

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42800
Docket No. MW-42736
17-3-NRAB-00003-140441**

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference**

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

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 the applicable daily per diem allowance to headquartered Claimants, listed below, who were assigned to work off district at Toledo, Ohio beginning on December 3, 2012 and continuing (Carrier's File BMW-576 NRP).

(2) As a consequence of the violation referred to in Part (1) above, the Claimants shall be allowed their per diem as follows:

**`December 3,4,5,6,7,10,11,12,13,14,15,17,18,19,20,21,26,27,28, 2012 -
T. Pollock, D. Marshall, S. Humphries, R. Kusmack, T. Fuller, H.
Moore, C. Klien, D. Webber, J. Watson, J. Moon, J. Plummer.**

**December 21, 26 and 27, 2012 - J. Anteau, T. Tisdale and K. Daniel.
December 28, 2012 - J. Anteau, H. Pursley, N. Tonkin, K. True.**

January 3, 2012 - J. Teeter, N. Tonkin, and N. Bedford.

January 4, 2013 - J. Teeter, T. Tisdale, N. Tonkin.

**January 7, 2013 - J. Teeter, T. Tisdale, N. Tonkin, D. Webber, T.
Fuller, B. Kusmack.**

January 8, 2013 - J. Teeter, T. Tisdale, N. Tonkin.

January 9, 2013 - J. Anteau, T. Tisdale, K. Daniel, H. Pursley, N. Tonkin, J. Teeter, N. Bedford, R. Kusmack, T. Fuller, H. Moore, K. True.

January 10, 2013 - T. Tisdale, K. Daniel, H. Pursley, N. Tonkin, J. Teeter, N. Bedford, R. Kusmack, T. Fuller, H. Moore, C. Klien.

January 11, 2013 - J. Anteau, N. Bedford, K. Daniel, C. Klien, H. Pursley, J. Teeter, T. Tisdale, N. Tonkin, K. True, T. Fuller, B. Kusmack.

January 12, 2013 - N. Bedford, K. Daniel, C. Klien, H. Pursley, J. Teeter, T. Tisdale, N. Tonkin, H. Moore, T. Fuller, B. Kusmack.

January 14, 2013 - J. Anteau, N. Beford (sic), K. Daniel, C. Klein, J. Teeter, T. Tisdale, K. True, T. Fuller, B. Kusmack.

January 15, 2013 - J. Antieau (sic), N. Beford (sic), K. Daniel, C. Klein, H. Moore, H. Pursley, J. Teeter, T. Tisdale, N. Tonkin, K. True, T. Fuller, B. Kusmack.

January 16, 2013 - J. Anteau, N. Beford (sic), K. Daniel, C. Klien, H. Moore, H. Pursley, J. Teeter, T. Tisdale, N. Tonkin, K. True, T. Fuller, B. Kusmack.

In view of the foregoing we are seeking the carrier make arrangements to pay the Claimant their per-diem for the days they have worked off district. Additionally, the claim is continuous during the duration of the Claimants working off their district at Toledo, Ohio.”

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.

Claimants T. Pollock, D. Marshall, S. Humphries, R. Kusmack, T. Fuller, H. Moore, C. Klien, D. Webber, J. Watson, J. Moon, J. Plummer, J. Anteau, T. Tisdale, K. Daniel, H. Pursley, N. Tonkin, K. True, J. Teeter, N. Bedford and B. Kusmack have established and retain seniority within various classifications in the Maintenance of Way Department. The Claimants were assigned to work off district and were transported each day to work at the Central Union Terminal, Toledo, Ohio for the reconstruction of tracks improvement project.

The underlying facts giving rise to the instant matter are not in serious dispute.

On November 19, 2012, Amtrak Director-Labor Relations Mark Johnson sent a letter to BMW General Chairman T. J. Nemeth, to confirm their recent discussion regarding the Toledo, OH improvement project and propose, to utilize, on a one-time basis and non-referencing Agreement, Michigan District BMW employees on leased property, to construct and install two #10 turnouts and replace approximately 4000 feet of track, ballast (1500NT), ties (1555) and related work. The November 19 letter also proposed a staff of 15 BMW employees headquartered in Jackson, Michigan to travel daily to Toledo, Ohio to perform the described work and estimated 30 days to complete the work.

