

## PUBLIC LAW BOARD NO. 6302

At the time the claim arose, Claimant was assigned to System Gang 8553, which was working compressed halves. The following facts are not in dispute. For the first half of July 2005, Claimant's gang was to observe the July 4 holiday at the end of its compressed work cycle on July 8, 2005, and then have July 9 - 15, 2005 as rest days. Claimant worked July 1, 2 and 3. He took vacation days for July 4 and 5, and Personal Leave days for July 6 and 7. Beyond these undisputed facts, the parties painted two very different pictures of these events during handling on the property. The different pictures have significantly different implications for Claimant's entitlement to per diem allowances for July 6 - 15, 2005.

Carrier maintains that Claimant voluntarily took vacation days on July 4 and 5 and Personal Days on July 6 and 7. Agreement Rule 39 provides for payment of per diem allowances on rest days, holidays and personal leave days but denies such payments to employees who are voluntarily absent on the day immediately preceding a rest day, holiday or personal leave day. Thus, Carrier contends, Claimant was not entitled to per diem allowances for the personal leave days of July 6 and 7, the holiday of July 8, or the rest days of July 9-15.

The Organization maintains that Claimant had requested only to take vacation days on July 4 and 5 and that his supervisor approved the request. Thus, Claimant was planning to work on July 6 and 7, for which he would have received per diem allowances and would have qualified for per diem allowances for the holiday and rest days of July 8-15. According to the Organization, Claimant's supervisor called him at home on the morning of July 5 and told him that he had to take personal leave or vacation days on July 6 and 7, thus preventing him from working those days.

During handling on the property, the Organization submitted a signed written statement from Claimant averring that on June 18, he completed a "Vacation/Day Off Form" for July 4 & 5, that his supervisor approved the request, that he intended to work on July 6 and 7, but that at 10:00 a.m. on July 5, his supervisor called him at home and told him he had to take the rest of the half off using vacation or personal leave days because the supervisor's supervisor had stated that vacations had to be taken in 40 hour increments.

Carrier introduced no statements or other evidence contradicting Claimant's written statement. Although Carrier asserted that Claimant voluntarily took the personal leave days on July 6 and 7, assertions are not evidence. Given the state of the record, we are compelled to find that Claimant intended to take only the vacation days on July 4 and 5 and intended to work on July 6 and 7 but was prevented from doing so by his supervisor's phone call on the morning of July 5. Had Claimant been told before he began his two day vacation on July 4 that he would be required to take the rest of the half off, he might have pursued the option of cancelling his vacation to protect his entitlement to per diem allowances for the holiday and his rest days. The timing of the notice to Claimant that he was required to take July 6 and 7 off precluded him from that option.

We conclude that it was Carrier's insistence that Claimant take July 6 and 7 off that precluded him from satisfying the requirement that he work the day immediately preceding the holiday and his rest days to get per diem allowances for those days. Because Carrier actively prevented Claimant from working on July 6 and 7, the requirement that Claimant have worked the day immediately preceding the holiday and rest days must be excused. We conclude that Claimant must be paid his per diem allowances for July 6 - 15.

We reject the claim to restore Claimant's two personal leave days. There is no dispute that Claimant did receive two days off with pay for his personal leave days. There is nothing in Claimant's written statement which would indicate how, other than by the loss of per diem allowances, he was prejudiced by having to take his personal leave days on July 6 and 7. To restore the personal leave days under these circumstances would award Claimant a windfall and

we decline to do that. Thus, the claim will be sustained only to the extent that Carrier will be required to pay Claimant his per diem allowances for July 6-15.

### AWARD

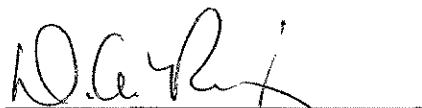
Claim sustained in accordance with the Findings.

### 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



T. W. Kreke, Employee Member  
Employee Member

July 7, 2008

July 7, 2008  
Dated at Chicago, Illinois, June 25, 2008