

PUBLIC LAW BOARD NO. 7156

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
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 failed and refused to pay "on-line" employee D. Ortiz the per diem allowance, pursuant to Rule 36, for October 9, 10, 11, 12, 13, 14 and 15, 2005. (System File MW-06-06/1436868 MPR).
2. As a consequence of the violations referred to in Part (1) above, Claimant D. Ortiz shall now be paid the per diem allowance for October 9, 10, 11, 12, 13, 14 and 15, 2005.

OPINION OF BOARD

Claimant was assigned to System Gang 9112 which worked an alternate work schedule. On September 30, 2005, Claimant was awarded a position on System Gang 9293, which also worked a alternate work scheduled. As allowed by the Agreement, Claimant was temporarily held over for on System Gang 9112. Claimant then worked all of

the workdays for the first work period of October 2005 with Gang 9112, his last day being October 8, 2005.

Claimant was instructed to report for training duty on October 16, 2005 on his new assignment on System Gang 9293. Claimant did so.

The record reveals that at the time this dispute arose, the alternate work schedules worked by Gangs 9112 and 9293 had the same work cycle start dates. Thus, when Claimant reported to Gang 9293 on October 16, 2005 to begin his new assignment, Gang 9112 was also starting its work cycle.

The parties agree that the facts in this case are similar to those in *Awards 3 and 4* of this Board. Therefore, it is fair to conclude that not only did Gangs 9112 and 9223 have the same work cycle start dates, they also had the same rest days. That being the case — *i.e.*, that the gang from which Claimant

came (9112) and the gang to which Claimant bid (9223) had the same work and rest days — the principles set forth in *Award 3* of this Board govern this case:

With respect to the claim for per diem allowance, Rule 36(b)(2) governs. Rule 36(b)(2) is clear — “[t]he per diem allowance will be paid for each day ... including rest days ... [i]t, however, will not be payable ... for rest days ... when the employee is voluntarily absent from service when work is available to him on the workday immediately preceding or ... following such rest days” Given the identical work and rest day schedules of the gang Claimant came from (9196) and the one Claimant bid to (9166), during the rest days in dispute, Claimant missed no work days and was not “... voluntarily absent from service when work is available to him on the workday immediately preceding or ... following such rest days” Aside from the fact that Claimant’s assignment to Gang 9166 was not effective until March 18, 2005 — a date in the middle of both gangs’ rest cycles — Claimant was not “... voluntarily absent from service ...” on the rest days in dispute because both gangs were observing the same rest days. Absent that condition, Rule 36(b)(2) clearly requires that “[t]he per diem allowance *will be paid* for each day ... including rest days ...” [emphasis added]. Given the identical work and rest cycles of the two gangs, Claimant was entitled to per diem allowance under the clear language of Rule 36(b)(2).

For reasons set forth in *Award 3*, the claim for per diem allowance has merit.

For similar reasons set forth in *Award 3*, the Carrier’s arguments do not change the result. And as we

found in *Award 4* due to the identical work and rest days of the two gangs:

One argument raised by the Carrier in this case — as was raised in *Award 3* — is the Carrier’s contention that under Rule 17 the Carrier is not to incur additional expense as a result of an employee’s exercise of seniority rights. As in *Award 3*, because the rest days of the two gangs were identical in this case, the Carrier will incur no additional expense due to Claimant’s exercise of his seniority rights:

Rule 17 (“[e]mployees accepting a position, in the exercise of their seniority rights, will do so without causing extra expense to the railroad”) does not require a different result because there was no additional expense to the Carrier due to Claimant’s exercise of his seniority rights. If Claimant had not exercised his seniority rights to bid from Gang 9196 to Gang 9166, he would have received per diem for rest days under Gang 9196’s rest days. By paying Claimant per diem in this case, the Carrier is not incurring any additional per diem expense due to Claimant’s exercise of his seniority rights. This is not a case where the employee attempts to gain per diem payments as a result of the exercise of seniority rights by attempting to use rest days from a prior gang after transferring to another gang which is working. Compare *Award 1* of this Board. This is a case where Claimant would have received per diem for the same days irrespective of the gang to which he was assigned. If anything, because of the identical schedules and the fact that the Carrier would have paid Claimant per diem for the rest days had he not bid from Gang 9196 to Gang 9166, by denying Claimant per diem in this case,

the Carrier is, for all purposes,
punishing Claimant for exercising
his seniority rights.

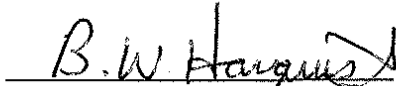
Claimant shall be paid the per
diem allowance for the rest days in
dispute.

AWARD

Claim sustained.



Edwin H. Benn
Neutral Member



B. W. Hanquist
Carrier Member



T. W. Kreke
Organization Member

Chicago, Illinois

Dated: November 5, 2008

CARRIER MEMBER'S DISSENT
TO
AWARDS 3, 4 & 5 OF PLB 7156
(Referee Benn)

These cases involve the interpretation of Rules 17 and 36(b)(2) of the Agreement effective July 1, 2000. The Organization had recently taken the position that their members were entitled to rest day per diem allowances when they voluntarily bid to another gang allegedly per the language of Rule 36(b)(2).

Our position was based upon a long documented and consistent practice of ending an employee's working relationship with a gang on the last day they performed service. Those employees did not receive any benefits between their old and new assignment until such time as they reported to the new gang. We also substantiated that Agreement Rule 17 emphatically stated there would be no additional cost to the Carrier from exercise of seniority rights. Conclusively, based on all the above, the Carrier was not obligated to bridge the per diem allowance in such exercises of seniority.

The Majority in these claims determined that the agreement language of Rule 36(b)(2) was applicable to seniority moves when the gangs had like rest days. While Rule 36(b)(2) addresses per diem over a rest day period, it does not imply that an employees assignment which has historically ended with the last day of service performed on an assignment is now extended to when they report to their new assignment when moving to another assignment. Contrary to the majority's decision, the agreement does not provide the "clear" or "specific" agreement language it finds with its interpretation and thus the approximate 25

plus years applying the agreement with Award No. 298 allowances and the last 17 years with Rule 36(b) in the same manner must be recognized.

Agreements are to be read as a whole which was not done here. Therefore, the Carrier strongly dissents to the Awards and finds them to have no precedential value whatsoever.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "B. W. Hanquist". The signature is written in a cursive, flowing style with a large initial "B" and a stylized "H".

B. W. Hanquist
Carrier Member