

PUBLIC LAW BOARD NO. 6638

AWARD NO. 2

CASE NO. 2

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier refused to allow System Gang employee F. E. Castorena the per diem allowance for the dates of September 9, 10, 11, 12, 13, 14 and 15, 2001 (System File C-0139-106/1295459).

(2) The Agreement was violated when the Carrier refused to allow System Gang employee V. Chavez the per diem allowance for the dates of July 26, 27, 28, 29, 30 and 31, 2001 (System File C-0139-111/1296958).

(3) The Agreement was violated when the Carrier refused to allow System Gang employee T. Castorena the per diem allowance for the dates of August 24, 25, 26, 27, 28, 29, 30 and 31, 2001 and holiday pay for labor Day, September 3, 2001 and when it further deducted an additional one-hundred forty-four dollars (\$144.00) from his pay (System File J-0139-61/1296071).

(4) As a consequence of the violation referred to in Part (1) above, Claimant F. E. Castorena shall now '... be compensated for seven (7) days of per diem allowance at \$48.00 per day for a total of \$336.00.'

(5) As a consequence of the violation referred to in Part (2) above, Claimant V. Chavez shall now '... be compensated for six (6) days of per diem allowance at \$48.00 per day for a total of \$288.00.'

(6) As a consequence of the violation referred to in Part (3) above, Claimant T. Castorena shall now be compensated for '... eight (8) hours of holiday pay for Labor Day September 3, 2001 and three hundred and eighty four dollars (\$384.00) rest day per diem for August 24, 25, 26, 27, 28, 29, 30 and 31, 2001, plus an one hundred and forty four dollars (\$144.00) of per diem is claimed, that we can not understand why it was deducted.'"

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

This case involves the consolidation of three claims dealing with the issue of the entitlement to a per diem (PD) allowance for accumulated rest days when an employee moves from one on-line gang working compressed halves to another on-line gang as a result of the exercise of seniority. It calls for an interpretation of the interplay between Rules 20(f) and 39(e), taking into account the language contained in Rules 35(e), 40(a), and Appendix X-1.

As background, the parties negotiated Rule 40, Alternative Work Periods, permitting a majority of the employees working on a project, with

the concurrence of supervision, to establish a consecutive compressed half work period consisting of consecutive work days of 8-12 hour duration totaling the number of straight time hours which would normally be worked during a payroll period, and accumulated rest days for the balance of the payroll period. Employees working in "on-line" service, e.g. in a gang which is not assigned to a fixed headquarter location and moves between assembly points as needed, are permitted a PD allowance under the following terms of Rule 39 - Per Diem Allowances:

(e) **On-line Service.** Employees assigned with headquarters on-line, as referenced in Rule 29, will be allowed a daily per diem allowance of \$48.00 to help defray expenses for lodging, meals and travel.

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 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.

Appendix X-1 defines "the employee is voluntarily absent" language of Rule 39(e) as "the employee has failed to render compensated service on a workday on which work was available to him."

As noted, these claims involve employees working compressed halves in on-line gangs who voluntarily bid on other assignments, and who

were awarded those assignments on other on-line gangs with effective dates either prior to, or at the completion of, the compressed half work period but before the commencement of the accumulated rest day period. In making such assignment, Carrier is bound by the following language of Rule 20(f):

Successful applicant will be released and permitted to move to the new assignment on the following Monday or as soon as provisions can be made for the employee's release, but, in no event, will such employee be held on the former position for more than ten (10) calendar days from the date of assignment.

Further, under Rule 35(e), Carrier is exempt from the requirement of paying overtime for work in excess of forty (40) straight time hours in any work week when such work is due to an employee moving from one assignment to another.

Claimant F.E. Castorena was working in on-line Gang 8505 during the compressed half from September 1-8, 2001, when he was notified that he had been awarded a position on Gang 6607 (which had a Monday-Friday work schedule), effective September 6, 2001. Carrier states that he was released to report to his new assignment on September 8, 2001, and the record reveals that work was available on such assignment between September 10-14, 2001. Claimant F.E. Castorena did not report to his new assignment until Monday, September 17, 2001, as his accumulated rest days on Gang 8505 were scheduled between September 9-15, 2001, and he stated that he was informed that he could not report until after September 15, 2001 as he was paid through that date and would be "double-dipping." Claimant did not report on September 16, 2001 since it

was a rest day for Gang 6607.

