

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6402**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES )  
and ) Case No. 98  
UNION PACIFIC RAILROAD COMPANY ) Award No. 85  
\_\_\_\_\_ )

Martin H. Malin, Chairman & Neutral Member  
T. W. Kreke, Employee Member  
B. W. Hanquist, Carrier Member

Hearing Date: January 7, 2008

STATEMENT OF CLAIM:

- (1) The Agreement was violated when the Carrier refused to allow Mr. H. Sanchez to work his position on Gang 9169 on February 14, 2004 (System File MW-04-94/1399489 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. Sanchez shall now be compensated at his applicable rate of pay for all straight time and overtime hours lost to him on February 14, 2004 and for the loss of seven days of per diem.

FINDINGS:

Public Law Board No. 6402 upon the whole record and all of 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, who has seniority as a Machine Operator, was assigned to Gang 9169 on February 14, 2004. On that date, he reported 20 minutes late to work. The Supervisor of the Gang had previously admonished the employees that anyone reporting late to work would not be allowed to work that day. In accordance with his warning, the Supervisor did not allow Claimant to work on February 14. Because February 14, 2004, was the last day of the Gang's first compressed half, Carrier did not pay Claimant his per diem for the rest days at the end of the half.

The Organization contends that Carrier disciplined Claimant without a fair and impartial hearing in violation of Rule 21. We do not agree. The clear weight of authority holds that a carrier may refuse to allow a tardy employee not to work that day and such disallowance does not constitute discipline. See, e.g., Third Division Awards Nos. 37807, 36566, 27226. Accordingly, the claim for pay for February 14, 2004, must be denied.

The Organization further argues that Carrier violated the Agreement when it denied Claimant per diem for his rest days. This aspect of the claim turns on interpretation and application of Rule 36(b)(2), which provides:

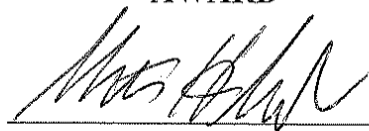
The per diem allowance will be paid for each day of the calendar week, including rest days, holidays and personal leave days. It, however, will not be payable for workdays that the employee is voluntarily absent from service, or for rest days, holidays or personal leave days when the employee is voluntarily 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 days. . . .

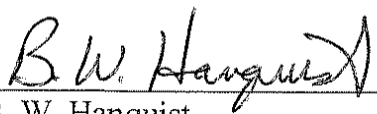
The Organization argues that Claimant was not voluntarily absent from service on February 14, 2004. He did not perform service because his Supervisor refused to allow him to work. We note that the claim which was denied in Third Division Award No. 36566 included a claim for per diem allowances, but we also note that the Award did not discuss the denial of per diem allowances or indicate the language of the Rule before that Board covering per diem allowances. Neither party has cited any other authority dealing with this precise issue.

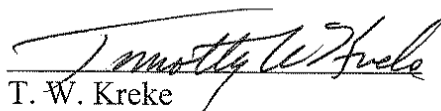
On the facts presented, however, we must deny the Organization's claim. There is no dispute that the Supervisor advised the Gang that anyone reporting for work tardy would not be allowed to work. Thus, when Claimant reported for work 20 minutes late on February 14, he did so knowing that the consequences would be that the Supervisor would not allow him to work. In this sense, Claimant, not the Supervisor, is responsible for his failure to work on February 14. Claimant voluntarily reported late and, under the circumstances, voluntarily absented himself from working that day.

**AWARD**

Claim denied.

  
Martin H. Malin, Chairman

  
B. W. Hanquist  
Carrier Member 4-9-08

 4-9-08  
T. W. Kreke  
Employee Member

Dated at Chicago, Illinois, March 31, 2008