

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 pay System Gang employees T. Zea, R. Shaurette, H. Jay, R. Johnson and C. Elmberg their per diem allowances for the dates of September 24, 25, 26, 27, 28, 29 and 30, 2002 (System File UPRM-9379T/1343949).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants T. Zea, R. Shaurette, H. Jay, R. Johnson and C. Elmberg shall now each receive compensation of three hundred sixty-four dollars (\$364.00) for the per diem allowance for the aforesaid dates.”

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.

Claimants were assigned to on-line System Surfacing Gang 9061. Pursuant to Rule 40(a) of the Agreement, they worked a compressed half work period consisting of eight consecutive days of work each pay period followed by rest days for the remainder of the period. In the first half of September, 2002, the Claimants worked September 1 through 8 and had accumulated rest days September 9 through 15. In the second half of the month their workdays were from September 16 through 23, 2002, with scheduled rest days for the remainder of the month. Sometime prior to September 23, 2002, in accordance with Section 5(B) of Appendix T of the Agreement, the Claimants gave notice to their supervisor that they were not agreeable to

moving with their assignment, which, effective October 1, 2002, was scheduled to move off their CW home road/region territory in Iowa to CE territory in Illinois.

On Tuesday, October 1, 2002, the Claimants exercised their seniority to displace into System Gang 9013, an on-line gang with the same compressed half work period schedule as their previous gang of eight workdays followed by rest days for the remainder of the pay period.

October 1, 2002, was the first day of the compressed half work period for both Gangs 9013 and 9061. Claimants were not paid per diem allowances for the accumulated rest days of September 24 through September 30, 2002. On October 23, 2002, the Organization by Vice Chairman R. D. Mulder filed a claim with the Carrier contending that the Claimants were entitled to be paid a daily per diem allowance for those rest days.

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

...

(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 (C) 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(a) 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 the Claimants’ accumulated rest days were part and parcel of their compressed half work assignment.” Rule 39(e), the Organization points out, requires that a per diem allowance be paid for each day of the calendar week, including rest days, and specifies 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 and that the Carrier’s decision to deny the Claimants per diem allowance violated the Agreement.

The Organization argues that by working their assigned consecutive compressed half schedule on Gang 9061 the second half of September, 2002, the Claimants accumulated the rest days for the remainder of the pay period. The Claimants, the Organization asserts, notified their supervisor at least ten working days prior to October 1, 2002—the date that Gang 9061 left CW territory—that they were not agreeable to moving with their assignment and having an assembly point off their home road/region territory. In addition, the Organization argues, it is undisputed that the Claimants immediately displaced and worked on Gang 9013 on October 1, 2002. “The salient point,” the Organization contends, “is that they could not be ‘released’ to exercise their seniority until October 1, 2002 when Gang 9061 left the territory and they were never ‘voluntarily absent’ and only momentarily ‘unassigned.’” Therefore, the Organization maintains, the Claimants were entitled to be paid per diem allowances for the rest days here in issue.

The Organization notes that Rule 39(e) provides specific exceptions when per diem allowances are not payable, namely, for workdays on which the employee is voluntarily absent

from service and 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. None of the exceptions applies, the Organization argues, and the maxim expressio unius est exclusio alterius forbids the Carrier from coming up with some additional exception to deny the Claimants their per diem allowances. The Organization reiterates that because there is “no dispute that the Claimants worked on the last workday of September 23, 2002 preceding their earned and accumulated rest days with Gang 9061 and displaced to work the first day work was available to them on Gang 9013, there can be no question but that they fulfilled the requirements to receive the claimed per diem allowances.”

The Organization takes note of the Carrier’s argument “that the Claimants were ‘unassigned’ the moment it ‘released’ them to exercise their seniority.” It rejects that argument, however, contending that “a careful reading of Section 5(B) of the System Gang Agreement (Appendix ‘T’) reveals that the Claimants could not exercise their seniority until Gang 9061 left the ‘CW’ territory in Iowa and moved onto the ‘CE’ territory in Illinois.”

The Organization further argues that there is a past practice acknowledged by the Carrier of allowing rest day per diems that bridge assignments between qualifying gangs when, as here, employees work the last day immediately preceding designated rest days and the first day work is available on a new qualifying assignment. The Organization cites Public Law Board No. 6638, Award No. 2, as recognizing the existence of such a practice.

