BEFORE
PUBLIC BOARD No. 7097

Award No. 13
Case No. 13

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	
vs.	)	**PARTIES TO**
	)	**DISPUTE**
UNION PACIFIC RAILROAD COMPANY	)	

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier allowed System Gang 8561 employe J.H. Haluzak, Jr. To be displaced during his regular assigned work period on November 8, 2002, failed and refused to allow him compensation for said date and when the Carrier failed and refused to allow him the per diem allowance for the dates of November 1,2, 3, 4, 5, 6 and 7, 2002, and the travel allowance for the round trip from his work assembly point in Oakridge, Oregon to his residence in Caliente, Nevada and returning to his work assembly point in Oakridge, Oregon(System File C-0221-126/1350328).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J.H. Haluzak, Jr. shall now be compensated for eleven (11) hours' pay at his respective straight time rate of pay, eight (8) days' per diem at $52.00 per day and a travel allowance in the amount of $400.00."

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the Employes and Carrier involved in this dispute are respectively Employes and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

Claimant has established and holds seniority in the Track Subdepartment of the Maintenance of Way and Structures Department. He had been regularly assigned to Gang 8561, which was working a "consecutive compressed half" schedule. Claimant worked October 23 through 31, 2002, traveled from the gang's assembly point in Oakridge, Oregon to his residence in Caliente, Nevada for his accumulated rest days of November 1 through 7, 2002, and traveled back to Oakridge and reported to work on November 8, 2002. According to Claimant, the timekeeper approached him shortly after roll call on November 8, at approximately 5:05 a.m., and told him that he was being bumped that day. This was the first time that he was told he was being bumped, he asserts. When he complained to his supervisor that the bump came after the start of the shift, his supervisor merely said that it was "close enough," according to Claimant.

The Carrier concluded that Claimant had performed no service on November 8, 2002, and denied him pay for that day, Rule 36 travel allowance for the weekend round trip from his work location to his home and back, and Rule 39 per diem allowance for his rest days and for November 8. The Organization filed this claim asserting that the Carrier violated numerous provisions of the Agreement, including Rules 21(g), 36, 39, and Appendix X-1 by displacing Claimant during his regularly assigned hours, causing him loss of pay for the day, his per diem allowance for his rest days and November 8, 2002, and his weekend travel allowance for traveling from his assembly point to his residence and back again.

The Organization contends that the notice of displacement given five minutes after roll call came too late, under Rule 21 (g): Rule 21(g) provides that "Employees will not be permitted to displace junior employees during the regularly assigned work period of the employee being displaced." However, there is a significant dispute of fact on this point. Contrary to Claimant's account, the supervisor reported during the on-property processing, "All bumps are done before start of shift and we announce

over loud speaker who is bumped. Employee then has to re bump if he can before start of shift. At no time have we allowed any bumps after start of shift." This direct evidence from a supervisor involved is a greater quantum of evidence than that disapproved in Third Division Award Nos. 21090, 30209, and 30586, on which the Organization relies. Although the Organization submitted a co-worker's written statement corroborating the time (5:05 am) that the timekeeper spoke directly to Claimant, that statement did not address the supervisor's statement that there was a practice at that work location of making bump announcements by loud speaker prior to the start of the shift, and of barring bumps after start of shift, and the Carrier's conclusion that Claimant's displacement had been announced first over the loud speaker prior to the start of the shift that day. Because the Organization is the moving party, it bears the burden of proving a violation of Rule 21(g), and in light of this irreconcilable factual dispute ("evidentiary gridlock" in the words of Referee Eischen in Third Division Award No. 33895), this Board must find that a violation of Rule 21(g) has not been proved. The Organization also objects that an announcement over a loud speaker is insufficient to inform employes that they have been displaced, but has cited no contract provision or past practice that bars this procedure.

Because the Organization has failed to prove that Claimant was improperly displaced on November 8, 2002, the Organization has also failed to prove that the Carrier violated Rule 36 and Rule 39. Section 7 of Rule 36 provides an end-of-work-week travel allowance for traveling gangs. As Section 7(g) indicates, unless an exception applies, the travel allowance will be paid to employes "who complete a round trip from work to home to work." However, while Claimant returned to the assembly point of Gang 8561, the Organization has failed to prove that he returned "to work," since the evidence fails to prove that he had begun his shift before he was bumped. Thus, the Organization has failed to prove that Claimant was entitled to travel allowance under Rule 36.

The Organization asserts that this reasoning adds an exception to the travel allowance rule that is not included among the exceptions listed in Section 7(f). Section 7(f) begins (emphasis added):

> An employee filling a Group 20, 26,or 27 assignment **who completes a round trip from work to home to work** will not be granted an allowance pursuant to paragraph (a) of this Section when any of the

following conditions exist:

and then lists four conditions that bar receipt of travel allowance. However, Claimant is disqualified, not because of one of the conditions listed in Section 7(f), but because he failed the preliminary eligibility requirement of both Section 7(f) and Section 7(g): The Organization failed to prove that Claimant completed "a round trip from work to home to work." For this reason, his claim for travel allowance must be denied.

Finally, this Board finds that the Organization failed to prove that the Carrier violated Rule 39 by refusing to pay Claimant the per diem allowance for his rest days from November 1 through 7, 2002 and for November 8, 2002. Rule 39 (e) provides that a per diem allowance is provided to "employes assigned with headquarters on-line," but the per diem allowance

> will not be payable for workdays on which the employe is voluntarily absent from service, or for rest days, holidays or personal leave days when the employe 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.

The parties have clarified, in Appendix X-1 to the Agreement, that

> 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; . . .

Once again, the Board must assume that the Claimant was properly displaced prior to the start of the shift on November 8, 2002. There is no evidence that he attempted to exercise his seniority to bump into another position. The only question here is whether the Carrier is correct that the Claimant was "voluntarily absent" within the meaning of Rule 39(e) after he was displaced. In Award No. 4 of PLB 6638, the Board concluded that an employe had failed the requirements of Rule 39(e) and Appendix X-1under circumstances very similar to those here: An employee on a compressed schedule returned to work after his accumulated rest days, was displaced prior to the start of the shift, and was then denied per diem for the rest days and the first day thereafter. The Board held in that case that the employe had been "voluntarily absent" because he had been entitled to displace a junior employee and

to work on the day after his rest days, but failed to do so.

The Carrier also asserts that there has been a past practice to consider an employee voluntarily absent anytime an employee fails to render compensated service either before or after rest days, except for holidays or personal leave days. However, Appendix X-1, negotiated by the parties, is unambiguous in stating that an employee is voluntarily absent when the employee has failed to render compensated service on a workday on which work was available to him, so it is unnecessary to turn to the question of past practice. In this case, assuming as we must that the Carrier properly notified Claimant of his displacement prior to the start of his shift, it was Claimant's responsibility to exercise his seniority to secure another assignment. The record is clear that Claimant did not do so. There is no evidence that his efforts would have been in vain. Therefore, this Board finds that Claimant was "voluntarily absent" on November 8, 2002, the day immediately following his rest days, and the Carrier did not violate Rule 39 by refusing to pay Claimant per diem for November 1 through November 8, 2008. In sum, the Organization has failed to prove that the Carrier has violated the Agreement by bumping him after the start of his shift, by refusing to compensate him for the loss of work on November 8, 2008, or by refusing to pay him travel allowance or per diem for the periods cited.

AWARD

Claim denied.

Lisa Salkovitz Kohn
Neutral Member

Carrier Member
Dated: June 27, 2008

Organization Member