

PUBLIC LAW BOARD NO. 7156

PARTIES) **BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**
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 failed and refused to allow "on-line" employee J. C. Kunze the per diem allowance for March 16, 17, 18, 19, 20, 21 and 22, 2005 and when it refused to allow him the travel allowance for the round trip made from his work location at Terrell, Texas to his residence at Bishop, Texas and returning to his work location at Terrell, Texas. (System File MW-05-10/1424345 MPR).
2. As a consequence of the violations referred to in Part (1) above, Claimant J. C. Kunze shall now receive payment of the per diem allowance for the aforesaid dates in the amount of three hundred ninety-nine dollars (\$399.00) and he shall receive payment of the travel allowance for the aforesaid nine hundred (900) mile round trip.

OPINION OF BOARD

Claimant was a machine operator assigned to On-Line Tie Gang 9196,

which worked a consecutive compressed halves schedule, allowing for extended consecutive workdays and accumulated rest days to be used consecutively later in the pay period.

On March 4, 2005, the Carrier advertised a machine operator's position on On-Line Tie Gang 9166. The effective date for the position was March 18, 2005. Claimant bid for and was awarded the position on Gang 9166. Claimant's last day of work on Gang 9196 was the final day of the compressed half — March 15, 2005. Although his assignment to Gang 9166 was effective March 18, 2005, Claimant's actual first day of work on Gang 9166 was March 23, 2005.

At the time Claimant exercised his seniority to move from Gang 9166 to Gang 9196, both gangs had the same compressed work schedules and observed the same rest days. Relevant to this dispute, the rest days for both gangs were March

16 through March 22, 2005. Further, at that time, both gangs worked at the same location and under the direction of the same individual. Claimant therefore reported to Gang 9166 on the first work day after both gangs' rest days.

The claim in this dispute is for per diem allowance for the rest days taken by Claimant during the period March 16 through 22, 2005 and for travel allowance for a round trip from to his residence.

The applicable rules provide as follows:

Rule 17:

Employees accepting a position, in the exercise of their seniority rights, will do so without causing extra expense to the railroad.

* * *

Rule 36(b)(2):

The per diem allowance will be paid for each day of the calendar week, including rest days, holidays and personal leave days. It, however, will not be payable for workdays that 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 such rest days, holidays, or personal leave day. The per diem allowance will not be reduced due to an employee working a work week arrangement of other than normal assignment

contemplated in Rule 25 of the this Agreement.

* * *

Rule 37 (Travel Allowance)

* * *

This case is fact specific and unique. Claimant exercised his seniority to change from one gang to another; on the relevant dates, both gangs worked the same compressed halves schedules and observed the same rest days; and both gangs were working at the same location under the same individual. For purposes of this dispute, the two gangs were twins. As far as Claimant and the Carrier were concerned, the only thing that really changed from the end of the work cycle on March 15, 2005 to the beginning of the next work cycle on March 23, 2005 was the number on Claimant's gang (and then, by only one digit). A snapshot of this situation shows no other change.

With respect to the claim for per diem allowance, Rule 36(b)(2) governs. Rule 36(b)(2) is clear — "[t]he per diem allowance will be paid for each day ... including rest days ... [i]t, however, will not be payable ... for rest days ... when the employee is voluntarily absent from service when work is available to him on the workday immediately preceding or

... following such rest days” Given the identical work and rest day schedules of the gang Claimant came from (9196) and the one Claimant bid to (9166), during the rest days in dispute, Claimant missed no work days and was not “... voluntarily absent from service when work is available to him on the workday immediately preceding or ... following such rest days” Aside from the fact that Claimant’s assignment to Gang 9166 was not effective until March 18, 2005 — a date in the middle of both gangs’ rest cycles — Claimant was not “... voluntarily absent from service ...” on the rest days in dispute because both gangs were observing the same rest days. Absent that condition, Rule 36(b)(2) clearly requires that “[t]he per diem allowance *will be paid* for each day ... including rest days ...” [emphasis added]. Given the identical work and rest cycles of the two gangs, Claimant was entitled to per diem allowance under the clear language of Rule 36(b)(2).

The Carrier’s arguments on the per diem issue do not change the result.

