

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42188
Docket No. MW-41830
15-3-NRAB-00003-120106**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 service employee L. Ramirez the daily per diem for July 16, 17, 18, 19, 20, 21, 22 and 23, 2010 (System File D-1039U-202/1542429).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Ramirez shall now be compensated for a total of four hundred fifty-six dollars (\$456.00) as payment for the daily per diem for July 16, 17, 18, 19, 20, 21, 22 and 23, 2010.”**

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 facts of what led to this claim are not in dispute. The Claimant is an Assistant Foreman with Group 26 System Gang 9063. In April 2010, he was involved in an incident for which the Carrier filed charges against him for alleged violation of Safety Rules while working with Tie Gangs 9063/65 and S/L Gang 9083. A formal Investigation was held on June 29, 2010, after which the Carrier concluded that the Claimant was guilty of the charges against him. By letter dated July 16, 2010, the Carrier issued the Claimant a seven-day suspension. Gang 9603 was working a compressed T-2 schedule, and for July 2010, its members rested during the period of July 1-7 and then worked July 8-15. Their next rest period was July 16-23, with July 24-31 as their remaining work days for the month. Accordingly, the Claimant was observing rest days during the period of July 16-23. His suspension ran from July 24-30, and his first day back at work was July 31, 2010. Under the terms of Rule 39(e) of the Parties' Agreement then in effect, on-line system gang members were entitled to a daily per diem allowance of \$48.00 "to help defray expenses for lodging, meals and travel." In part, Rule 39(e) stated:

"The foregoing per diem allowance will be paid for each day of the calendar week, including rest days, holidays and personal 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 credits will occur when a gang is assigned a compressed work week, such as four (4) ten-hour days. . . ."

When the Claimant received his paycheck for the last half of July, he noticed that he had not received the per diem allowance for the rest period from July 16 through July 23, 2010. When he asked about the discrepancy, the Carrier informed him that he was not entitled to the allowance because he had been voluntarily absent on July 24, 2010, the first work day after the July 16-23 rest period. There is no dispute that if the Claimant had not been suspended and had worked his next regularly scheduled workday on July 24, 2010, he would have been entitled to the rest day per diem allowance for July 16-23.

The Organization filed this claim on his behalf, seeking payment pursuant to Rule 39(e). According to the Organization, the Claimant was not "voluntarily absent from service." He was withheld from service by the Carrier, which had suspended

him. (A separate claim filed over the suspension was denied.¹) The Claimant would have worked on July 24, but was not permitted to do so by the Carrier. He reported in and worked the first day after his suspension, on July 31, 2010, which was, to use the terms set forth in Rule 39(3), the first workday immediately following his rest days that work was available to him. In fact, the Organization asserts, the Carrier's refusal to pay the Claimant his rest period per diem allowance is an impermissible form of additional discipline. The Carrier raised several arguments: (1) The claim should be dismissed because it is duplicative of the claim filed over the suspension itself, which sought "wages and allowance" withheld during the suspension. "Allowance" would include the rest day per diem allowance; (2) The Claimant was not eligible for the per diem allowance because he did not render compensated service and had voluntarily absented himself from work on July 24, 2010, by his unsafe actions during the incident for which he was suspended; and (3) the Carrier historically has not paid per diem allowances for days on which employees were suspended or for rest days leading up to the start of a suspension. According to the Carrier, the Organization did not refute the Carrier's assertion of this fact, so the Board must accept it as proven.

The Carrier's first position, that the claim must be dismissed because it is duplicative of the claim filed over the suspension itself, is not persuasive. While the claim for "wages and allowance" withheld as a result of the suspension could include the per diem allowance as collateral damages, this claim is in fact separate and distinct from the substantive claim over the appropriateness of the suspension. To put it another way, the Organization could have filed this claim even if it had not challenged the suspension. The issue presented here is whether an employee is entitled to the per diem allowance for rest days preceding a suspension, when he is prevented by the Carrier-imposed suspension from returning to work and performing service as he normally would do on the first day after his rest period. Whether the suspension was warranted is independent from the question whether an employee is entitled to the rest day per diem allowance for the period immediately preceding the start of the suspension.