The Carrier takes the position that since the inception of the rule effective January 1, 1998, allowing an employee voluntarily to “walk off” his gang when the gang leaves his home road territory, the Carrier has never paid the employee per diem allowance following the last day he performed compensated service before leaving the gang. Separate and apart from that practice, the Carrier argues, under the terms of Rule 39(e) of the Agreement the Claimants were no longer assigned to Gang 9061 after September 23, 2002, and were therefore not entitled to the

per diem allowance payable to employees who were assigned to the gang.

The Carrier disputes that there exists a practice as described by the Organization, namely, to bridge assignments between qualifying gangs whenever employees work the last day immediately preceding designated rest days and the first day work is available on a new qualifying assignment. The actual practice, according to the Carrier, is that “in most cases when an employee has an exercise of seniority (either bidding or displacement) between two ‘on-line’ gangs [the employee has] been allowed to bridge the per diem as long as they work the first available workday available to them at their new assignment.” The Carrier asserts, “This was done by company policy some years ago only for employees who bid, who had their positions abolished or who were displaced.” The Carrier insists that it “has never paid per diem to bridge positions following an employee invoking a Section 5(b) of Appendix ‘T’ . . .” such as in the present case. It stresses that this was pointed out on the property and was never disputed by the Organization. (emphases in the original).

Rule 39(e), the Carrier asserts, is specific that employees must be assigned to an on-line gang and render compensated service on the days that work is available to them in order to qualify for a per diem allowance. Rule 21(e), the Carrier states, increases the normal ten-day period for exercising seniority to 15 days for employees exercising seniority displacement rights into or away from positions which are working a compressed work period. According to the Carrier, Rule 21(e) means that employees have 15 days to exercise seniority from the last day they hold an assignment without incurring any wage loss. For an employee walking off an on-line gang, the Carrier argues, such as in the present situation, the 15-day period begins to run on the completion of the employee’s last workday on the gang and not on the completion of the following accumulated rest days. Consequently, the Carrier contends, as of the end of the shift on September 23, 2002, the Claimants vacated Gang 9061, thereby rendering them ineligible to receive per diem allowances.

The Carrier stresses that according to Rule 39(e) the purpose of a daily per diem

allowance is to help defray expenses for lodging, meals, and travel for employees assigned with headquarters on-line. When the Claimants vacated the 9061 gang, the Carrier contends, they were no longer assigned to an on-line gang and had no lodging or other travel expenses to defray.

Analysis

It is not disputed that pursuant to Section 5(B) of Appendix T of the Agreement, the Claimants gave at least ten working days' notice to their supervisor of their desire to vacate their assignment. The exact date that they gave notice is not found in the record. However, the latest date that they could have given notice can be figured out from the language of Section 5(B). That section provides that employees must notify their supervisor of their unwillingness to move with their assignment "at least ten (10) working days prior to their assignment leaving their home road/region territory."

Gang 9061 left the Claimants' home road/region territory on October 1, 2002. The ten working days of the gang prior to October 1, 2002, were September 7, 8, 16, 17, 18, 19, 20, 21, 22, and 23, 2003. Therefore, in order to comply with Section 5(B), the Claimants would have had to notify their supervisor no later than September 6, 2003, that they were not agreeable to move with their assignment. That would have provided the supervisor a full ten days of notice of their desire to be released from the assignment.

Section 5(B) further provides, "If given orally, written confirmation of same will be promptly furnished and, in any event, before the employees vacate their assignment." The sentence shows that the parties understood the expression "not agreeable to moving with their assignment" as synonymous with vacating their assignment. In other words, employees who wish to vacate their gang because it is moving to an assembly point off their home road/region territory must give at least ten working days' notice prior to vacating their assignment. When the ten days are up they have the absolute right to exercise their seniority in terms of bidding for or displacing into another job. Accordingly it must be found that the Claimants vacated their assignment to Gang 9061 effective as of the end of their workday on September 23, 2003, and

had the right to exercise their seniority as of that time. The Board so finds.

There is no evidence that the Carrier took any action on or after September 23, 2003, or on any other date that was inconsistent with Claimants' having vacated their positions after their shifts ended on September 23, 2003. There is no evidence of any assignment given to them on Gang 9061 after September 23 or of their being asked to accompany the 9061 gang to its new assembly point. The only peg on which the Organization hangs its hat is its contention that Claimants did not have the right to walk off a system gang until it actually left their home region. In support of that contention the Organization cited Rule 30(a) and Section 5(B) on the property. In its submission to the Board, the Organization argues that "a careful reading of Section 5(B) of the System Gang Agreement (Appendix 'T') reveals that the Claimants could not exercise their seniority until Gang 9061 left the 'CW' territory in Iowa and moved onto the 'CE' territory in Illinois."

