

PUBLIC LAW BOARD NO. 7098

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYEES DIVISION
(
(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 Mr. A. D. Reed the per diem allowance for the dates of May 24 through June 2, 2002 (System File SGRM-9638T/1335710)
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. D. Reed shall now be compensated for ten (10) days per diem for a total of four hundred eighty dollars (\$480.00).

The Carrier has declined this claim.”

FINDINGS:

Public Law Board No. 7098, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant worked a compressed half work period on on-line System Gang 9081 pursuant to Rule 40(a) of the Agreement. The gang’s work schedule was eight consecutive days of work each pay period followed by rest days for the remainder of the period.

The particular pay period here in issue is May 16 to 31, 2002. Pursuant to Section 5 (B) of Appendix T of the Agreement, the Claimant gave timely notice to his supervisor that he did not wish to move with the assignment of Gang 9081, which, effective June 1, 2002, was scheduled to move from CW territory in Minnesota to CE territory in Chicago. The Claimant thereafter reported for work and displaced on System Gang 9018 on Monday, June 3, 2002. That

gang, which was also headquartered on-line, worked a Monday through Thursday workweek of 10-hour days, followed by three days off. Gang 9018 had worked the week of Monday through Thursday, May 27 through 30, 2002, but the Claimant made no effort to displace on that gang during that week. The Carrier abolished the Claimant's position on Gang 9081 effective Thursday, May 23, 2002. His last pay period on Gang 9081 the Claimant worked eight consecutive days from May 16 through May 23, 2002.¹ The Claimant requested and obtained from the Timekeeper for the gang a letter that stated as follows:

TO WHOM IT MAY CONCERN:

THIS IS TO INFORM YOU THAT AS [of] THE CLOSE OF SHIFT ON 5/31/2002
EMPLOYEE A D REED . . . WAS RELEASED FROM THE #9081 SYSTEM GANG,
AND THE ABOVE MENTIONED EMPLOYEE HAS ALL THE REQUIRED SAFETY
EQUIPMENT IN THEIR POSSESSION, + WAS LAST PAID ON, DATE 5/31/ 2002

. . .

The Carrier paid the Claimant for the eight days he worked from May 16 to May 23 plus a travel allowance for each of the days May 24 to May 31, 2002. Later, however, he was notified that the payment for May 24 to 31 was in error, and the Carrier recouped the travel allowance payment for those days. The Organization then filed a grievance seeking travel allowance payment for the Claimant for May 24-31, 2002, plus Saturday, June 1, and Sunday, June 2, 2002.

Applicable Contract Provisions

The following provisions of the Agreement between the parties are relied on by the Carrier or the Organization as here pertinent:

Rule 39 - PER DIEM ALLOWANCES

. . .

¹ According to the correspondence between the parties, May 23, 2002, was a contractual holiday for the Claimant, and he was paid holiday pay for that day. It is not disputed that he did not miss any scheduled day of work between May 16 and May 23, 2002.

(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 and \$57.00 effective July 1, 2005) 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.

RULE 40 - ALTERNATIVE WORK PERIODS

(a) With the election in writing from the majority of the employees working on a project and with the concurrence of the appropriate Manager, a consecutive compressed half work period may be established where operations permit. The consecutive compressed half will consist of consecutive workdays that may be regularly assigned with eight (8) or more hours per day (i.e. 8, 9, 10, 11, or 12 hour workdays) and accumulated rest days. The consecutive compressed half will commence on the first calendar day of the payroll period unless changed by mutual agreement between the Manager and a majority of the employees. The consecutive compressed half arrangement will equal the number of hours worked as if the assignment was for a normal half with 8-hour workdays. Accumulated rest days for employees assigned to a gang working a consecutive compressed half arrangement will consist of the remaining days in the payroll period.