By letter dated January 17, 2013, the Organization's filed the instant claim letter asserting that the Claimants were entitled to daily per diem under Rule 29, Paragraph VI. 4. of the Agreement as a result of their being assigned to work off

district at the Carrier's Central Union Terminal, Toledo, Ohio. This Organization's claim letter also defined the territory of the Michigan Seniority District as per Appendix I of the February 28, 1978 Agreement. By letter dated March 12, 2013, Division Engineer Klouda denied this claim for several reasons, including that Claimants:

- "1. had headquartered positions and were paid for all the hours worked and for all the hours of transportation to and from the work location at the Central Union Terminal in Toledo, Ohio;**
- 2. did not provide their own transportation to the project site and were not required to report to the work location;**
- 3. were not financially harmed in any way;**
- 4 who were working in Lawton, Michigan had requested to work on the Toledo project, and**
- 5 who worked on the Toledo project had also signed a letter requesting that their names be removed from this claim."**

By letter dated April 24, 2013, the Organization's second level appeal letter to Amtrak's Labor Relations Manager Valorie Giulian, substantially reiterates its initial claim letter dated January 17, 2013.

The Carrier's response letter dated August 15, 2013 provided several reasons to deny this claim:

- First, clearly this claim on its face does not involve a District Unit as it is defined in Rule 29, Paragraph I. of the Agreement. The Organization acknowledges that Claimants are headquartered in Lawton, Michigan and other headquarters in the Michigan Seniority District. Therefore, this claim does not involve District Units and there is no violation of Rule 29.**
- Next, the parties' letters of November 19, 2012 and January 14, 2013 confirm the proposed work and utilization of some Michigan District members was on a one-time and non-referencing agreement, in order to assist other railroad contractors to work on the improvement project at Amtrak's Central Union Terminal in Toledo, Ohio.**

- **Further, there was no communication between Messrs. Johnson and Nemeth evidencing any intention or agreement to pay any travel allowance or per diem.**

The Organization's appeal letter dated October 9, 2013 while essentially repeating the allegations set forth in its initial claim letter of January 17, 2013 and its second level appeal letter dated April 24, 2013, provided an attached five-page listing of claimants who are alleged to have worked in Toledo, Ohio on the dates claimed, and such listing is submitted by the Union as information which came from the recollection of three of the Claimants.

By letter dated January 31, 2014, the Carrier denied the Organization's appeal at the third level, noting, among other things, that the Organization has not asserted any new arguments or additional information in support of this claim. On March 12, 2014, the Organization submitted a reconsideration request letter to the Carrier, to which the Carrier responded by letter dated March 25, 2014 with a point-by-point rebuttal to the Organization's assertions in support of reconsideration.

The parties were unable to resolve this claim, and as a result, the Organization submitted a notice letter dated July 25, 2014 to the National Railroad Adjustment Board (NRAB) Third Division of the Organization's intent to submit this dispute to the NRAB. Subsequently, by letter dated July 29, 2014, the NRAB Director, Office of Arbitration Services advised the parties of the Organization's July 25, 2014 notice of intent in this case, and provided the NRAB's request for the parties to submit their briefs and attachments to the NRAB by October 12, 2014.

As noted above, the signed letter dated November 19, 2012 from the Carrier's Director-Labor Relations Mark Johnson to the Organization's General Chairman T.J. Nemeth, countersigned as concurring the same date by the Organization, sets forth the proposal by the Carrier for the involved employees headquartered in Lawton, Michigan and other headquarters in the Michigan Seniority District, offered an opportunity work with other outside contractors on the reconstruction of tracks in Amtrak's Central Union Terminal in Toledo, Ohio. The agreed upon terms between the parties state that the Carrier will pay the employees to travel to and from Toledo, Ohio daily to perform the work, and the estimated time to complete this work was 30

days. Significantly, the record is void of any discussion or writing between the Carrier and Organization representatives to pay a travel allowance or per diem. Moreover, it is undisputed that none of the Michigan District BMW employees initially assigned to the Toledo project were paid per diem for their work, and no grievance was filed. Pursuant to the agreement between the Carrier and the Organization, the Claimants who performed work on the improvement project in Toledo, Ohio were paid their wages for their entire continuous time for traveling to and from their Michigan headquarters and Toledo, Ohio each day. For these reasons, the instant claim will 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 28th day of November 2017.