

PUBLIC LAW BOARD NO. 6867

AWARD NO. 13

CASE NO. 13

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 System Gang employees D. Swanson, K. Kulisky, R. Deming and B. Shannon, Jr. the travel allowance as provided in Rule 36 for their respective round trips made on March 24 and April 1, 2003 (System File UPRM-9438T/1363943).

(2) As a consequence of the violation referred to in Part (1) above, the Claimants shall now be compensated as follows: Mr. D. Swanson for twenty-five dollars (\$25.00), Mr. K. Kulisky for fifty dollars (\$50.00), Mr. R. Deming for one hundred fifty dollars (\$150.00) and Mr. B. Shannon for twenty-five dollars (\$25.00) for their respective travel allowance for their aforesaid round trips."

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 the entitlement of Claimants to weekend travel allowance for their respective round trips made on March 24 and April 1, 2003. The following provisions of Rule 36 - Travel Service, are pertinent to this dispute:

Rule 36 - TRAVEL SERVICE

* * * * *

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:

0 to 100 miles	\$ 0.00
101 to 200 miles	\$ 25.00
201 to 300 miles	\$ 50.00
301 to 400 miles	\$ 75.00
401 to 500 miles	\$100.00

Additional \$25.00 payments for each 100 mile increments.

* * * * *

f) An employee filling a Group 20, 26 or 27 assignment who completes a round trip from work to home to work will not be granted an allowance pursuant to paragraph (a) of this Section when any of the following conditions exist:

(1) the employee is absent without authorization on a work day immediately preceding and/or following the rest days during which the round trip was made;

(2) the employee applies for, receives, and reports for a bulletined position on another gang, not involving the project encompassing the employee's previous assignment, on the work day immediately following the rest day round trip;

(3) instead of exercising seniority displacement rights to an

available position of the same or higher class on a gang involving the project encompassing the employee's previous assignment, the employee exercises seniority displacement rights to a position on another gang, not involving the project encompassing the employee's previous assignment, on the day immediately following the rest day round trip; or

(4) the employee claims and receives a Rule 36 Section 6 transportation allowance for the same period.

(g) If none of the above conditions exist, such employees who complete a round trip from work to home to work will be granted an allowance pursuant to paragraph (a) of the Section.

Claimants were members of System Tie Gang 9068 which was working compressed halves, with their rest days scheduled from March 24 to 31, 2003. They each traveled different distances home during this rest period and reported to the work site on April 1, 2003 but were displaced before the start of their work shift on April 1 and were unable to displace others until the following work day, April 2, 2003. It was Carrier's denial of their claims for weekend travel allowance under Rule 36 for their round trips on March 24 and April 1, 2003 that led to the filing of the instant claim.

The Organization argues that Claimants meet the requirements of the clear language of Rule 36 (a) for payment of weekend travel allowance since they each made the round trip and reported to work on April 1. The Organization asserts that Claimants are not disqualified under Rule 37(f) since they were not absent without authorization on April 1 as they reported to their work site and that they were forced to sit out because work was not available to them. It relies on the statement of Claimant Shannon to this effect. The Organization notes that nothing in the rule requires that an employee actually work the position as alleged by Carrier. It 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) and relies on Third Division Awards 12942 and 14506.

Carrier contends that Claimants did not meet the requirements of Rule 36 for entitlement to travel allowance since they were displaced from System Tie Gang 9068 prior to the beginning of the compressed work period on April 1, 2003, they did not render compensated service on it or elsewhere on April 1, 2003, the first day following their rest days, and that their displacement terminated their rights associated with that gang, relying on Public Law Board No. 6638, Awards 4 and 12. Carrier asserts that Rule 36, Section 7(f) does not apply to Claimants since they did not fill a Group 20, 26 or 27 assignment following their rest days and did not complete the round trip as required for the payment of travel allowance.

Carrier argues that the Board must look to the practice of the parties with respect to the payment of weekend travel allowance under Rule 36 where a displacement occurs, since there is no clear language encompassing the situation. 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 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 since it is obligated to pay travel allowance to the displacing employee if he meets the requirements of Rule 36. 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 as well as the prior precedent on this issue that has been cited. We believe that this case is similar in a number of respects to Public Law Board No. 6867, Award 12 and that certain principles established with respect to contractual rights attendant to a position when a displacement occurs prior to the commencement or resumption of work in that position are also applicable. As noted in Public Law Board No. 6638, Award 12, once a displacement occurs, rights attendant to the position previously held are terminated.

In this case Claimants' entitlement to weekend travel allowance under Rule 36, Section 7 (a) and (g) is premised not only on their traveling the most direct highway route but also on their filling a Group 20, 26 or 27 assignment and completing a round trip from work to home to work, and not meeting any of the conditions listed in Rule 36, Section 7(f). Unfortunately for Claimants, they were displaced prior to performing any work on System Gang 9068 on April 1, 2003 at the beginning of the work cycle associated with the compressed half, and were unable to exercise their displacement rights until April 2, 2003. Thus, they did not fill a Group 20, 26 or 27 assignment at the time they

completed their round trip (April 1, 2003) and were absent on the work day immediately following their rest days during which the round trip was made, under the language of Rule 36, Section 7(f)(1). The Organization does not contend that the absence was with Carrier's authorization, but only that it was not due to the fault of Claimants. Whether that absence was "without authorization" as intended by the parties is not determinative since it does not change the fact that as of their displacement on April 1 Claimants had technically not completed the round trip from work to home to work, since no work was performed on that date.

This Board is unable to accept the Organization's assertion that Rule 36, Section 7(a) is clear and unambiguous, and requires only proof of travel to and from home and back to the location of a prior assignment at the beginning of a work week, without actual performance of any work on the gang in issue or elsewhere. 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 of Rule 36 by actually protecting a position on the gang at the time the work week commences, whether by displacement or otherwise. Claimant Shannon's statement that employees are sometimes permitted to work a few hours on the gang despite their displacement to secure these contractual benefits does not rise to the level of an established practice or defeat Carrier's proof of a past practice of nonpayment of travel allowance when an actual displacement without continued work occurs, as was the case herein.

As we noted in Public Law Board 6867, Award 12, there is nothing in the Agreement requiring Carrier to pay more than one employee travel

allowance for the same position. While not being foreclosed from challenging Carrier's denial of Claimants' 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 Claimants were entitled to the weekend travel allowance under Rule 36 under the facts of this case. Apparently, displacements such as occurred here are apparently common on this Carrier and Claimants had displacement rights of their own under the Agreement which they 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