Appendix T, Section 5 (B)

(B) Employees with a seniority date of 1-1-98 or earlier assigned to Group 20, 26 or 27 positions who are not agreeable to moving with their assignment and having an assembly point off their home road/region territory, must personally notify their supervisor at least ten (10) working days prior to their assignment leaving their home road/region territory. If given orally, written confirmation of same will be promptly furnished and, in any event, before the employees vacate their assignment. Employees, who do not provide such notice, may be required to travel and assemble for work off their home road/region territory and release from their assignment would, then, be controlled by © below, or the normal provisions of the Collective Bargaining Agreement. (See Side Letter No. 5)

Positions of the Parties

It is the position of the Organization that under Rule 40 consecutive compressed half work schedules consist of consecutive workdays and accumulated rest days. Further, the Organization asserts, Rule 40 provides that "accumulated rest days" on such a schedule consist of the remaining days in the payroll period following the consecutive days worked in the payroll

period. It is clear, the Organization argues, “that Claimant’s accumulated rest days were part and parcel of his compressed half work assignment.” Rule 39 (e) then comes into play, according to the Organization, by requiring that a per diem allowance be paid for each day of the calendar week, including rest days, and specifying that there is to be no elimination of per diem allowances when a gang is assigned a compressed workweek. The Organization contends that none of the contractual exceptions disqualifying an employee from receiving a per diem allowance applies in this case.

The Carrier takes the position that the Claimant was not entitled to per diem payment for the rest days because the Claimant walked off of Gang 9081 in accordance with Section 5(B) of Appendix T of the Agreement. Since the inception of the Rule in 1998, the Carrier avers, it has never paid an employee per diem allowance following the last day he performed compensated service before voluntarily leaving the gang. In addition, the Carrier contends, Claimant has no valid claim for per diem allowance because he was voluntarily absent on the first workday that he could have worked on his new gang (Gang 9018) after he walked off his old gang (Gang 9081). Rule 39(e), the Carrier contends, precludes payment for rest days on an on-line position under such circumstances.

Further, the Carrier contends, recent awards by Public Law Board 6638 have determined that an employee is not entitled to per diem allowance after he is no longer assigned to a particular gang and he has a work opportunity available to him on another gang for which he did not exercise seniority on the first available day. In the present case, the Carrier contends, since work was available to the Claimant on Gang 9018 on May 27 through 30, 2002, and he did not exercise seniority to displace into that gang on any of those dates, he forfeited the right to payment of per diem allowance for the intervening rest days between May 23 and May 27, 2002 in accordance with the terms of Rule 39(e). The Carrier cites Rule 21(e) as the basis for its position that the Claimant had the right to exercise seniority into Gang 9018 at any time during a 15-day period after his position in Gang 9081 was abolished on May 23, 2002.

The Carrier argues that its stance in this case is also supported by Rule 35(e) that provides exceptions to the requirement for the payment of overtime where an employee works more than 40 hours or more than five days in the week. One of the exceptions is “where such work is performed by an employee due to moving from one assignment to another. . . .” That provision, the Carrier contends, bolsters its assertion that when an employee walks off an on-line system gang at the time that it leaves his home region, he is no longer assigned to an on-line gang with its per diem allowance and has the right immediately to exercise his seniority to displace into another gang. The Agreement, the Carrier contends, does not permit an employee to walk off an on-line gang but nevertheless continue to receive a per diem allowance applicable only to on-line gangs. Nor, the Carrier maintains, does the Agreement permit an employee to elect to delay reporting to his new assignment but nevertheless expect the Carrier to supplement his days off with a per diem allowance. The purpose of the per diem rule, the Carrier argues, is to help employees defray expenses while assigned to an on-line gang while working away from home.

The fact that the timekeeper gave the Claimant a paper stating that he was released from 9081 system gang at the close of the shift on May 31, 2002, the Carrier contends, is not determinative. The Carrier views this as “one union member (timekeeper) attempting to extend unwarranted per diem allowances to a fellow union member (Claimant).” There are no provisions in the Agreement, the Carrier argues, permitting it to hold an employee on a gang after he has voluntarily made his intentions known that he is not willing to work on the gang and voluntarily walks off. The timekeeper’s form stating that the Claimant was released following his rest days, the Carrier contends, does not supersede the specific language of the Agreement. The Organization has not met its burden of proof, the Carrier maintains, and the claim must be denied.

