

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 pay System Gang employees D. Swanson, K. Kulisky, R. Deming, B. Shannon, Jr., J. Jacobi and R. Upah their per diem allowances for the dates of March 24, 25, 26, 27, 28, 29, 30 and 31, 2003 (System File UPRM-9439T/1363944).

(2) As a consequence of the violation referred to in Part (1) above, Claimants D. Swanson, K. Kulisky, R. Deming, B. Shannon, Jr., J. Jacobi and R. Upah shall now each receive compensation of four hundred twenty-six dollars (\$426.00) for the per diem allowance for the aforesaid dates."

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 Claimants' entitlement under Rule 39(e) to rest day per diem (PD) allowance after completing their work days (March 16-23, 2003) in on-line System Tie Gang 9068 which works compressed halves, and returning to work on April 1, 2003 after their accumulated rest days and finding that they have been displaced prior to the start of their shift, are unable to displace less senior employees on different gangs until the following day, and do not perform compensated service for Carrier on April 1, 2003, the day immediately following their rest days. Claimants were not paid the rest day PD allowance for the period March 24-31, 2003 which this claim seeks.

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 (\$52.00 effective July 1, 2002) 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 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 an employee 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 Claimants were not voluntarily absent on April 1, 2003, and were forced to sit out against their will after they had appeared at the work site since work was not available to them until they could displace less senior employees on distant gangs on April 2, 2003, relying on Third Division Awards 31153, 29043, 28235.

Initially Carrier argues that this case presents exactly the same issue as the one decided between the parties under this Agreement language in Public Law Board No. 6638, Award 4, and that this Board should deny it based on the principle of *stare decisis*, citing Third Division Awards 29230, 27915; Second Division Award 10779; Fourth Division Award 4855. On the merits, Carrier contends that Claimants did not meet the prerequisites for rest day PD contained in the Agreement since they did not work on April 1, 2003, the day following their accumulated rest days. It notes that the language of Rule 39(e), read in conjunction with Appendix X-1, is clear and unambiguous in stating that an employee is voluntarily absent when he fails to render compensated service either before or after his rest days, as was the case with Claimants herein.

Carrier also asserted on the property, without contradiction, its historical practice of not allowing employees rest day PD when they do not perform compensated service both before and after their rest days. Carrier submitted both a statement from a supervisor to this effect and a letter dated December 5, 2002 from General Chairman Wehrli to General Chairman Tanner concerning how rest day PD was administered since it was negotiated and for the 10 years under his tenure. Said letter indicates that the main issue that arose concerning PD was which gang would have to pay it in a case involving a transfer between gangs due to an event such as a displacement, and not whether it was payable. Therein Wehrli stated that in their dealings with the gangs on this issue the Carrier representative made clear that the PD payment would only be made to employees if they satisfied the requirement of performing service on the work day immediately preceding the rest days as well as the work day immediately following their rest days. The written statement submitted by Claimant Shannon indicates that it is unfair that some supervisors pay employees show up pay when they are displaced so that they can get their rest day PD and others do not.

The Board has fully considered the arguments of the parties and the record in this case. We are in agreement with Carrier that the issue in the case is the same as that decided by Public Law Board No. 6638 in Award 4, although the facts concerning Claimant's subsequent actions are not. The Organization distinguishes that case on the basis of the fact that Claimant therein was entitled to displace a junior employee on the date of his displacement to maintain his eligibility to rest day PD but chose not to do so. However, Claimants herein also had seniority rights under the Agreement, and whether they were able to effectively exercise them on April 1, 2003 cannot change the fact that work was available to them on

other gangs on that date and they performed no compensated service on April 1, 2003.

This record contains specific evidence of Carrier's practice of administering rest day PD and the Organization's knowledge of the eligibility requirement of performing service on the work day immediately preceding the rest days as well as the work day immediately following the rest days. Unlike the cases cited by the Organization which dealt with the issue of the "availability for service" under the holiday rules of different agreements, the rest day PD language contained in Rule 39(e) of this Agreement raises the question of whether the employee is voluntarily absent on the relevant days as defined by the parties in Appendix X-1.

As the Board did in Public Law Board No. 6638, Award 4, we also conclude that the clear language of Rule 39(e), as defined in Appendix X-1, governs this dispute. In order for Claimants to be entitled to receive the rest day PD allowance requested in this claim they must meet the eligibility requirements, and not fall within the stated exceptions. It is undisputed that, despite reporting to the gang on the first workday immediately following their rest days, April 1, 2003, they did not perform any compensated service on that day. The Organization cannot meet its burden of establishing that work was not available to Claimants on that date merely by indicating that the gangs they eventually displaced into were located some distance from their reporting location and had earlier start times. Carrier asserted that work was available on those gangs and elsewhere on April 1, 2003, and Claimants understood the common practice of displacement prior to the start of a shift and what is involved in protecting an assignment for purposes of maintaining benefits. The Organization also was aware of Carrier's long time practice of requiring

compensated service on the day preceding and following the rest days in issue. Under such circumstances, Claimants meet the definition for being voluntarily absent contained in Appendix X-1, and fall within the stated exception for entitlement to rest day PD contained in Rule 39(e).

The principle of *stare decisis* applies to the findings of Public Law Board No. 6638, Award 4 with respect to the interpretation of Rule 39(e), in light of the language of Appendix X-1, for employees who are displaced prior to the start of the work day immediately following their rest days and do not perform compensated service for Carrier on that day, and requires that this claim be denied. Third Division Award 29230.

AWARD:

The claim is denied.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

Brant W. Hanquist

Brant W. Hanquist
Carrier Member

Timothy W. Kreke

Timothy W. Kreke
Employee Member

Dated: 4-23-08

Dated: April 23, 2008