

**BEFORE
PUBLIC LAW BOARD No. 7097**

**Award No. 14
Case No. 14**

BROTHERHOOD OF MAINTENANCE OF WAY	)	
EMPLOYEES	)	
	)	
vs.	)	PARTIES TO
	)	DISPUTE
UNION PACIFIC RAILROAD COMPANY	)	

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier allowed System Gang 9065 employe W. Nez to be displaced during his regular assigned work period on November 16, 2002, and failed and refused to allow him compensation for said date and when the Carrier failed and refused to allow him the per diem allowance for the dates of November 9, 10, 11, 12, 13, 14, 15, and 16, 2002 and the travel allowance for the round trip from his work assembly point in Price, Utah to his residence in Blue Gap, Arizona and returning to his work assembly point in Torrington, Wyoming (System File C-0221-122/1349459).

- (2) The Agreement was violated when the Carrier allowed System Gang 9065 employe J. Yellowhorse to be displaced during his regular assigned work period on November 16, 2002, and failed and refused to allow him compensation for said date and when the Carrier failed and refused to allow him the per diem allowance for the dates of November 9, 10, 11, 12, 13, 14, 15, and 16, 2002 and the travel allowance for the round trip from his work assembly point in Price, Utah to his residence in Pinion, Arizona and returning to his work assembly point in Torrington, Wyoming (System File C-0221-121/1349458).

- (3) The Agreement was violated when the Carrier allowed System Gang 9065 employee R. Bekay to be displaced during his regular assigned work period on November 16, 2002, and failed and refused to allow him compensation for said date and when the Carrier failed and refused to allow him the per diem allowance for the dates of November 9, 10, 11, 12, 13, 14, 15, and 16, 2002 and the travel allowance for the round trip from his work assembly point in Helper, Utah to his residence in Shiprock, New Mexico and returning to his work assembly point in Torrington, Wyoming (System File J-0221-72/1349464).
- (4) The Agreement was violated when the Carrier allowed System Gang 9065 employee R. Bee to be displaced during his regular assigned work period on November 16, 2002, and failed and refused to allow him compensation for said date and when the Carrier failed and refused to allow him the per diem allowance for the dates of November 9, 10, 11, 12, 13, 14, 15, and 16, 2002 and the travel allowance for the round trip from his work assembly point in Helper, Utah to his residence in Pinion, Arizona and returning to his work assembly point in Torrington, Wyoming (System File J-0221-74/1349465).
- (5) The Agreement was violated when the Carrier allowed System Gang 9065 employee L. Bekay to be displaced during his regular assigned work period on November 16, 2002, and failed and refused to allow him compensation for said date and when the Carrier failed and refused to allow him the per diem allowance for the dates of November 9, 10, 11, 12, 13, 14, 15, and 16, 2002 and the travel allowance for the round trip from his work assembly point in Helper, Utah to his residence in Kaiboto, New Mexico and returning to his work assembly point in Torrington, Wyoming (System File J-0221-73/1349463).
- (6) The Agreement was violated when the Carrier allowed System Gang 9065 employee B. Shone to be displaced during his regular assigned work period on November 16, 2002, and failed and refused to allow him compensation for said date and when the Carrier failed and refused to allow him the per diem allowance for the dates of November 9, 10, 11, 12, 13, 14, 15, and 16,

2002 and the travel allowance for the round trip from his work assembly point in Helper, Utah to his residence in Pinion, Arizona and returning to his work assembly point in Torrington, Wyoming (System File J-0221-75/1350334).