The Carrier asserts that even though there is no Agreement language requiring it to pay per diem allowance when an employee exercises seniority, it has done so as a matter of policy when an employee moves from one assignment to another and both assignments are

headquartered on line. In such a situation, the Carrier states, it requires that the employee move to the new assignment at the first available opportunity, allowing for reasonable travel time. The Carrier insists, however, that it has never paid per diem allowance where an employee voluntarily walks off a gang and that it has no obligation to do so.

Analysis

In his letter dated January 15, 2003, to the General Chairman BMWE, the Director Labor Relations enclosed what the letter referred to as an “abolishment notice that he [the Claimant] vacated his position on May 23, 2002.” The document is part of the record in this case and states “ABOLISHMENT: 05/23/02 0700 A.” It gives the title of the position as SYS ASST FOREMAN, notes that it is a permanent position, and that it is in Gang 9081. It is not disputed that the document pertains to the Claimant’s position.

The Organization, by its General Chairman, wrote to the Carrier’s Director Labor Relations on April 15, 2003, noting that the claim was conferenced on April 11, 2003, and that no settlement was reached. The letter makes no direct reference to the abolishment notice included in the Director Labor Relation’s letter of January 15, 2003. It does however take issue with the Director’s statement that the Claimant vacated his position on May 23, 2002, and denies that the Claimant’s position was abolished. Thus the General Chairman’s letter contains the following relevant statements numbered 2, 3, and 5:

2. Claimant cannot walk off the system gang until it actually leaves the home road region. The 9081 gang worked all of the work days on the CW region and did not work or move to the CE region until June 1, 2002.
3. The 9081 gang was allowed deferred starting time on June 1 to allow for the gang move from the CW region to the CE region, per Rule 30. This is when the gang moved, June 1st, and not on May 23rd. Otherwise, deferred starting time would have been allowed on May 23rd.
5. Claimant walked off the system gang and was not abolished. Since the gang couldn’t

change their headquarters until June 1st, the walk off could not have occurred before that time, and his displacement period could not have begun until June 1st as well.

Paragraphs 2 and 3 of the General Chairman's letter do not address the issue of whether the Carrier abolished the Claimant's position on May 23, 2002, as stated in the abolishment notice. Paragraph 2 deals with when the Claimant can walk off the gang and paragraph 3, with when the gang moved. Even if the Board accepts for the sake of discussion the Organization's position that the Claimant did not have the right voluntarily to leave Gang 9081 until the gang left its home road region, which paragraph 3 asserts occurred on June 1, it does not follow that the Carrier did not have the right to abolish the Claimant's position earlier.

In paragraph 5 the Organization, by the General Chairman, states that Claimant walked off the system gang and was not abolished. The Carrier, however, has produced a document, the authenticity of which is not challenged by the Organization, stating that the Claimant's position was abolished on May 23rd. In the absence of evidence that the document is not genuine, this Board must accept it as true and authentic.

The issue then becomes whether the Carrier had the right to abolish the Claimant's position in the middle of the pay period after he had completed all of the consecutive scheduled days of work of the compressed half pay period but before he commenced his accumulated rest days. That issue was decided by Public Law Board No. 6638, Award No. 6, involving these same two parties and the same Agreement. In Award No. 6 the claimant worked the first eight days of his compressed half work period (November 1-8, 2001) on an on-line gang and had scheduled rest days from November 9 to 15, 2001. The Carrier abolished the gang effective the close of the shift on November 8, 2001. The claimant bid on a headquartered gang on November 19, 2001. The Organization took the position that the per diem allowance was earned for all days of the pay period, including the rest days, when the claimant worked the eight consecutive scheduled workdays of the compressed

half and that the Carrier could not deprive the claimant of per diem allowance for the remaining days of the pay period, consisting of rest days, by abolishing his gang prior to the end of the compressed half pay period.

