

PUBLIC LAW BOARD NO. 6638

AWARD NO. 6

CASE NO. 6

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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 allow Gang 8576 employee J. V. Esquivel per diem allowance for the dates of November 9, 10, 11, 12, 13, 14 and 15, 2001 (System File C-0139-113/128537).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. V. Esquivel shall now '... be compensated for seven (7) days of per diem allowance at \$48.00 per day for a total of \$336.00."

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 case involves the issue of the entitlement under Rule 39(e) to a per diem (PD) allowance for accumulated rest days when the on-line gang

an employee works on is abolished at the end of the work portion of the compressed half and he exercises his seniority onto a fixed headquarter gang after the accumulated rest day period for the on-line gang.

Claimant was assigned to on-line Gang 8576 working a compressed work period including the first eight days of the half (November 1-8, 2001), with scheduled rest days from November 9-15, 2001. The gang was abolished effective the close of the shift on November 8, 2001. Under Rule 21, Claimant had 15 calendar days to displace another position before being considered self-furloughed. Claimant chose to exercise his seniority to headquartered Gang 4929 on November 19, 2001. Claimant asserted that he attempted to contact Carrier during his rest days to ascertain where he could displace, but was unable to get in touch with its representative until November 16, 2001 at 1:00 p.m., and thus did not learn where he could go until it was too late to work on that day. The record reflects that Carrier bridges rest day PD when an employee works the last day prior to and the first day following said rest days in on-line service. There is no Agreement provision for payment of PD to help defray expenses of fixed headquarter gangs.

Employees working in "on-line" service are permitted a PD allowance under the following terms of Rule 39 - Per Diem Allowances:

(e) **On-line Service.** Employees assigned with headquarters on-line, as referenced in Rule 29, will be allowed a daily per diem allowance of \$48.00 to help defray expenses for lodging, meals and travel.

The foregoing per diem allowance will be paid for each day of the calendar week, including rest days, holidays and personal leave days, except it 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. No elimination of days for per diem allowances or vacation credits will occur when a gang is assigned a compressed work week, such as four (4) ten-hour days.

Appendix X-1 (formerly W-1) defines "the employee is voluntarily absent" language of Rule 39(e) as "the employee has failed to render compensated service on a workday on which work was available to him."

The correspondence on the property, consistent with the arguments presented to the Board, reveal the Organization's position that the language of Rule 39(e) clearly provides for the payment of PD allowance for each day, including rest days, regardless of whether the on-line gang is working a compressed work week. It asserts that the only exceptions to PD entitlement set forth in Rule 39(e) are when Claimant voluntarily absents himself from service on either a scheduled work day or the workday immediately preceding or following his rest days. In this case the Organization argues that Claimant was not voluntarily absent from work on the work day immediately following his rest days since it was Carrier that chose to abolish his position prior to his accrued rest days, and Claimant reported to work on his new assignment at the first opportunity he had once he learned where he was able to displace.

The Organization contends that Claimant did not fit within the only exceptions specifically listed in Rule 39(e), and Carrier's attempts to imply a further exception for an employee whose position is abolished during a compressed half must fail, relying upon the contract construction principle of 'expressio unius est exclusio alterius' and Third

Division Awards 31300, 29865, 31398. The Organization notes the absence in the Agreement of any language supporting the position that Carrier may deprive an employee of PD previously earned in on-line service by abolishing his gang prior to the end of the compressed half, or by the mere fact that the employee next reports to a headquartered gang. The Organization advances an equity argument that the PD allowance was intended to be payable throughout the entire compressed work half in order to help employees defray their expenses during the working period, since the amount of PD does not fully cover employees' expenses while on the road.

Carrier initially notes that PD allowance by its very language is intended to help defray (not fully pay for) the expenses incurred by on-line employees, not to be treated as unemployment income or wages. It argues that when Claimant's position was abolished effective November 8, 2001, on-line Gang 8576 ceased to exist, and Claimant was no longer assigned to a position which was entitled contractually to receive PD allowance payments and was not incurring any expenses attributable to his former position. Carrier asserts that, even if an employee meets the eligibility requirements set forth in Rule 39(e) for rest day PD, its undisputed practice reveals that it will only bridge PD payments when the employee moves between on-line gangs, not into a headquartered gang with no entitlement to this expense reimbursement. Carrier contends that when or whether Claimant contacted its representative was never fully developed on the property and is not a determinative issue to the outcome of the claim, since he chose to exercise his seniority to a headquartered gang not eligible for PD allowance.

Carrier contends that the Organization has failed to meet its burden of proving that there is any specific Agreement language requiring it to

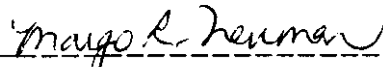
pay rest day PD when Claimant no longer performs compensated service on an on-line gang and does not have any expenses to defray, relying upon Third Division Awards 26033, 27851, 27895. Carrier points out that the Organization has never filed claims for PD entitlement associated with abolishments involving other work week arrangements.

The Board has fully considered the arguments of the parties and the record in this case. We conclude that the clear language of Rule 39(e) governs this dispute. In order for Claimant to be entitled to receive the rest day PD allowance requested in this claim he must meet the eligibility requirements, and not fall within the stated exceptions. The first eligibility requirement is that Claimant must be performing on-line service. The record reflects that Claimant ceased working on-line with the abolishment of Gang 8578 on November 8, 2001. He no longer had any rights attributable to his position in that gang since it no longer existed after November 8, 2001. Further, Claimant's decision to exercise his seniority onto a fixed headquarter gang rather than another on-line gang negates any entitlement to have his rest day PD allowance bridged in this case, consistent with Carrier's unrefuted practice of only doing so when an employee moves between on-line gangs and meets the eligibility requirements of Rule 39(e).

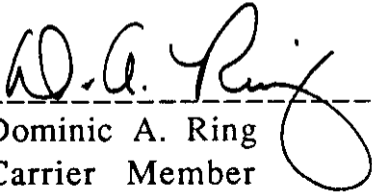
Accordingly, since the Organization failed to meet its burden of proving that Carrier violated the Agreement by denying Claimant his rest day PD as alleged, the claim must be denied.

AWARD:

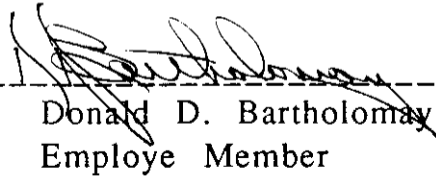
The claim is denied.



Margo R. Newman
Neutral Chairperson



Dominic A. Ring
Carrier Member



Donald D. Bartholomay
Employee Member

Dated: December 11, 2003

Dated: 12-11-03