

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
and) Case No. 128
UNION PACIFIC RAILROAD COMPANY) Award No. 129
_____)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: February 7, 2008

STATEMENT OF CLAIM:

- (1) The Carrier violated the Agreement when it failed and refused to allow Mr. M. Kuker the meal allowance for November 7, 8, 9 and 10, 2003 (System File 2RM-9523T/1390225CNW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Kuker shall now be compensated for the four (4) days of meal allowance, at \$23 per day which totals \$92.

FINDINGS:

Public Law Board No. 6302 upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

At the time of the incident giving rise to the claim, Claimant was assigned to Gang 2984, headquartered in camp cars, working ten hour days Monday - Thursday with rest days of Friday, Saturday and Sunday. Claimant worked his assigned shift on Thursday, November 6, 2003. He was off on rest days on Friday, Saturday and Sunday. He took a personal leave day on Monday, November 10, 2003, and returned to work on Tuesday, November 11, 2003.

Rule 47 of the Agreement provides for payment of a per diem meal allowance for employees living away from home in camp cars. Carrier denied Claimant his per diem meal allowance for November 7, 8, 9 and 10. At issue is the application and interpretation of Rule 47(B)(4), which provides:

The foregoing per diem meal allowance shall be paid for each day of the calendar week, including rest days and holidays, except that it shall not be payable for work days on which the employee is voluntarily absent from service, or for rest days if the employee is voluntarily absent from service when work was available for him on the work day immediately preceding or the work day immediately following said rest days or holidays.

The Organization argues that Claimant was entitled to his per diem for the four days in question because, when Carrier approved his request for a personal leave day for Monday, November 10, work was no longer available to him on that day and he was not voluntarily absent. Carrier contends that Claimant was voluntarily absent on Monday, November 10 and properly denied per diem for all days in question.

Carrier relies on this Board's Award No. 14 and a July 23, 2002, letter from Director of Labor Relations D. A. Ring to General Chairman L. R. Fenhaus in support of its position. The Organization counters that Award No. 14 concerned a different Agreement, that the instant Agreement governs the former Chicago & North Western property, that the July 23, 2002, letter was a unilateral declaration by Carrier rather than an agreement with the Organization, and that the established practice on the Chicago & North Western was to treat personal leave days as vacation days and to pay per diem for rest days immediately preceding a personal leave day.

The instant claim raises two different issues: whether Claimant was entitled to per diem for his rest days and whether Claimant was entitled to per diem for his personal leave day. We shall address these issues in turn.

We faced the issue of entitlement to per diem for rest days in Award No. 14. The Agreement before us in that case contained language similar to that in Rule 47(B)(4). The Agreement before us in Award No. 14 specified that employees would be granted per diem allowances for the weekend immediately preceding the start of their vacation periods and would receive no other per diem allowances until they returned to work. At the time, employees were not allowed to take single vacation days, but the practice on the property was to allow single day vacations. The claimant in that case had worked his assigned shift on a Friday, had rest days of Saturday and Sunday and had taken a single day vacation on the following Monday. Carrier denied him per diem allowances for the Saturday and Sunday on the ground that he was voluntarily absent from work on Monday, the day immediately following the rest days.

We denied the claim in Award No. 14. We reasoned as follows:

At the time the claim arose, the Agreement did not provide for employees to take vacation in anything less than a block of one week. Consequently, it is not surprising that the Agreement, through Appendix W-1, expressly provides how to treat rest days immediately before and immediately after Monday through Friday vacations. Employees receive their per diem allowances for the weekend immediately prior to the vacation but not for the weekend immediately following the vacation. It also is not surprising that the Agreement did not address how to treat per diem allowances where an employee takes

less than a full week of vacation because such a situation simply did not exist under the Agreement.

