

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 6

)

) Award No. 14

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: May 12, 2000

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when it failed and refused to pay System Gang 9011 employee T. L. Bogenreif the per diem allowance for on-line employees on Saturday, February 4 and Sunday, February 5, 1995 (System file N-189/950438).
2. As a consequence of the violation referred to in Part (1) above, Mr. T. L. Bogenreif shall now be allowed the per diem allowance for February 4 and 5, 1995.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Claimant worked his regularly assigned schedule on Friday, February 3, 1995. Saturday and Sunday, February 4 and 5, 1995, were his regularly assigned rest days. With Carrier's agreement, Claimant took one day of vacation on Monday, February 6, 1995. He returned to work on Tuesday, February 7, 1995. Carrier refused to pay Claimant the per diem allowance for Saturday and Sunday, February 4 and 5, 1995. The parties disagree over the application of Rule 39(e), which provides, in relevant part:

Employees assigned with headquarters on-line, as referenced in Rule 29, shall be allowed a daily per diem allowance of \$30.00 to help defray expenses for lodging, meals and travel.

The foregoing per diem allowance shall be paid for each day of the calendar week, including rest days, holidays and personal leave days, except it shall 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. . . .

Rule 39(e) also references Appendix W-1, which provides, in relevant part:

- (1) 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;
- (2) For Monday through Friday vacations, employees will be granted per diem allowances for the weekend immediately preceding the start of the vacation period and no other per diem allowance will apply or commence until the employee returns to work.

The parties disagree over whether Claimant was voluntarily absent on Monday, February 6, 1995. They also disagree over whether paragraph (2) of Appendix W-1 applies. With all due respect to the parties, we find that the attempts to apply the language of Rule 39(e) and Appendix W-1 are not particularly helpful in resolving this dispute. This is because the dispute arises from a situation that the Agreement clearly did not contemplate and, therefore, did not address expressly.


At the time the claim arose, the Agreement did not provide for employees to take vacation in anything less than a block of one week. Consequently, it is not surprising that the Agreement, through Appendix W-1, expressly provides how to treat rest days immediately before and immediately after Monday through Friday vacations. Employees receive their per diem allowances for the weekend immediately prior to the vacation but not for the weekend immediately following the vacation. It also is not surprising that the Agreement did not address how to treat per diem allowances where an employee takes less than a full week of vacation because such a situation simply did not exist under the Agreement.

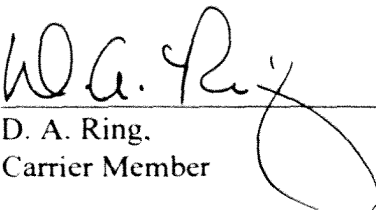
Although the Agreement did not allow for one day vacations, the practice on the property was to allow it. We are of the view that, because Claimant's ability to take a one day vacation was dependent on the practice on the property, the treatment of per diem allowances where a one day vacation is taken must also be governed by the practice on the property. During handling on the property, Carrier maintained that the consistent practice was not to pay per diem allowances for weekends preceding vacations of less than one full week. The Organization never denied the

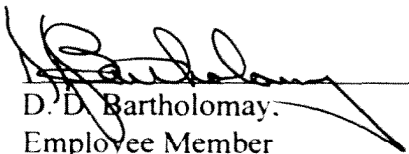
existence of such a practice. Although the Organization has argued that Carrier failed to present evidence of the practice, Carrier was not required to do so in the absence of an Organization denial of the practice's existence. Accordingly, we find that the practice governs this case and that the claim must be denied.

AWARD

Claim denied.



Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, July 25, 2000.