- (7) As a consequence of the violation referred to in Part (1) above, Claimant W. Nez shall now be compensated for ten (10) hours' pay at his respective straight time rate of pay, eight (8) days' per diem at \$52.00 per day and a travel allowance in the amount of \$275.00.
- (8) As a consequence of the violation referred to in Part (2) above, Claimant J. Yellowhorse shall now be compensated for ten (10) hours' pay at his respective straight time rate of pay, eight (8) days' per diem at \$52.00 per day and a travel allowance in the amount of \$275.00.
- (9) As a consequence of the violation referred to in Part (3) above, Claimant R. Bekay shall now be compensated for ten (10) hours' pay at his respective straight time rate of pay, eight (8) days' per diem at \$52.00 per day and a travel allowance in the amount of \$225.00.
- (10) As a consequence of the violation referred to in Part (4) above, Claimant R. Bee shall now be compensated for ten (10) hours' pay at his respective straight time rate of pay, eight (8) days' per diem at \$52.00 per day and a travel allowance in the amount of \$275.00.
- (11) As a consequence of the violation referred to in Part (5) above, Claimant L. Bekay shall now be compensated for ten (10) hours' pay at his respective straight time rate of pay, eight (8) days' per diem at \$52.00 per day and a travel allowance in the amount of \$225.00.
- (12) As a consequence of the violation referred to in Part (6) above, Claimant B. Shone shall now be compensated for ten

(10) hours' pay at his respective straight time rate of pay, eight (8) days' per diem at \$52.00 per day and a travel allowance in the amount of \$275.00."

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the Employees and Carrier involved in this dispute are respectively Employees and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

At all times relevant to this claim, the employees of System Gang 9065 had been assigned and were working a compressed half work schedule in accordance with Rule 40 of the Agreement. Each of the Claimants named in this dispute reported for duty to their assigned positions on On-Line System Gang 9065 at the regularly assigned start time of 6:30 A.M. on Saturday, November 16, 2002, the first workday following the gang's assigned rest period. According to the Claimants, beginning at 6:30 A.M., they attended System Gang 9065's mandatory roll call, job briefing and the morning exercises, then boarded the gang bus for transportation to the work site. Rather than depart for the work site, System Gang 9065 employees waited on the bus while the Carrier attempted to determine the relative seniority of employees attempting to displace onto System Gang 9065. At 8:30 A.M., two hours after the start of their regularly scheduled workday, the Carrier informed the Claimants that they were being displaced by senior employees and would not be permitted to work the remainder of the day.

The Carrier concluded that the six Claimants performed no service on November 16, 2002 and were not entitled to any compensation therefor. In addition, the Carrier also determined that because the Claimants allegedly performed no service on November 16, 2002, they were not entitled to any travel expenses under Rule 36 for the round trip travel from the assembly point to their homes and back or their Rule 39 per diem expenses for System Gang 9065's assigned rest days of November 9, 10, 11, 12, 13, 14 and 15 as well as November 16, 2002.

The Organization contends that the notice of displacement was not given until two hours after roll call, well into Claimant's regularly assigned work period. However, there is a significant dispute of fact on this point. Contrary to the

Claimants' accounts, the timekeeper on duty reported that Claimants all were displaced prior to the start of their shift. The timekeeper also called the supervisor, who was off-site at the time, and notified him of the displacement, and then called N.P.S. in Omaha to determine whether the displacements were legal under the Agreement. The timekeeper reported that at 8:30 a.m., he notified Claimants that the displacements that had already been announced had been verified.

Rule 21(g) provides:

Employees will not be permitted to displace junior employees during the regularly assigned work period of the employee being displaced.

The Organization filed this claim asserting that the Carrier violated numerous provisions of the Agreement, including Rules 21(g), 36, 39, and 40 by displacing Claimants during their regularly assigned hours, causing them loss of pay for the day, their per diem allowance for their rest days and November 16, 2002, and their weekend travel allowance for traveling from their assembly point to their residences and back again.

The Organization reasons that Claimants were not displaced until two hours *after* roll call, during Claimants' regularly assigned work period, in violation of Rule 21(g). The Carrier asserts that while Claimants may have waited at the work location at their own accord to ensure that the displacements were legal, they were first notified of the displacements prior to the start of the shift, and were not held on their positions. The Carrier's position is that the timekeeper's announcement prior to the start of their shift was the point at which Claimants were displaced, in compliance with Rule 21(g).

As in Award No. 13 of this Board:

Because the Organization is the moving party, it bears the burden of proving a violation of Rule 21(g), and in light of this irreconcilable factual dispute ("evidentiary gridlock" in the words of Referee Eischen in Third Division Award No. 33895), this Board must find that a violation of Rule 21(g) has not been proved.