Claimant Victor Chavez was working in on-line Gang 9052 during the compressed half from July 15-25, 2001, when he was notified that he had been awarded a position on Gang 9030, effective July 24, 2001. Carrier states that he was released to report to his new assignment on July 25, 2001, and the record reveals that work was available on such assignment between July 26-31, 2001. Claimant Chavez did not report to his new assignment until August 9, 2001, as his accumulated rest days on Gang 9052 were scheduled between July 26-31, 2001, and he stated that he was asked to work until July 25, 2001 but not released until July 31, 2001. Chavez's statement indicates that he let Gang 9030 know his status by telephone, and was told by the timekeeper to report there on August 8, 2001 as that was the first day of the compressed half scheduled for Gang 9039. Apparently, Carrier granted Chavez PD for the July 25-31 and August 1-7 periods, discovered its error, and took back such pay from him.

Claimant T.J. Castorena was working in on-line Gang 8505 during the compressed half from August 16-23, 2001, when he was notified that he had been awarded a position on Gang 8517 (working 5 days/week, 8 hours/day), effective August 23, 2001. Carrier states that he was released to report to his new assignment on that date, and the record reveals that work was available on such assignment between Augusts 27-31, 2001. Claimant T.J. Castorena did not report to his new assignment until September 4, 2001, as his accumulated rest days on Gang 8505 were scheduled between August 24-31, 2001, and the Labor Day Holiday occurred on September 3, 2001, the payment for which is also included in his claim. Claimant asserts that he was not released until August 31, 2001,

although Carrier's records reveal that he was listed as being on Gang 8517 from August 27-31, 2001, and the other applicant awarded a position on that gang along with Claimant commenced working on it on August 23, 2001.

The extensive correspondence on the property, consistent with the arguments presented to the Board, reveal the Organization's position that the language of Rule 39(e) provides for the payment of PD allowance for each day, including rest days, regardless of whether the on-line gang is working a compressed work week. It asserts that under the definition of compressed half work arrangements found in Rule 40(a) and Appendix X-1, such schedules include both the consecutive work days and the accumulated rest days, which an employee accrues by working the compressed half and is entitled to enjoy, and which cannot be cut off by Carrier's decision to award the employee a new assignment prior to the completion of the payroll half. The Organization argues that Rule 20(f) deals only with the 5 days/week, 8 hours/day or 4 days/week, 10 hours/day scenarios, not the compressed half situation.

The Organization contends that it is counter to the intent of the special circumstances contemplated in Rule 40(a) to say that the job ends when an employee bids off of it and the new job starts. Under compressed half situations, the Organization argues that the employee is not released from his old assignment until the completion of the accrued rest days, and that his reporting to the new assignment on the first scheduled work day immediately following such rest days meets the qualification for payment of PD allowance under the language of Rule 39(e). The Organization asserts that Carrier failed to show that Claimant's disqualified themselves by voluntarily absenting themselves from service

since they worked on the last available workday of their old assignment and the first workday immediately following their accumulated rest days, thus not falling within the exceptions to the payment of PD allowance under Rule 39(e).

On the property, after the claims were consolidated, the Organization attached a letter from then General Chairman Wehrli who was involved with the negotiation of the on-line agreement language as well as its implementation. Such letter contends that the intent of Rule 39(e) was to cover all scheduling scenarios, and that an issue arose concerning rest day PD during the period when an employee transferred from one on-line gang to another, as the supervisor of each gang did not want to be responsible for paying the PD out of his budget. Wehrli asserted that there was never any disagreement about its entitlement, only which gang pays for it and he and Supervisor Moser agreed that arrangements would be made through timekeeping and Labor Relations to resolve the payment issue. Such agreement noted that rest day PD would only be paid to an employee if he satisfied the requirement of performing service on the work day before and after the rest days. Wehrli's letter notes that this was the consistent practice applied by Carrier's Labor Relations Department throughout the years since Rule 39(e) was adopted.

Carrier argues that the Organization is attempting to expand the Agreement to significantly increase its costs, and that PD allowance has always been intended to help defray the expenses incurred by on-line employees, not to be treated as additional "unemployment" income unrelated to an employee working, or as an agreement to finance an employee's time at home. It notes that Claimants voluntarily bid on new positions with effective dates, and asserts that it is that date or the later

date when Carrier releases the employee from the old gang that terminates their prior assignment, subjecting Claimants to the working conditions of the new gang. Carrier contends that the whole issue of Claimant's entitlement to PD allowance turns on when their prior assignment terminates, since at that time they no longer would be subject to the working conditions of that assignment, including the accumulated rest days. Carrier notes that once an employee bids off his current compressed half assignment, he will be eligible for PD allowance so long as he protects his new assignment, under the language of Rule 39(e). Carrier notes that although the contract does not specifically require it, Carrier has historically bridged PD allowance when an employee works the last day of the prior assignment and the first day of the new assignment, even if rest days begin the new compressed half, permitting a reasonable amount of travel time for the employee to get to the new assignment.