The Board finds nothing in the language of Rule 30(a) that would be inconsistent with Claimants' having been released from or vacated Gang 9061 at the end of their ten-day notification period on September 23, 2002. The Organization relies on language in Rule 30(a) dealing with the number of miles that traveling on-line employees may normally be required to travel during a 24-hour period and during the unassigned hours between two consecutive workdays in moving to a new assembly point. In this case, however, the Claimants gave timely notice that they were not moving to the new assembly point. Rule 30(a) would therefore have no application to their situation in this claim.

With regard to Section 5(B), the most reasonable reading of that provision is that the Claimants were released from their assignment and able to exercise their seniority no later than the end of their shifts on September 23, 2002. Under the terms of that section the minimum amount of notice the Claimants were permitted to give that they were vacating their assignment was ten working days. The last working day during the payroll period was September 23, which meant that they had to give notice no later than September 6, as explained above. The rest days

may not be counted for purposes of the notification requirement. Once the ten days were up on September 23, 2002, the Claimants were free to vacate their positions and exercise their seniority to displace into another gang. This Board finds nothing in the language of Section 5(B) to indicate or suggest that the Claimants were required to wait until the expiration of the rest days in order to exercise their seniority.

So far as the record shows, the Carrier took no action to interfere with or delay the vacation of the Claimants' assignments on the 9061 gang as of that date. Nor does the Organization point to any evidence to indicate that the Carrier did not release the Claimants from their assignments on the 9061 gang as of the end of their shifts on September 23, 2002. Rather it relies on a legal argument that either Rule 30(a) or Section 5(B), or the two provisions read together, did not permit the Claimants to be released from their 9061 gang assignment prior to October 1, 2002. The Board has found no merit to that argument for the reasons stated. The Board finds that Claimants vacated their assignments to Gang 9061 as of the end of their shifts on September 23, 2002, and were free to exercise their seniority at that time.

When the Claimants vacated Gang 9061 on September 23, 2002, they were no longer members of that gang. Their situation was the same as that of the claimant in Public Law Board Case No. 6638, Award No. 6, whose position on an on-line gang was abolished on November 8, 2001, at the end of the work portion of his compressed half work period. The Board in that case denied him per diem allowances for his accumulated rest days following that date, explaining, "He no longer had any rights attributable to his position in that gang since it no longer existed after November 8, 2001." Similarly when Claimants vacated their Gang 9061 positions on September 23, 2002, they no longer were assigned to that gang and consequently had no right to receive per diem allowances payable to employees who were assigned to the gang.

The Organization argues that in any event the Claimants are entitled to prevail because of the recognized practice, as noted in Award No. 2 of Public Law Board No. 6638, whereby "Carrier has historically bridged PD [per diem] allowance when an employee works the last day

of the prior assignment and the first day of the new assignment, even if rest days begin the new compressed half, permitting a reasonable amount of travel time for the employee to get to the new assignment.”

The Carrier, however, describes the practice somewhat differently: “[I]n most cases when an employee has an exercise of seniority (either bidding or displacement) between two ‘on-line’ gangs [they] have been allowed to bridge the per diem as long as they work the first available workday available to them at their new assignment. This was done by company policy,” the Carrier asserts, “some years ago only for employees who bid, who had their positions abolished or who were displaced. . . .” (emphasis in original).

The evidence supports the Carrier’s version of the practice. For example, Public Law Board No. 6638 stated in Award No. 2 that the case involved “the consolidation of three claims dealing with the issue of the entitlement to a per diem (PD) allowance for accumulated rest days when an employee moves from one on-line gang working compressed halves to another on-line gang as a result of the exercise of seniority.” The particular exercises of seniority that occurred in that case were bids onto other on-line gangs that were awarded to the claimants with effective dates prior to or at the end of their respective compressed half work periods. The claimants had been released to report to their new assignments immediately but had failed to do so. Award No. 2 did not involve a case of an employee voluntarily walking off an on-line gang.