Although the Agreement did not allow for one day vacations, the practice on the property was to allow it. We are of the view that, because Claimant's ability to take a one day vacation was dependent on the practice on the property, the treatment of per diem allowances where a one day vacation is taken must also be governed by the practice on the property. During handling on the property, Carrier maintained that the consistent practice was not to pay per diem allowances for weekends preceding vacations of less than one full week. The Organization never denied the existence of such a practice. Although the Organization has argued that Carrier failed to present evidence of the practice, Carrier was not required to do so in the absence of an Organization denial of the practice's existence. Accordingly, we find that the practice governs this case and that the claim must be denied.

The Agreement in the instant case does not expressly address the effect of taking a personal leave day immediately before or after rest days on payment of per diem for rest days. As the parties' arguments illustrate, on its face, the reference in Rule 47(B)(4) to being voluntarily absent when work is available is ambiguous and subject to conflicting inferences as to its applicability to the taking of personal leave days. As in Award No. 14, we turn to the practice on the property to resolve the ambiguity.

During handling on the property, the Organization submitted signed statements from thirty-three employees attesting that the consistent practice on the property that is the subject of the instant claim has been to pay per diem for rest days preceding a personal leave day but not for rest days following a personal leave day. Those statements are unrefuted.

Carrier maintains, however, that its July 23, 2002, letter negated any past practice. The letter reads, in pertinent part:

As a result of an audit it has come to my attention that NPS has been erroneously paying employees working under the terms of the Union Pacific Railroad (C&NW System Federation) BMWE agreement a per diem allowance on personal leave days. Unless I have missed some language in the agreement or missed a side letter of agreement signed in the past there is no provision for the payment of the per diem allowance on those dates.

Since this is an apparent clerical error on the part of the Railroad we will not be authorizing recoupment of allowances erroneously paid in the past. However, NPS will be advising all Managers and Supervisors that per diem will no longer be paid on personal leave days and the eligibility requirements of Rule 47 or any other side letters which may be specifically applicable will be applied.

On its face, the letter addressed payment of per diem allowances on personal leave days. It did not address payment of per diem allowances for rest days preceding or following a personal leave day. Accordingly, we conclude that the letter does not contradict the thirty-three statements

reflecting that the practice on this property has been to pay per diem allowances for rest days immediately preceding a personal leave day. To the extent that the claim seeks payment of per diem allowances for Claimant's three rest days, it must be sustained.

We turn now to the question whether Claimant was also entitled to payment or per diem for his personal leave day. The thirty-three statements submitted by the Organization attested only to the payment of per diem for rest days. None spoke to whether per diem was paid for the personal leave day itself. As indicated above, Carrier's July 23, 2002, letter expressly disclaimed any employee entitlement to payment of per diem for personal leave days and notified the Organization that it would be correcting its prior error of paying such per diem allowances. There is no evidence of any protest by the Organization. Accordingly, we conclude that the Agreement does not require Carrier to pay per diem allowances for personal leave days. To the extent that the claim seeks payment of a per diem allowance for Monday, November 10, 2003, it must be denied.

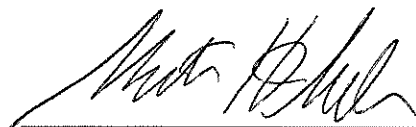
To recap, the claim is sustained with respect to the claim for per diem allowances for Claimant's rest days, November 7, 8 and 9, 2003, but denied with respect to the claim for per diem allowance for Claimant's personal leave day, November 10, 2003.

AWARD

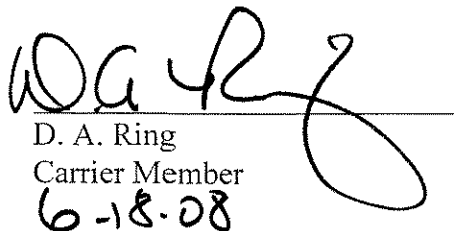
Claim sustained in accordance with the Findings.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto



Martin H. Malin, Chairman



D. A. Ring
Carrier Member
6-18-08



T. W. Kreke, Employee Member
Employee Member

Dated at Chicago, Illinois, June 13, 2008