Carrier contends that Claimants in this case were awarded bids on other gangs with effective dates prior to, or at, the end of the compressed half work period, and were released at that time to report to their new assignments. Carrier argues that in order to be eligible for rest day PD, Claimants were required to protect their new assignments by reporting to work on the next scheduled work day of such assignment, permitting a reasonable time to travel to it, which it asserts is consistent with Wehrli's understanding and the language of Rule 39(e) requiring an employee to work the last day of his old assignment and the first day of his new one. In this case, by Claimants' not reporting to their new assignments when work was available for them there, despite being released from their old assignments prior to the accumulated rest days, and choosing instead to remain home for an extended period before commencing work on their new assignment, Carrier contends that they voluntarily absented

themselves from service, thereby falling within the exception contained in Rule 39(e) for the payment of PD allowance.

Carrier notes that the language of Rule 35(e) shows that the parties contemplated the situation where an employee would be required to work more than the normal work week hours without entitlement to overtime when changing assignments. It explains that while Rule 20(f) allows management to hold an employee on the old job for up to ten days in order to allow it to bulletin the position and get a replacement, its primary purpose is to assure that employees will be promptly released to go to their new bid assignments as soon as possible. Carrier contends that Rule 20(f) applies to all scenarios, including compressed halves. When reading Rule 20(f) in conjunction with Rule 35(e), Carrier asserts that its failure to permit Claimants the enjoyment of their accumulated rest days with PD allowance is not a violation of the Agreement, and was contemplated by the parties in situations where employees are moving from one assignment to another.

The Organization asserts that the employee should have the option of choosing to use the rest days with PD entitlement which were earned and accrued upon working the compressed half and then report to the new position, or to report to the new assignment early and start earning wages immediately, thereby giving up the right to the entitlements earned on the old position upon commencement of working the new one. The Organization conceptualizes the PD entitlement during the accumulated rest days as part of the bargain of offsetting the costs for employees in on-line gangs, who could not meet expenses during the compressed half solely on the basis of the PD paid during that working time. It contends that it is not attempting to expand the Agreement, but only arguing the

equity of the situation. It notes that Claimants were not disciplined for reporting to work after the commencement of their assignment in these cases.

Carrier asserts that the intent of PD allowance was to "help defray costs" not to fully cover them, and notes that the Organization's "equity" argument cannot substitute for the language agreed upon by the parties. Carrier agrees that Rule 39(e) was intended to cover all scenarios, not just compressed halves, and that the implication of the Organization's argument for treating rest days as part of the prior assignment when an employee exercises his seniority to change gangs is that a majority of employees could not displace during that period and nothing could happen until after the half ends. Carrier contends that such result is nonsensical and contrary to established practice, and would, in effect, negate the possibility of the latter employee option put forward by the Organization.

The Board has fully considered the arguments of the parties concerning this difficult issue. What emerges from this record is the fact that the language of Rule 39(e) is ambiguous with respect to the situation presented in these claims, e.g. the entitlement of an on-line employee working a compressed half under Rule 40(a) to rest day PD during the accumulated rest day period of the half when he is awarded a new assignment on a different on-line gang prior to the accumulated rest day period, that assignment has available work during such period, and the employee chooses to enjoy the rest days of his prior assignment before reporting to the new assignment. There is no dispute about the eligibility for accumulated rest day PD for such employees if they remained on their old assignments. Nor is there a dispute concerning Carrier's obligation to

bridge the rest day PD for the reasonable period it takes for employees to report to their new assignment, so long as they protect the new assignment.

The parties disagree about whether the PD eligibility requirement to work the last day immediately preceeding and the first day immediately following "said rest days" refers to the rest days of the old assignment or the new one. By its language Rule 39(e) does not clearly explain whether an employee exercising seniority to change gangs prior to the end of the half, "voluntarily absents himself" from service by opting not to report to the new assignment until after the accumulated rest day period of the compressed half. Since we have found such provision ambiguous with respect to the situation we are confronted with herein, it is the burden of the Organization as proponent of these claims to prove by a preponderance of the evidence that its interpretation of the Agreement language is correct, and that Carrier violated Rule 39(e) by failing to pay Claimants rest day PD as alleged.

