

PUBLIC LAW BOARD NO. 6638

AWARD NO. 4

CASE NO. 4

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to pay system gang employee R. S. Knapp the per diem allowance for the dates of June 24, 25, 26, 27, 28, 29 and 30, 2001 (System File RJ-0139-101/1286438).

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. S. Knapp shall now receive payment of the per diem allowance for the dates of June 24, 25, 26, 27, 28, 29 and 30, 2001."

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 issue of the entitlement under Rule 39(e) to a per diem (PD) allowance for accumulated rest days when an employee in

an on-line gang working compressed halves returns to work after his accumulated rest days but is displaced and does not perform compensated service for Carrier on the day immediately following his rest days.

Claimant was assigned to on-line System Gang 9072 working a compressed work period including the first eight days of the half (June 16-23, 2001), with rest days from June 24-30, 2001. Claimant was informed that he had been displaced when he returned to work on System Gang 9072 on July 1, 2001, was told to wait around to see if he could displace, but was unable to do so and did not perform any services for Carrier on July 1, 2001, and was not paid for that date or for the rest day PD for the period June 24-30, 2001 which this claim seeks. The record reflects that Claimant next worked for Carrier on July 30, 2001 on System Gang 9055.

Employees working in "on-line" service 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 (formerly W-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."

The correspondence on the property, consistent with the arguments presented to the Board, reveal the Organization's position that the language of Rule 39(e) clearly 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 the only exceptions to PD entitlement set forth in Rule 39(e) are when Claimant voluntarily absents himself from service on either a scheduled work day or the workday immediately preceding or following his rest days. In this case the Organization argues that Claimant did not disqualify himself since he made himself available for his next scheduled workday after his accumulated rest days, July 1, 2001, by driving the 350 miles from his home in Nebraska to Minnesota, but was displaced after he reported to work, so work was not available to him on that day. The Organization contends that Claimant did not fit within the only exceptions specifically listed in Rule 39(e), and Carrier's attempts to imply a further exception for an employee who "performs no service" on the date immediately following his rest days must fail, relying upon the contract construction principle of 'expressio unius est exclusio alterius' and Third Division Awards 20693, 33632, 31300, 29865, 31398. The Organization notes the absence in the Agreement of any language supporting the position that if an employee is displaced during his scheduled rest days he is deprived of PD for them.

Carrier argues that PD allowance by its very language states that it is

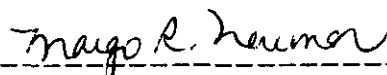
intended to help defray the expenses incurred by on-line employees, not to be treated as additional income unrelated to an employee working. Carrier avers that Claimant did not have any expenses to defray between June 23 and July 30, 2001, pointing out that travel allowance is a separate item covered elsewhere in the Agreement. It notes that Claimant self furloughed after being displaced prior to his starting time on the first available day after his rest days, July 1, 2001, that he did not perform any compensated service until July 30, 2001, and was voluntarily absent from service after failing to exercise his seniority to displace another employee for the entire month of July. Carrier states that there were work opportunities for Claimant after his July 1 displacement which he did not avail himself of, thereby falling within the exception listed in Rule 39(e) of voluntarily absenting himself from work on the day following his rest days.

Carrier argues that the language of Rule 39(e), read in conjunction with Appendix X-1, is clear and unambiguous in stating that an employee is voluntarily absent when he fails to render compensated service either before or after his rest days, as was the case with Claimant herein. Third Division Award 31082. In the event the Board finds the provision ambiguous, Carrier asserted on the property, without contradiction, its historical practice of ending PD payments for on-line gangs when the employee performs his last day of service prior to his rest days, noting that employees have never been allowed rest day PD when they do not perform service before or after the weekend. Third Division Awards 29142, 29057, 28030. Carrier contends that the Organization has failed to meet its burden of proving that there is any specific Agreement language requiring it to pay PD after Claimant no longer performs compensated service and does not have any expenses to defray, relying upon Public Law Board 6302, Award 14; Third Division Awards 26033, 27851, 27895.

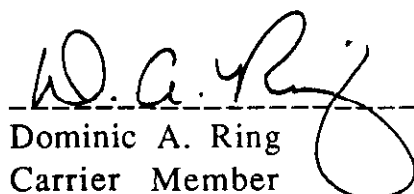
The Board has fully considered the arguments of the parties and the record in this case. We conclude that the clear language of Rule 39(e), as defined in Appendix X-1, governs this dispute. In order for Claimant to be entitled to receive the rest day PD allowance requested in this claim he must meet the eligibility requirements, and not fall within the stated exceptions. There is no dispute that Claimant performed compensated service on the workday immediately preceding his accumulated rest days on System Gang 9072. It is also undisputed that, despite reporting to the gang on the first workday immediately following his rest days, July 1, 2001, he did not perform any compensated service on that day. Thus, Claimant meets the definition for being voluntarily absent contained in Appendix X-1, and falls within the stated exception for entitlement to rest day PD contained in Rule 39(e). Displacements such as that which occurred herein are common on this Carrier, and Claimant himself was entitled to displace a junior employee on July 1, 2001 to maintain his eligibility to rest day PD under Rule 39(e). His failure to do so requires that this claim be denied.

AWARD:


The claim is denied.



Margo R. Newman
Neutral Chairperson



Dominic A. Ring
Carrier Member



Donald D. Bartholomay
Employee Member

Dated: December 11 2003

Dated: 12-11-03