Public Board No. 6638 ruled as follows in the case:

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 [per diem] 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. . . .

It is clear from the foregoing holding of Public Law Board No. 6638 that that Board did not accept the Organization's position that the Carrier did not have the right to deprive the members of a gang of previously earned per diem allowance by abolishing the gang after its members had worked the entire work portion of the compressed half but before the start of the accumulated rest days. On the contrary, PLB No. 6638 permitted the Carrier to do so as is clear from its holding that the claimant "no longer had any rights attributable to his position in that gang since it no longer existed after November 8, 2001."

The principal difference between this case and Award No. 6 of Public Board No. 6638 is that instead of abolishing the entire gang after completion of only the work portion of the compressed half pay period, the Carrier abolished only the Claimant's position on the gang. The Organization has not cited any contract Rule which prohibits the Carrier from abolishing an individual position effective as of the last day actually worked in the position by an incumbent who has given proper notice that he is walking off the position. Nor is this Board aware that such prohibitory contract language exists in

the parties' Agreement. In the absence of the citation of any such contract language, this Board finds PLB No. 6638's decision in Award No. 6 controlling² and concludes that there is no basis for ruling that the Carrier has less power to abolish an individual position on a gang than to abolish all positions on the gang.

The Board finds that the Claimant's position on Gang 9081 ceased to exist after May 23, 2002, and that he was no longer a member of that gang after that date. He was therefore not entitled to per diem allowance for the rest days that employees who were part of Gang 9081 were paid for the period May 24 through May 31, 2002.

Nor was the Claimant entitled to bridge the days between his two on-line assignments on the basis of the recognized practice of allowing per diem allowance for the intervening days when an employee whose on-line position has been abolished exercises seniority to move to another on-line gang. According to the evidence such bridging is permitted only when the employee displaces into the new on-line gang at the first available opportunity, allowing for reasonable travel time.

The Claimant's last scheduled workday on Gang 9081 was May 23, 2002. His new gang worked on May 27 through 30, 2002, and he could have exercised his seniority to displace into the gang on any of those days, but elected not to. The practice of bridging non-work days when exercising seniority between two on-line gangs would therefore not apply to the Claimant since he did not move into the new assignment at the earliest available opportunity. Since, in any event, the Claimant did not meet all of the necessary

²Although, absent contract language making a prior award on an issue binding in future cases, the Board is not bound by prior awards, the Board will, as a general rule, follow a prior award involving the same parties and the same agreement if it is in point unless the Board determines that the prior award was clearly erroneous or there are other unusual circumstances. See Third Division Award No. 27810. Neither exception applies in this case.

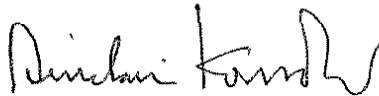
conditions for payment under the practice it is not necessary to determine in this case whether the practice applies in a situation where an employee walks off an on-line assignment pursuant to Section 5(B) of Appendix T of the Agreement.

A W A R D

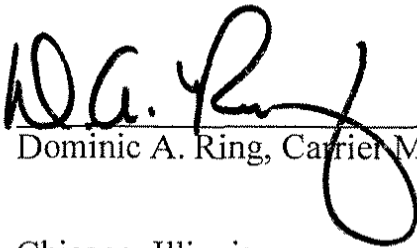
Claim denied.

O R D E R

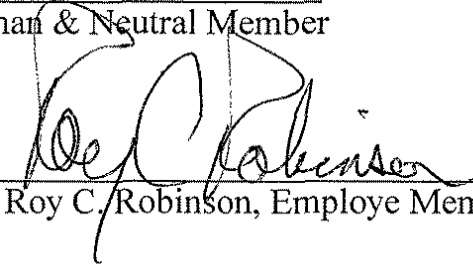
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.



Sinclair Kossoff, Chairman & Neutral Member



Dominic A. Ring, Carrier Member



Roy C. Robinson, Employee Member

Chicago, Illinois
Dated: July 29, 2008