In this case the Board finds that the Organization has failed to meet its evidentiary burden for the following reasons. There is no doubt that the Organization's arguments concerning the interpretation of Rule 39(e) in light of the intention of Rule 40(a) are logical and make sense, as is its argument that Carrier's position could provide an opportunity for employee's to "double dip" for payroll purposes, a situation Carrier normally is opposed to. However, it is equally clear that Carrier's arguments concerning why PD allowance intended to defray costs of on-line gangs was not intended to be payable to employees sitting at home between assignments rather than choosing to report immediately to protect their new assignments when work was available for them are also

plausible.

The parties contemplated that situations would arise where an employee works over the normal straight time weekly or bimonthly period when changing assignments, and agreed that they would be exempt from receiving overtime on such occasions. See Rule 35(e). Thus, by implication, the contract permits Carrier to make a new assignment prior to the completion of the old one, and requires an employee to work additional hours on straight time when changing positions. Further, the language of Rule 20(f), which we agree accrues primarily for the benefit of employees, requires Carrier to release employees to their new assignments when they are successful applicants as soon as possible, permitting retention for up to 10 days on the old assignment presumably for the purpose of getting the position filled. In compressed half situations, when Carrier has the accumulated rest day period to follow required procedures in filling the assignment, there is no justification for keeping the employee on the old assignment (thereby preventing him from earning wages in his new position) for longer than the following Monday or date after which the employee can reasonably be expected to report to the new job and protect that assignment.

Such was the situation in these cases. Claimants all voluntarily bid on positions with effective dates prior to their accumulated rest days, were awarded the positions on such date or at the end of their compressed half work period, and did not protect their new assignments within a reasonable time period from their release from their old assignment. While they clearly worked on the workday immediately preceding their rest days on the old assignment, in compliance with the language of Rule 39(e), they did not work on the workday immediately

following the rest days of the new assignment. According to Carrier and its records, Claimants' new assignments became effective on the date they were released from the prior gang - the day following their last compressed half work day - and they became subject to the terms and conditions of their new position at that time.

Thus, the Board finds that Carrier has shown that a plausible explanation for the intention of the parties in bridging rest day PD contained in Rule 39(e) for employees moving from gangs working compressed halves is that the rest days contemplated for purposes of that provision are defined as those in effect for the gang to which Claimants were newly assigned as of the first day of the new position. While the Organization's argument that compressed half rest days are accumulated and part of that assignment under the language of Rule 40(a), a fact not disputed, in determining whether the employee meets the conditions of working the last day immediately preceding and first day immediately following said rest days contained in Rule 39(e), it is not unreasonable for Carrier to look at the rest day assignments of the position held by the employee as of the effective date of the new job award. As noted by Carrier, if an employee is assigned to a new on-line position on an effective date which falls within or at the commencement of an accumulated rest day period in a compressed half, he is entitled to enjoy the PD benefits of such new position, since work is not available to him until the first day of the working compressing half.

Accepting the Organization's argument would also make the effective date of a job assignment for purposes of entitlement to rest day PD up to the option of the employee. The Board cannot accept that the parties contemplated two possible different effective dates for converting

an employee over to the terms and conditions of a job assignment after being declared the successful applicant to a position, at the employee's option. For record keeping and scheduling purposes, there must be consistency. Carrier's records reveal that the effective date for assignment to the new jobs in this case were the date Claimant's were released from their old gangs.

Further, as Carrier points out, if employees working compressed halves were required to wait until the conclusion of their accumulated rest day period to exercise their seniority or make displacements, they would be prevented from the utilizing option of choosing to report to protect their new assignment, bridge their rest day PD under Rule 39(e), and commence earning the wages and benefits of the new position. The Organization does not claim that this has either been the practice or is a desirable result. Rather, it wishes to leave the option of enjoying the rest day benefit accumulated during the compressed half along with its entitlement to PD to the employee. The Board cannot find that it was the clear intention of the parties to give the employee that option when it negotiated the language of Rule 39(e) or 40(a).

When Carrier as well as the Organization puts forth plausible explanations for the intent of the language of an ambiguous provision, the Board is compelled to find that the Organization has failed to meet its burden of proving a violation by a preponderance of the evidence. Accordingly, we cannot accept the Organization's interpretation of the language of Rule 39(e) or its assertion that there was a violation of such rule in this case, and we must deny the claims for rest day PD herein.

AWARD:

The claims are denied.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

D.A. Ring

Dominic A. Ring
Carrier Member

Dated: *December 11, 2003*

Donald D. Bartholomay

Donald D. Bartholomay
Employee Member

Dated: *12-11-03*