

PUBLIC LAW BOARD NO. 6638

AWARD NO. 8

CASE NO. 8

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 Agreement was violated when the Carrier failed and refused to allow Gang 8578 employee L. Aguilar per diem allowance for the dates of November 9, 10, 11, 12, 13, 14 and 15, 2001 (System File C-0139-115/1299206).

(2) As a consequence of the violation referred to in Part (1) above, Claimant L. Aguilar shall now be compensated for seven (7) days of per diem allowance at \$48.00 per day for a total of \$336.00."

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 the on-line gang

an employee works on is abolished at the end of the work portion of the compressed half and he exercises his seniority to displace to another on-line gang after the accumulated rest day period designated for the abolished on-line gang.

Claimant was assigned to on-line Gang 8578 working a compressed work period including the first eight days of the half (November 1-8, 2001), with scheduled rest days from November 9-15, 2001. The gang was abolished effective the close of the shift on November 8, 2001. Under Rule 21, Claimant had 15 calendar days to displace another position before being considered self-furloughed. Claimant states that he initially bumped onto Gang 9052 but was himself bumped before he even reported. Claimant chose to exercise his seniority to on-line Gang 9063 on November 18, 2001. Carrier's records reflect that Gang 9063 worked on November 11-14, 2001, and Carrier asserted that there was a work opportunity for Claimant on Gang 9052 prior to his November 14, 2001 attempt to displace there. The record reflects that Carrier has a practice of bridging rest day PD for on-line employees exercising seniority when they immediately move from one on-line assignment to another.

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 was not voluntarily absent from work on the work day immediately following his rest days since it was Carrier that chose to abolish his position prior to his accrued rest days, making work unavailable to him until he was able to displace onto another gang (which he did within 15 days) and report to work on his new assignment.

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 whose position is abolished during a compressed half must fail, relying upon the contract construction principle of 'expressio unius est exclusio alterius' and Third

Division Awards 31300, 29865, 31398. The Organization notes the absence in the Agreement of any language supporting the position that Carrier may deprive an employee of PD previously earned in on-line service by abolishing his gang prior to the end of the compressed half. The Organization advances an equity argument that the PD allowance was intended to be payable throughout the entire compressed work half in order to help employees defray their expenses during the working period, since the amount of PD does not fully cover employees' expenses while on the road.

Carrier initially notes that PD allowance by its very language is intended to help defray (not fully pay for) the expenses incurred by on-line employees, not to be treated as unemployment income or wages. It argues that when Claimant's position was abolished effective November 8, 2001, on-line Gang 8578 ceased to exist and Claimant could no longer claim any benefits associated with such nonexistent position, including PD allowance as he was not incurring any expenses attributable to his former position.

Carrier contends that Claimant fell within the specific exception to eligibility for PD allowance contained in Rule 39(e) since he was voluntarily absent from work on the day immediately following his rest days. Carrier asserts that since work was available to Claimant prior to November 14, 2001 when he attempted to displace on Gang 9052, as well as on Gang 9063, which he eventually exercised his seniority onto on November 18, 2001, Claimant failed to immediately exercise his seniority to another on-line gang where work was available to him, thereby voluntarily absenting himself from work and removing any eligibility he may have had for rest day PD after November 8, 2001. Carrier asserts that an employee may not sit home and incur no expenses for the entire 15

day displacement period, despite the availability of work elsewhere, and expect Carrier to finance such time with rest day PD allowance, which was never intended to be used for that purpose.

Carrier avers that while there is no specific Agreement language requiring it to pay PD during exercises of seniority, its practice has always been that for gangs abolished on Friday, an employee does not get rest day PD unless he shows up for work on an on-line gang on Monday. Carrier notes that gangs are always bid with a 5 day/week, 8 hours/day schedule, and that there has never been accumulated Saturday and Sunday rest day PD in such circumstances. It posits that Rule 40(a) was never intended to change such fact, noting that when employees vote to work a compressed half, they still must work the day immediately prior to and following the rest days to be eligible for rest day PD, which is not accrued until the employee meets such eligibility requirement. Carrier argues that by failing to displace immediately after his position was abolished, when work was available elsewhere to him, Claimant did not meet the eligibility requirement for rest day PD. Carrier contends that the Organization has failed to meet its burden of proving that there is any specific Agreement language or established practice requiring it to pay rest day PD to Claimant in this case and requests that the claim be denied, relying upon Third Division Awards 26033, 27851, 27895.

The Board has fully considered the arguments of the parties and the record, and finds that the rationales expressed in prior Awards 2 and 6 of this Board govern the facts of this case. First, we have found that once a gang or position is abolished, it no longer exists for any purposes, including the continuation of benefits associated with it. Second, Rule 39(e) clearly requires an employee seeking rest day PD to meet the eligibility requirements which include working the day immediately before

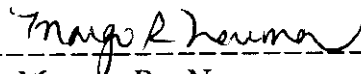
and after said rest days, which we have found is subject to the plausible interpretation that the rest days contemplated by the parties are no longer the ones associated with the old gang, which in this case no longer exists, but, rather, are those attributable to the new gang which was either voluntarily bid on, or to which an employee may displace through an exercise of seniority. As Carrier notes, to permit an employee to sit home and not exercise his seniority when work is available to him after his position no longer exists and maintain his eligibility for rest day PD when he incurs no expenses would be unjust enrichment not contemplated by the parties in the language of either Rule 39(e) or Rule 40(a).

The Organization has failed to show that the language of the Agreement, or established practice of the parties, supports the conclusion that rest day PD is accumulated by working the prior work period without meeting the stated conditions in Rule 39(e), e.g. working the day immediately before and after the rest days. There is no evidence that employees working 5 days/week, 8 hours/day in on-line gangs accumulate Saturday and Sunday rest day PD prior to reporting to work on the following Monday. In fact, in such situation, Carrier only pays rest day PD for the weekend if the employee reports to work on Monday. Under Carrier's admitted practice of bridging rest day PD during the exercise of seniority only when an employee immediately reports to protect his new assignment, in order to be eligible for such PD payment, an employee in an abolished position or gang must exercise his seniority to displace onto an on-line gang where work is available to him immediately after the rest days associated with such new gang. Since Claimant did not immediately protect a new assignment where work was available to him after his position was abolished, he is not eligible to receive rest day PD under the language of Rule 39(e).

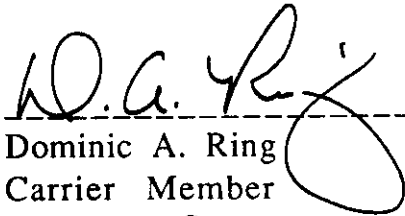
Accordingly, since the Organization failed to meet its burden of proving that Carrier violated the Agreement by denying Claimant his rest day PD as alleged, the claim must be denied.

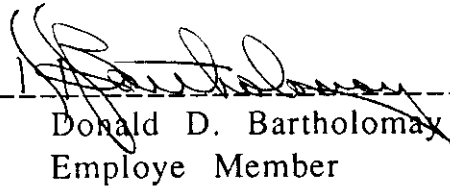
AWARD:

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