The Carrier also argued that it has historically and customarily not paid rest day per diem allowances under these circumstances, and that the Organization's failure to challenge that assertion during the on-property handling means that the Board must accept the assertion as a proven fact. The argument that "unrefuted facts must be taken as established" is one that recurs regularly. While it may be true up to a point, one must be careful not to overgeneralize. Here, the Carrier asserts that it has

¹ See, Public Law Board No. 6302, Award 209 (2010).

historically and customarily not paid employees in similar circumstances and that as a result of its having made that statement, the burden shifts to the Organization to disprove the assertion. The Carrier made an assertion that it argues should be accepted as true without any evidence whatsoever to support it. There are numerous Awards favoring both Parties that establish that mere assertions of fact without more are not sufficient proof of the facts asserted. Moreover, the information needed here either to establish the proposition or to disprove it – payroll records – is uniquely within the custody and control of only one party – the Carrier. It should be relatively easy for the Carrier to present at least some payroll records showing that it did not pay rest day per diem allowances in other instances where employees did not report to work on the first work day after the rest day or period because they were suspended. Without access to payroll records, it would be significantly more difficult for the Organization to prove the opposite, and unfair of the Board to require it to do so.

The primary substantive argument between the Parties is whether the Claimant was “voluntarily absent from service” when he was suspended. The exception to Rule 39(e) regarding payment of rest day per diem allowances states:

“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 rest days . . . when the employee is voluntarily absent from service when work is available to him on . . . the workday immediately following said rest days . . .” (emphasis added)

The language of Rule 39(e) is expansive: the per diem allowance is payable for rest days, holidays and personal leave days as long as the employee works the last workday before and the first workday after “said rest days,” etc. But there is a caveat to those last and first workdays – “when work is available to him.” The contractual language does not merely say that the employee must work the last and first workdays around his rest days to be entitled to the per diem allowance. The workdays must be days “when work is available to him.”

Having considered the evidence in the record, the Board concludes that the Claimant was not “voluntarily absent” as that term was intended in Rule 39(e), and that work was not “available to him” on July 24, 2010, the first day of his suspension. He was directed by the Carrier not to report to work that day, and if he had, he would have been denied the opportunity to perform compensated service. The Organization put its argument persuasively in its December 27, 2010 letter to the Carrier:

“. . . Rule 39(e) specifically states that the per diem allowance grieved herein shall not be paid when the employee is voluntarily absent on the last day prior to the rest days or the first [day] following the rest days. Likewise, Appendix X-1 defines voluntarily absent as a day when the employee is absent and work was available to him. If Mr. North is contending work was available to Claimant Ramirez, he needs to explain how the Claimant could have performed service when work opportunity was denied him by Management direction.

It should not be lost that work is not available on a day that an employee is directed to serve a suspension due to the Carrier's own discipline policy. Indeed, the word suspension in no way connotes voluntary. . . . Certainly, if the Claimant was removed from his post, even temporarily, work was not available to him. Therefore, he was voluntarily absent on a day that work was available to him.

. . . [The Claimant] did not volunteer to be suspended and was in fact, following management direction.”

The Claimant could not return to work on July 24, 2010, because the Carrier told him not to. The only option available to him to challenge the Carrier's action was to file a claim, which he did.

The record establishes that on July 24, 2010, the Claimant was involuntarily absent on a day when there was no work available for him. That is not a situation covered by the exceptions to Rule 39(e). As the Organization pointed out in its Submission, had the Parties intended to include disciplinary absences in Rule 39(e)'s exceptions, they could have done so. The Claimant worked on the first day that work was again available to him – July 31, 2010. Given the otherwise expansive scope of Rule 39(e) regarding payment of the per diem allowance “for each day of the calendar week, including rest days, holidays and personal leave days,” and specific exceptions set forth in the following paragraph that were not met in this case, the Board concludes that the Carrier violated the Parties' Agreement when it refused to pay the Claimant's rest day per diem allowance for July 16-23, 2010.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 28th day of October 2015.