

PUBLIC LAW BOARD NO. 6638

AWARD NO. 10

CASE NO. 10

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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 9035 employe S. G. Melendez per diem allowance for the dates of January 4 and 5, 2002 (System File C-0239-102/1305110).

(2) As a consequence of the violation referred to in Part (1) above, Claimant S. G. Melendez shall now be compensated \$50.00 for two (2) days of per diem allowance at \$48.00 per day for a total of \$96.00."

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 rest days when an employee is displaced on

the last day of his work week and does not exercise his seniority to displace to another gang immediately.

Claimant worked on Gang 9035 in Sidney, NE during the four (4) ten hour/day work week commencing Monday, December 31, 2001, which included some holidays. On Thursday, January 3, 2002, the last day of the work week, Claimant was displaced by a senior employee, but he was permitted to work on that day. Claimant placed himself on Gang 9052 in South Morrill on January 6, 2002. This claim seeks rest day PD for January 4 and 5, 2002, when the record reflects that Gang 9052 to which he displaced worked both January 4 & 5 as part of their regular work week. It appears that there was only 18 miles between the locations of Claimant's old and new gangs.

Before the Board, the Organization included a written statement from Claimant indicating that he could have placed himself on Gang 9052 on January 4 & 5, 2002 but that he called the appropriate NPS Carrier office in Omaha on January 4, 2002 to find out where he could place himself and they were unable to tell him exactly where the gang was. The Organization asserted that since Claimant did not find out the exact location of Gang 9052 until sometime thereafter, and he had to travel 187 miles from his home to get there, he made himself available at the first opportunity he had to work on that gang, January 6, 2002, and therefore met the eligibility requirement for rest day PD contained in Rule 39(e).

Carrier contends that Claimant's statement was not exchanged between the parties on the property, accounting for the fact that it did not rebut any of the information contained therein concerning Claimant's attempt to contact Omaha and the practice of locating new gangs, and requests that the Board not consider this evidence. In argument before

the Board, Carrier asserts that since gangs move daily, employees are given the supervisor's cell phone number to call to find out the gang's location, and that Claimant chose to drive home 187 miles on January 3, 2002 rather than travel the 18 miles to Gang 9052 to perform work that was available to him on January 4, 2002. Carrier argues that Claimant failed to satisfy the requirement of working both the day immediately before and after the rest days of his new assignment to be eligible for rest day PD under Rule 39(e). Carrier avers that accumulated rest days are not applicable to schedules of four (4) ten hour days, as they are under Rule 40(a) for compressed halves. It also appears that, in argument before the Board, Carrier contends that Claimant is not eligible for rest day PD since he was not assigned to an on-line gang or any gang after he was displaced, a contention not made during the processing of this claim on the property.

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."

It is 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 four (4) ten hour days. 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's inability to inform Claimant where Gang 9052 was working that prevented him from reporting prior to January 6, 2002, which it notes was one of his three rest days on Gang 9035.

Carrier argues that when Claimant was displaced from his position on Gang 9035 he could no longer claim any benefits associated with such gang, including entitlement to PD allowance as he was no longer incurring any expenses attributable to his former position. Carrier contends that Claimant fell within the specific exception to eligibility for PD allowance contained in Rule 39(e) since he was voluntarily absent from work when work was available to him on January 4 & 5, 2002, normal work days on Gang 9052. It notes that Rule 35(e) contemplates that employees moving between assignments can work and be paid for more than the normal 40 hours per week at the straight time rate of pay, depending on the work week schedules. Carrier contends that the Organization has failed to meet

its burden of proving that there is any specific Agreement language or established practice requiring it to pay rest day PD to Claimant in this case and requests that the claim be denied, relying upon Third Division Awards 26033, 27851, 27895.

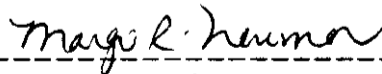
The Board has fully considered the arguments of the parties and the record that was exchanged between them on the property, and not new evidence or arguments presented for the first time before the Board. We find that the Organization has failed to sustain its burden of proving that Carrier violated Rule 39(e) in this case. That rule clearly requires an employee seeking rest day PD to meet the eligibility requirements which include working the day immediately before and after said rest days, which we have found in Award 2 of this Board is subject to the plausible interpretation that the rest days contemplated by the parties are no longer the ones associated with the old gang, but, rather, are those attributable to the new gang to which an employee may displace through an exercise of seniority. As Carrier notes, to permit an employee to sit home and not exercise his seniority when work is available to him after he has been displaced and maintain his eligibility for rest day PD when he incurs no expenses would be unjust enrichment not contemplated by the parties in the language of either Rule 39(e) or Rule 40(a).

Further, the parties clearly anticipated that employees exercising seniority and moving between assignments might be required to work in excess of 40 hours per week as a result of the schedule of the new gang in Rule 35(e). In such circumstances, the parties agreed that the employee would do so at the straight time rate of pay. That is the exact situation occurring in the instant case. Claimant was displaced at the end of his workweek, and exercised his seniority onto a gang who was in the middle of their workweek. Claimant was obliged to meet the new schedule to be

eligible for any rest day PD associated with the new gang. His failure to do so made him voluntarily absent under the language of Rule 39(e), and ineligible for the rest day PD claimed herein. 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:

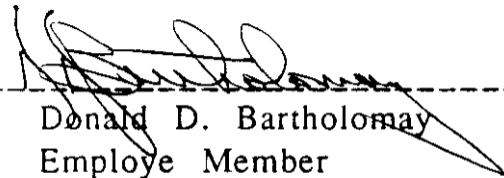
The claim is denied.



Margo R. Newman
Neutral Chairperson



Dominic A. Ring
Carrier Member



Donald D. Bartholomay
Employee Member

Dated: December 11, 2003

Dated: 12-11-03