

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 129
UNION PACIFIC RAILROAD COMPANY) Award No. 130
_____)

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. G. Hudson the meal allowance for December 20 and 21, 2003 (System File 4RM-9527T/1390554CNW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Hudson shall now be compensated for the two (2) days of meal allowance, at \$23 per day which totals \$46.

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 3472, headquartered in camp cars at Boone, Iowa. Claimant worked his assigned shift on Friday, December 19, 2003. He was off on rest days on Saturday and Sunday. He took vacation days on Monday and Tuesday, December 22 and 23.

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 December 20 and 21. 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 two days in question because, when Carrier approved his request for vacation for Monday and Tuesday, December 22 and 23, work was no longer available to him on those days and he was not voluntarily absent. Carrier contends that Claimant was voluntarily absent on Monday and Tuesday, December 22 and 23 and properly denied per diem for all days in question. Carrier relies on this Board's Award No. 14 and NRAB Third Division Awards 37163, 37105 and 36718, which it maintains consistently resolved the issue and control the instant claim under the principle of stare decisis.

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 vacation 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 vacation leave days in less than one week increments. 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-seven 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 vacation day even though the vacation is taken in less than a five day increment. Those statements are unrefuted.

Carrier, however, also relies on Third Division Awards 37163, 37105 and 36718. Award 36718 involved a claim for travel allowance for travel to and from home on the claimant's rest days. The claimant in that case, however, failed to work the Monday following his rest day and the Board held, based on the record before it, that the Organization had failed to prove that the claimant had actually returned to the work location on Sunday night and had failed to work on Monday because of illness. Award 36718 simply has no relevance to the instant case.

Award 37105 relied on our Award No. 14 and held that it established that the practice on that property was to deny per diem allowances where employees took vacation of less than a full week immediately following their rest days. We fail to see how Award No. 37105 adds to the applicability of Award No. 14 to a different Agreement on a different property.

Award No. 37163 involved the former Western Lines of the Southern Pacific. The Organization argued that the per diem allowance provision was initially written by Arbitration Board 298 in 1967 and Arbitration Board 298's question and answer expressly provided for payment of per diem for rest days immediately preceding a five day vacation but not for the vacation period. The Organization further argued that because the 1996 National Mediation Agreement allowed employees to take vacation in less than one week increments, the question and answer from Arbitration Board 298 applied similarly to mandate payment of per diem for rest days immediately preceding a vacation of less than one week. The Board disagreed:

The Organization's argument is quite logical. But, because of the language in Rule 37(4) and the lack of a modification to the per diem allowance provisions after the 1996 National Mediation Agreement, at best, the Organization's argument is debatable that when the less than 40 hour per week provisions for vacation came into effect that the parties also intended to amend the per diem allowance provisions. Without more of a showing by the Organization that such was the parties' intent, we cannot sustain this

claim.

In the instant case, the Organization has provided "more of a showing" of the parties' intent on the property involved in the instant dispute. Specifically, the Organization has provided unrefuted evidence of a consistent practice on the property of paying per diem allowances for rest days immediately preceding the taking of less than a full week's vacation. In accordance with our reliance on practice on the property in Award No. 14, we rely on the practice on the property in the instant case and hold that Claimant was entitled to per diem allowances for the rest days that immediately preceded his taking of two days paid vacation.


AWARD

Claim sustained.

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