Public Law Board No. 6638 had occasion to refer to the same practice in Award No. 8. That time the Board described the practice consistent with the Carrier’s statement in the present case: “The record reflects that Carrier has a practice of bridging rest day PD for on-line employees exercising seniority when they immediately move from one on-line assignment to another.” (emphasis added). The particular exercise of seniority involved in that case was “to displace to another on-line gang after the accumulated rest day period designated for the abolished on-line gang.” PLB No. 6638 Awards Nos. 2 and 8 are in harmony with the Carrier’s position in this case that the practice applies “only for employees who bid, who had their

positions abolished or who were displaced.”

The Organization has presented no evidence that the Carrier has ever applied the practice in a walk-off situation. On the contrary, during the handling of this claim on the property the Carrier unequivocally stated in its correspondence with the Organization, “Historically, the Carrier has never paid employees who utilize Section 5(b) in the Consolidated System Agreement.” It also provided the Organization with a written statement from the Supervisor NPS Timekeeping Operations, who stated that he has been Non Operating Timekeeping Supervisor since June 11, 1997, and that it has always been his understanding that “employees were not due travel or per diem allowance on non service days while exercising their seniority rights by walking off one gang and placing on another.”

Neither the Carrier’s correspondence on the issue or the timekeeping supervisor’s statement was contested by the Organization on the property. The Organization’s failure to challenge on the property the Carrier’s position regarding the historical picture concerning payment to employees who walk off one gang and place on another makes it very doubtful that the practice cited by the Organization applies to walk-off situations. The fact situations of PLB No. 6638 Awards Nos. 2 and 8, on the other hand, support the Carrier’s contention that the practice applies where an employee exercises seniority to move from one on-line gang to another as the result of a bid award, abolishment of the employee’s position, or displacement of the employee.

There remains for consideration the question of whether the claim should be sustained on the ground that the Carrier acted arbitrarily in treating the exercise of seniority in a walk-off situation differently from the three situations where the Carrier acknowledges a practice to bridge per diem as long as the employee works the first workday available to him on the new on-line assignment. The Board believes that the Carrier’s action in this case cannot be deemed to be arbitrary. Where the employee’s position is abolished or he is displaced, he is entirely passive and a “victim” of circumstance. It is fair to protect his per diem so long as he works the first

workday available to him in the new position.

In the case of a bid award, the employee is filling an open position posted by the Carrier. Bridging per diem promotes the filling of vacant positions, which is in the interest of both the Carrier and the employees. In addition, the successful bidder has no control over the effective date of the bid award. It is not in the Carrier's interest, however, to promote the voluntary walking off of gangs. This Board cannot say that the Carrier acted irrationally or arbitrarily when it decided not to apply the same practice regarding the bridging of per diem where seniority is exercised in moving between on-line gangs in a walk-off situation as it does where seniority is exercised in moving between such gangs as a result of a position abolishment, displacement, or bid award.

When the Claimants vacated their positions at the end of their shifts on September 23, 2002, they were no longer part of Gang 9061, and the Carrier was within its rights in declining to pay them a per diem allowance for the rest days on which they were no longer members of the gang. The evidence shows that the Carrier acted consistent with how it has handled walk-off situations since Appendix T became part of the parties' collective bargaining agreement.

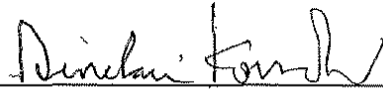
A W A R D

Claim denied.

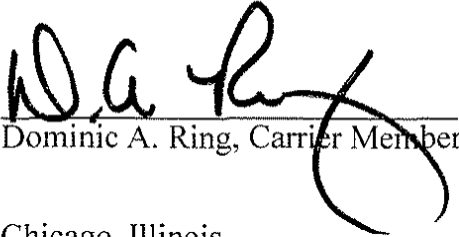
O R D E R

This Board, after consideration of the dispute identified above, hereby orders that

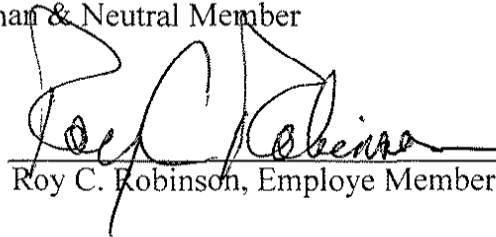
an award favorable to the Claimants not be made.



Sinclair Kossoff, Chairman & Neutral Member



Dominic A. Ring, Carrier Member



Roy C. Robinson, Employee Member

Chicago, Illinois
Dated: July 31, 2008