Rule 17 (“[e]mployees accepting a position, in the exercise of their seniority rights, will do so without causing extra expense to the railroad”)

does not require a different result because there was no additional expense to the Carrier due to Claimant’s exercise of his seniority rights. If Claimant had not exercised his seniority rights to bid from Gang 9196 to Gang 9166, he would have received per diem for rest days under Gang 9196’s rest days. By paying Claimant per diem in this case, the Carrier is not incurring any additional per diem expense due to Claimant’s exercise of his seniority rights. This is not a case where the employee attempts to gain per diem payments as a result of the exercise of seniority rights by attempting to use rest days from a prior gang after transferring to another gang which is working. *Compare Award 1* of this Board. This is a case where Claimant would have received per diem for the same days irrespective of the gang to which he was assigned. Because of the identical schedules, the Carrier would have paid Claimant per diem for the rest days had he not bid from Gang 9196 to Gang 9166. Under Rule 17, the Carrier has not incurred any additional expense as a result of Claimant’s exercise of his seniority.

The Carrier also raises past practice as a defense. Putting aside the question of whether the circum-

stances are the same in the instances cited by the Carrier as compared to this fact situation, past practice cannot be considered in the face of clear language. See *Third Division Award 35457* ("... another tool of Contract Construction is to look to how the parties have interpreted the disputed language in the past"). However, as further explained in that award, that tool of construction can only be used "... when language is not clear" Here, the language is clear. With respect to per diem payments, assertions of past practice are therefore irrelevant.

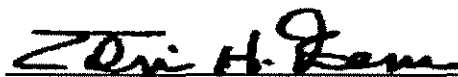
Finally on the per diem issue, this Board has examined *PLB 6638, Award 2* and finds that award distinguishable. That case involved three employees under a different agreement not applicable to this case who exercised their seniority to bid to gangs which had different work and rest day schedules and denied the claims for per diem payments for rest days when the gangs the employees bid to worked on rest days taken by the employees. See *id.* at 4-6, 10 (describing the facts as "... an on-line employee working a compressed half ... [claiming] rest day PD during the accumulated rest day period of the half when he is awarded a new assignment on a dif-

ferent on-line gang prior to the accumulated rest day period, that assignment has available work during such period, and employee chooses to enjoy the rest days of his prior assignment before reporting to the new assignment."). Those facts are similar to *Award 1* of this Board. This case involves identical work and rest day schedules of the two gangs with no work available on the rest days of the new gang for which per diem is claimed.

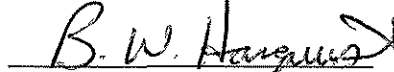
Turning to the travel allowance portion of the claim, the parties have resolved that dispute on a non-precedential basis therefore making this portion of the claim moot.

AWARD

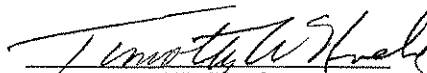
Claim sustained in accord with the findings.



Edwin H. Benn
Neutral Member



B. W. Hanquist
Carrier Member



T. W. Kreke
Organization Member

Chicago, Illinois

Dated: November 5, 2008

CARRIER MEMBER'S DISSENT
TO
AWARDS 3, 4 & 5 OF PLB 7156
(Referee Benn)

These cases involve the interpretation of Rules 17 and 36(b)(2) of the Agreement effective July 1, 2000. The Organization had recently taken the position that their members were entitled to rest day per diem allowances when they voluntarily bid to another gang allegedly per the language of Rule 36(b)(2).

Our position was based upon a long documented and consistent practice of ending an employee's working relationship with a gang on the last day they performed service. Those employees did not receive any benefits between their old and new assignment until such time as they reported to the new gang. We also substantiated that Agreement Rule 17 emphatically stated there would be no additional cost to the Carrier from exercise of seniority rights. Conclusively, based on all the above, the Carrier was not obligated to bridge the per diem allowance in such exercises of seniority.

The Majority in these claims determined that the agreement language of Rule 36(b)(2) was applicable to seniority moves when the gangs had like rest days. While Rule 36(b)(2) addresses per diem over a rest day period, it does not imply that an employees assignment which has historically ended with the last day of service performed on an assignment is now extended to when they report to their new assignment when moving to another assignment. Contrary to the majority's decision, the agreement does not provide the "clear" or "specific" agreement language it finds with its interpretation and thus the approximate 25

plus years applying the agreement with Award No. 298 allowances and the last 17 years with Rule 36(b) in the same manner must be recognized.

Agreements are to be read as a whole which was not done here. Therefore, the Carrier strongly dissents to the Awards and finds them to have no precedential value whatsoever.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "B. W. Hanquist". The signature is written in dark ink and is positioned above the printed name.

B. W. Hanquist
Carrier Member