In this case, the six Claimants assert that they were displaced two hours after the beginning of their shift, but the timekeeper asserts that they were displaced prior to the 6:30 a.m. start of their shift, an action that he verified with Omaha and then

reconfirmed to Claimants at 8:30 a.m. This Board simply does not have the authority to resolve this irreconcilable conflict over the facts necessary to prove the claim and must therefore rule against the moving party, in this case the Organization, and deny the claim. See also Third Division Award No. 33487 (where there is “irreconcilable dispute in the facts necessary to resolve [a] claim,” the claim must be denied).

Attempting to avoid this result, the Organization asserts that even if Claimants had been told of a *possible* displacement prior to the start of the shift, the displacement did not occur until they were informed two hours later that the legality of the displacement had been confirmed. According to the Organization, the Carrier bears the burden of determining the propriety of a displacement prior to the beginning of the displaced employee’s shift. However, the Organization has not identified any contract provision that imposes this burden on the Carrier. Rule 21(g) merely states that an employee cannot be displaced during his regularly assigned work period. Nothing bars management from implementing a displacement before verifying its legality with N.P.S., at least as long as management is not acting in bad faith or otherwise abusing its managerial discretion under the Agreement. There is no evidence that the Carrier abused its discretion here. Thus, the Organization has failed to prove that Claimants were not displaced until after to the start of their regularly assigned work period.

Because the Organization has failed to prove that Claimants were improperly displaced on November 16, 2002, the Organization has also failed to prove that the Carrier violated Rule 36 and Rule 39. Section 7 of Rule 36 provides an end-of-work- week travel allowance for traveling gangs. As Section 7(g) indicates, unless an exception applies, the travel allowance will be paid to employees “who complete a round trip from work to home to work.” However, while Claimants returned to the assembly point of Gang 9065, the Organization has failed to prove that they returned “to work,” since the evidence fails to prove that they had begun their shift before they were bumped. Thus, the Organization has failed to prove that Claimants were entitled to travel allowance under Rule 36.

As in our Award No. 13, the Organization asserts that this reasoning adds an exception to the travel allowance rule that is not included among the exceptions listed in Section 7(f). Section 7(f) begins (emphasis added):

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:

and then lists four conditions that bar receipt of travel allowance. As in our Award No. 13, these Claimants were disqualified from receiving travel allowance, not because of one of the conditions listed in Section 7(f), but because they failed the preliminary eligibility requirement of both Section 7(f) and Section 7(g): The Organization failed to prove that they completed “a round trip from work to home to work.” For this reason, their claims for travel allowance must be denied.

Finally, as in our Award No. 13, this Board finds that the Organization failed to prove that the Carrier violated Rule 39 by refusing to pay Claimants the per diem allowance for their rest days from November 9 through 15, 2002 and for November 16, 2002. Rule 39 (e) provides that a per diem allowance is provided to “employees assigned with headquarters on-line,” but the per diem allowance

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.

The parties have clarified, in Appendix X-1 to the Agreement, that

The language of Rule 39(e) indicating “the employee is voluntarily absent” means the employee has failed to render compensated service on a workday on which work was available to him; . . .

Once again, the Board must assume that Claimants were properly displaced prior to the start of the shift on November 16, 2002. There is no evidence that they attempted to exercise their seniority to bump into another position. For the reasons discussed in our Award No. 13, and incorporated herein, we find that Claimants were “voluntarily absent” on November 16, 2002, the day immediately following their rest days, and that the Carrier did not violate Rule 39 by refusing to pay them per diem for November 9 through November 16, 2008.

In sum, the Organization has failed to prove that the Carrier violated the Agreement by bumping Claimants after the start of their shift, by refusing to compensate them for the loss of work on November 16, 2008, or by refusing to pay them travel allowance or per diem for the periods cited.

AWARD

Claim denied.

Lisa S Kohn

Lisa Salkovitz Kohn
Neutral Member

W.A. Ruff

Carrier Member
Dated: *July 18, 2008*

Tommy W. Grebe

Organization Member
July 18, 2008