Gang 9113 in December 2007. The assembly point for Gang 9113 was near Rosenberg, Texas. Gang 9113 worked a compressed schedule. The gang's rest days began on December 19 and its new work cycle began on January 3, 2008 at Rosenberg, Texas.

The Claimant had five vacation days and a personal leave day to be observed by the end of the year. The Organization asserted in its correspondence on the property that the Carrier insisted that he observe his vacation and personal leave day before observing his accumulated rest days. The Carrier did not dispute the Organization's assertion that it compelled the Claimant to observe his remaining vacation and personal leave day before the end of the year. Because this is an undisputed material fact, the Board finds and relies on this assertion as fact (Third Division Award 35773).

As required by the Carrier, the Claimant observed five vacation days during the period of December 13 through 17. He observed his personal leave day on December 18. He observed his accumulated rest days and holidays from December 19 through January 2, 2008.

On December 21, the Claimant learned that his bid for a position to on-line Gang 9558 was successful. He attempted to contact his supervisor on Gang 9113 in order to be released from that gang so he could travel on January 3 from his home

in Ft. Worth, Texas, to his new gang's assembly point in the area of Canadian, Texas. He could not reach his supervisor. The Claimant left a message, but his call was not returned.

Because he had not been released from Gang 9113, he reported to the assembly point for Gang 9113 on January 3, 2008. After roll call, the supervisor released him. He did not allow the Claimant to work on January 3. The Claimant then traveled from Rosenberg to Canadian, Texas, a distance of approximately 591 miles. He reported to Gang 9558 on January 4. Gang 9558 worked a compressed schedule. Its work cycle began on January 2.

The Claimant seeks payment of per diem for the rest days that fell during the period of December 19, 2007 through January 2, 2008. This claim requests a travel allowance for the trip in December from Rosenberg, Texas, to his home in Ft. Worth and from Ft. Worth to Rosenberg and then on to Canadian, Texas, on January 3. The claim for per diem for the rest days amounts to \$855.00. The Organization also contends that the Claimant is entitled to eight hours pay because his supervisor did not permit him to work on January 3, 2008. The Board addresses each of these issues seriatim.

Rule 36 (b) (1) and (2) governs the determination of the claim for per diem. It reads, in relevant part, as follows:

“(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.”

The Organization argues that the Claimant was not voluntarily absent when he observed his vacation and personal leave day during the period of December 13-18. The Carrier required him to observe those days before observing his rest days. Because the Carrier required him to observe the days, there is no break in compensated time. The Claimant was not “absent from service when work was available to him” on the workday immediately preceding such rest days.

The Organization further argues that the Claimant reported as required on the workday immediately following his rest days. His supervisor did not permit him to work on January 3. The fact pattern conforms to the contractual language. The Carrier violated this provision, when it refused to pay him the per diem.

Conversely, the Carrier argues that in accordance with past practice on this property, once an employee exercises his seniority and bids off of a gang, his assignment to that gang ends on the last day of compensated service on that gang. His assignment on the new gang and any entitlement to per diem, if the gang on which he bids is an on-line gang subject to payment of per diem, only begins when he reports to the new gang. The Carrier refers to several manager statements; one was made in 2004 by Timekeeping Supervisor Darrold Nord:

“I assumed the duties of Non Operating Timekeeping Supervisor on June 11, 1997. It has always been my understanding that per diem is not due MP BMW employees for the calendar days between workdays on a change of assignment due to a seniority move.”

William Loggins simply described the practice in his statement:

“Off day per diem is not allowed when bidding from one gang to another. . . .”

T. Epperson describes the practice on the Missouri Pacific Railroad, as follows:

“The exercise of seniority and the selection of jobs are done at the employee’s expense, not at the expense of the UPRR. This has always been this way on old MOPAC lines.”

The Carrier’s principle defense is based on the stare decisis doctrine. In Public Law Board No. 7156, Award 2, Referee Benn determined that vacation constitutes a voluntary absence within the meaning of Rule 36 (b) (2). When the vacation precedes or follows rest days it precludes the payment of per diem, he ruled.

The stare decisis doctrine may not apply in this case. The Organization argues that the Carrier’s insistence that the Claimant observe his vacation and personal leave day before his accumulated rest days renders the vacation and the personal leave day an involuntary absence. Neither the Carrier nor the Organization cited any Awards that addressed the question whether vacation or personal leave observed under compulsion remains voluntary in the context of the language of Rule 36 (b) (2).

