Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30518
Docket No. MW-29569
94-3-90-3-516

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Southern Pacific Transportation Company
((Eastern Lines)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned Laborer A. Q. Giner to fill a laborer driver vacancy on Extra Gang 384 at El Paso, Texas from May 29, 1989 through July 4, 1989 instead of recalling furloughed Laborer-Driver D. G. Galindo (System File MW-89-92/485-41-A).

(2) As a consequence of the violation referred to in part (1) hereof, Laborer-Driver A. Q. Galindo shall be allowed two hundred sixteen (216) hours at his pro rata rate of pay."

FINDINGS:

The Third Division of the Adjustment Board, 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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Carrier allegedly violated the Agreement when it called the Laborer to fill a Laborer-Driver vacancy in lieu of Claimant, who established and holds seniority as a Laborer-Driver in the San Antonio District as of September 4, 1984. Prior to the time of this dispute, Claimant had been furloughed.

It is not disputed that in February 1989, a Carrier Labor Clerk contacted Claimant and offered him a temporary vacancy on Extra Gang 384 in Marfa, Texas. Claimant responded that he was planning on attending a class to become certified as a jailer for the Brewster County Sheriff's Department. For that stated reason, he declined the temporary vacancy. It is at this juncture, however, that the Parties recollection of subsequent events conflicts.

The Organization maintains that subsequent to Carrier's call of February 1989, Claimant "...periodically checked with Clerk Powell as to the availability of positions he could work in accordance with his seniority." Carrier asserts that the Labor Clerk offered the temporary vacancy on Extra Gang 384 to Claimant again during the first week of May 1989, but that he again turned it down. According to the Labor Clerk, Claimant told her that he had a "good job as a jailer with the Brewster County Sheriff's Office and did not want to quit that job to return to SPTCO for a temporary assignment." The Organization asserts it filed the claim because "commencing May 29, 1989 and continuing through July 4, 1989, Carrier assigned Track Laborer A. Q. Giner, 'who holds no seniority whatsoever' as a Laborer-Driver, to work on Extra Gang 384 in lieu of recalling Claimant."

Unfortunately, the Board is faced with an irreconcilable conflict of material fact in this record, compounded by credibility problems. The Submission presented by each Party is in direct conflict with regard to whether Claimant declined the call to cover the May 1989 temporary vacancy. The Organization asserts that Claimant "kept in contact with Carrier," while Carrier maintains that it contacted Claimant for the vacancy, and Claimant "declined" to accept it. (The Board notes that Claimant does not deny declining the earlier recall in February 1989). Claimant and the Organization have the burden of making out at least a **prima facie** case. When faced with such a conflict in the facts necessary to substantiate a claim, the Board has held that the claim should be dismissed. See Third Division Awards 29270, 29236 and 26604.

AWARD

Claim dismissed.

ORDER

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 9th day of November 1994.

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LABOR MEMBER'S DISSENT
TO
AWARD 30518, DOCKET MW-29569
(Referee Eischen)

In this dispute, the Carrier violated the Agreement when it failed to fill the vacancy involved here as provided in Article 3, Section 8, which provides that the senior laid off employe (Claimant) in the seniority group and seniority district will be given preference in employment and that notification of vacancies to be filled by recall will be made by mail or telegram to the employe's last known address. The Agreement does not contemplate that an employe would be recalled to service by telephone or any other means of notification other than by mail or telegram. In this case, the claim was filed contending that the Carrier violated the Agreement when it failed to recall the Claimant as provided in Article 3, Section 8. The Carrier never once even so much as asserted that it had complied with the Agreement by notifying the Claimant (or anyone else) of the vacancy by mail or telegram. Hence, a prima facie case was established. If the Majority's comment that the Organization has the burden of making out a prima facie case is meant in any way to suggest that it failed to carry that burden, such a suggestion is simply wrong.

The Carrier attempted to defend its actions not by challenging the Organization's prima facie case, but by asserting as an affirmative defense that the Claimant had been offered the position

in dispute by the Labor Clerk over the telephone and that the Claimant declined to accept said position. Of course, by asserting such a defense, the Carrier was admitting that it failed to comply with the Agreement. All that was left was for the Majority to sustain the claim on the basis of the admitted Agreement violation.

The Majority chose not to sustain the claim on the basis of the aforesaid undenied violation of the Agreement, but decided to dispose of this claim based on the Carrier's affirmative defense. Inasmuch as the Carrier's affirmative defense failed to address its admitted violation of the Agreement, the Majority's decision to rely on said defense was in error, rendering this award palpably erroneous and without value as precedent.

Notwithstanding that the Majority was wrong to rely on the Carrier's aforementioned defense, the Majority embraces a basic fallacy in its analysis of said defense and its application. First, the Majority erroneously found that "Unfortunately, the Board is faced with an irreconcilable conflict of material fact in this record, compounded by credibility problems. ***" However, an irreconcilable factual dispute does not arise merely by declaration. The Organization submitted a written statement from the Claimant attesting to the fact that he was never offered the

vacancy in question. However, instead of presenting a written statement from the Labor Clerk to establish whether she had, in fact, contacted the Claimant by telephone to inform him of the subject vacancy (which the Board could properly have considered first-hand evidence, even though it would not have addressed the underlying Agreement violation), the Carrier chose instead to rely on hearsay assertions from the Roadmaster, who was not a party to any alleged conversation between the Labor Clerk and the Claimant. It is a basic principle that first-hand evidence is to be given far greater weight than hearsay. Hence, the only proper conclusion in this case would have been to resolve the alleged conflict in facts in favor of the only first-hand evidence in the record. Of course, the first-hand evidence established that the Claimant was never notified of the vacancy at issue here by any means whatsoever. The Majority's failure to credit first-hand evidence over hearsay was erroneous.

Finally, even if there were an irreconcilable conflict in facts, the alleged conflict in facts involved substantiation of the Carrier's affirmative defense. It is so well established as to be beyond question that the party asserting an affirmative defense must bear the burden of proving such defense. Awards 17051 and 21090. Hence, where an irreconcilable conflict in facts involving

the Carrier's affirmative defense truly does exist, it is the affirmative defense which must be dismissed for lack of proof and the claim sustained.

Inasmuch as the Majority erred when it failed to sustain the claim based on the clear and unambiguous language of the Agreement and instead dismissed the claim based an unproven affirmative defense which failed to address the undenied violation of the Agreement, this award is palpably erroneous and has no precedential value.

Respectfully submitted,

G. L. Hart
Labor Member