

PUBLIC LAW BOARD NO. 6867

AWARD NO. 12

CASE NO. 12

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 pay Mr. D. Erbe the travel allowance in accordance with Rule 36 for the trip he made from Mason City, Iowa to Valparaiso, Nebraska on January 12, 2003 in connection with reporting to his assignment and start up of System Gang 9018 on January 13, 2003 (System File UPRM-9416T/1356827).

(2) As a consequence of the violation referred to in Part (1) above, Mr. D. Erbe shall be compensated the travel allowance for miles traveled in the amount of eighty-seven dollars and fifty cents (\$87.50)."

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 claim raises the issue of Claimant's entitlement to travel allowance from his home to the start up of System Gang 9018 at the beginning of the work season. The following provisions of Rule 36 - Travel Service, are pertinent to this dispute:

Rule 36 - TRAVEL SERVICE

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**Section 7 - End of Work - Week Travel
Allowance for Traveling Gangs.**

(a) At the beginning of the work season employees are required to travel from their homes to the initial reporting location, and at the end of the season they will return home. This location could be hundreds of miles from their residences. During the work season the Carrier's service may place them hundreds of miles away from home at the end of each work week. Accordingly, the Carriers will pay each employee a minimum travel allowance as follows for all miles actually traveled by the most direct highway route for each round trip:

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301 to 400 miles	\$75.00
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(b) At the start up and break up of a gang, an allowance will be paid after 50 miles, with a payment of \$12.50 for the mileage between 51 and 100 miles.

Claimant was awarded an assistant foreman position on System Rail Pickup Gang 9018 effective January 13, 2003, which was to start its work season at the initial reporting location of Valparaiso, Nebraska. Claimant traveled 321 miles by the most direct highway route from his residence in Mason City, Iowa on January 12, 2003. He was displaced pursuant to Rule 21(g) prior to the start of the shift and did not work on January 13, 2003. Claimant displaced on System Gang 9045 as a ballast regulator operator on January 14, 2003.

The Organization argues that the clear language of Rule 36 (a) and

(b) requires payment of the travel allowance of \$87.50 to Claimant since it was the beginning of the work season and Claimant traveled 321 miles from his residence and was present on the first day of work when the gang was established. It asserts that, even though Claimant was displaced from his assigned position before starting time, he met the requirements of receiving gang start up travel allowance since he was assigned to the gang and actually traveled by the most direct route from his residence to the work location. It notes that nothing in the rule requires that an employee actually work the position, and Claimant was not afforded the opportunity to do so. The Organization disputes Carrier's contention that it has acquiesced in its interpretation of this provision by failing to progress prior claims raising the application of Rule 36(a) and (b) by relying on Special Board of Adjustment 1110, Award 104 and Third Division Award 35773.

Carrier contends that Claimant was not entitled to travel allowance since he was displaced prior to the start up of Gang 9018, he was no longer in a position on the gang at the time of its start up, and he did not perform service on it, thereby terminating his rights associated with that position, relying on Public Law Board No. 6638, Awards 4 and 12. It argues that since there is no provision in the agreement to pay two employees travel allowance for one position, the Board must look to the practice of the parties. Carrier asserts that it has consistently applied Rule 36 since its inception in 1996 and has not paid travel allowance to an employee who has been displaced prior to the start of his shift under similar circumstances, pointing to documentation to this effect by two supervisors involved in the process, a fact not rebutted by the Organization, citing Third Division Awards 29142 and 29057.

Carrier notes that it paid the employee displacing Claimant on Gang 9018 the appropriate travel allowance. It relies on the language of Rule 18 stating that exercises of seniority will be without expense to Carrier in arguing that the Organization's interpretation of Rule 36 would cause double travel expense. Carrier contends that the Organization has accepted its interpretation of Rule 36 by not progressing any claim on the issue since 1998, and that latches must apply. Finally, Carrier argues that the basis of this claim is an equity argument by the Organization which the Board is not empowered to entertain, citing First Division Award 25052; Fourth Division Award 4936; Public Law Board No. 5872, Award 1. It requests that the claim be denied for failure of the Organization to meet its burden of proof, citing Third Division Awards 26033, 27851 and 27895.

The Board has considered the arguments of the parties expressed in the on property handling of this case. Unlike the situation in Public Law Board 6638, Awards 4 and 12, this case involves the interpretation of Rule 36 Section 7 (a) and (b) with respect to the start up of a gang at the beginning of the work season. However, certain principles established with respect to contractual rights attendant to a position when a displacement occurs prior to commencement of work in that position are nonetheless applicable. As noted in Public Law Board 6638, Award 12, once a displacement occurs, rights attendant to the position previously held are terminated. In this case Claimant's entitlement to travel allowance under Rule 36 (a) and (b) was a right attendant to his position on Gang 9018 and his travel associated with its start up. Unfortunately for Claimant, despite traveling from home a distance to protect his assistant foreman position, he was displaced prior to performing any work in that position and prior to the start up of the gang. At that time his rights

associated with the start up of that gang were extinguished through no fault of his own.

This Board is unable to accept the Organization's assertion that Rule 36(a) and (b) is clear and unambiguous, and requires only proof of travel from home to the initial starting location at the beginning of a work season and assignment to a gang, without actual performance of any work on the gang in issue. Under Rule 36 (b) the allowance is paid at the start up of the gang. Since Claimant was displaced prior to the start up of Gang 9018, he is not necessarily entitled to such allowance under the language of the Agreement. This interpretation is supported by Carrier's un rebutted evidence that it has consistently applied the travel allowance rule since its inception in 1996 as being payable to the employee meeting the requirements who actually protects a position on the gang at the time of start up, by displacement or otherwise.

There is no dispute that Carrier paid the individual displacing Claimant on Gang 9018 the requisite travel allowance in accord with its practice. There is nothing in the Agreement requiring it to pay more than one employee travel allowance for the same position. While not being foreclosed from challenging Carrier's denial of Claimant's request for travel allowance in this case, in the absence of the progression of a prior challenge by the Organization to this interpretation of Rule 36, and the continuation of its application over an extended period of time, the Organization cannot be said to have met its burden of establishing that it was Claimant rather than the senior employee who displaced him on Gang 9018 that was entitled to the travel allowance under Rule 36, or that they both were similarly entitled. It was stated in Public Law Board No. 6638, Award 4 between these parties, that displacements such as occurred here

are apparently common on this Carrier and that Claimant had displacements rights of his own under the Agreement which he exercised the following day. As noted by Carrier, we are not a board of equity but are called upon to interpret and apply the contract language consistent with the parties' practice. Public Law Board No. 5872, Award 1. Accordingly, we conclude that the claim must fail.

AWARD:

The claim is denied.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

Brant W. Hanquist

Brant W. Hanquist
Carrier Member

Timothy W. Kreke

Timothy W. Kreke
Employee Member

Dated: 4-23-08

Dated: April 23, 2008