The Board concludes that it need not determine this portion of the claim on the basis of the voluntary/involuntary arguments. The language of the Rule does not directly address the question of when the employee’s responsibility and benefits end when he changes gangs through the exercise of his seniority to a position on a different gang that requires dislocation to another area. It is appropriate, therefore, to look to past practice to ascertain how the parties dealt with this particular factual pattern. The Board finds that the Carrier has established the existence of a practice on the former Missouri Pacific property. As succinctly stated by Supervisor Loggins, “Off day per diem is not allowed when bidding from one gang to another.” This practice is determinative, and it serves as a basis to deny the claim for per diem.

Rule 37 (a) (1) governs the determination of travel allowance portion of the claim. It reads as follows:

“At the beginning of the work season employees are required to travel from their home to the initial reporting location, and at the end of the season they will return home. This location could be hundreds of miles from their residence. During the work season the Carrier’s service may place them hundreds of miles away from home at the end of each workweek. Accordingly, the Carrier will pay each employee a minimum travel allowance as follows for all miles actually traveled by the most direct highway route for each round trip.”

The sequence of events pertinent to this portion of the claim is undisputed. The Claimant observed a personal leave day immediately preceding the rest days observed by Gang 9113. The travel allowance is paid when the travel to and from home brackets the rest days. The Organization argues that the Claimant traveled from Rosenberg to his home, when he completed service in December and returned to Rosenberg from his home in Ft. Worth when he reported to the assembly point for Gang 9113 on January 3, 2008. The Organization expands its claim to have the travel allowance cover the ensuing travel from Rosenberg to Canadian, Texas.

With regard to the Organization’s claim for mileage from Rosenberg to Canadian, Texas, Rule 17 precludes the inclusion of this mileage in the calculation of the travel allowance. Rule 17 provides as follows:

“Employees accepting a position, in the exercise of their seniority rights, will do so without causing extra expense to the railroad.”

The trip to Canadian, Texas, came about as a result of the Claimant having exercised his seniority to change from Gang 9113 in Rosenberg to Gang 9558 located in Canadian, Texas. Therefore, this leg of the trip and portion of the claim for travel allowance would generate extra expense for the Carrier. Consequently, this portion of the claim lacks merit and is denied.

When the Claimant’s supervisor failed to respond to his request to be released from Gang 9113 upon learning of his successful bid on December 21, the Claimant completed one portion of the round trip when he reported to Rosenberg, Texas, on January 3. In the on-property exchange, the Carrier at one point asserted

that the supervisor informed members of the gang that if any of their bids to positions on other gangs were awarded during the rest days, they should consider themselves released. However, the Carrier failed to provide any proof, such as, a statement from the supervisor attesting to what he allegedly told the members of the gang.

The Board treats the Carrier's attempt at an affirmative defense as a mere assertion without proof. It treats the Claimant's travel from his home in Ft. Worth to Rosenberg as one leg of the round trip. With respect to this last point, the Carrier attached Public Law Board No. 6867, Award 16 which appears to determine whether just reporting to the assembly point of the original gang without the performance of any service constitutes a leg of the round trip. Award 16 relies on the analysis in Award 13 which is not in the record before the Board. In any event, the instant claim is determined on the basis of the first leg of the trip in December. If either leg does not fall within the qualifications for the travel allowance, the claim fails.

On the day before the commencement of the rest days, on December 18, the Claimant took a personal leave day. In Public Law Board No. 7156, Award 2, Referee Benn concluded that:

"There is nothing in any rule cited to this Board which provides that an employee is entitled to travel allowance when the employee utilizes a personal leave day as the Claimant did on the last work day immediately prior to the gang's scheduled rest days. Absent language agreed to by the parties to that effect, this Board has no authority to add such a requirement."

The Organization counters that the Claimant was compelled to take the personal leave day. However, the purpose of the travel allowance is to provide the scheduled payment for a round trip from the work location where an employee is in service to the Carrier to the employee's home for the weekend/rest days on a compressed schedule.

The personal leave intervenes. When personal leave is observed on the day before rest days are observed, the travel occurs after the personal leave day. The

travel is from the Claimant's location on his personal leave day; it does not immediately follow the work day. It may not be from his work location. The travel, therefore, cannot be considered to be a leg of the round trip, work location to home to same gang work location. Thus, this portion of the claim must be denied.

Lastly, the Organization argues that when the Claimant reported for work on January 3, the Carrier had no reason to prevent him from working that day. The Claimant's supervisor had the discretion to hold him over on Gang 9113 for January 3. Similarly, the supervisor had the discretion to release the Claimant immediately so as to allow him to travel to the assembly area of the gang to which he bid. The Organization cites no Rule that requires the supervisor to hold the Claimant to work that day. Thus, there is no Rule support for this portion of the claim. Because the Organization failed to meet its burden of proof, the instant claim lacks merit and 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 21st day of December 2011.