Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36521
Docket No. MW-35378
03-3-99-3-250

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Santa Fe Railway (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier recalled junior Group 3 Machine Operator J. M. Moe, instead of senior furloughed Group 3 Machine Operator D. K. Wald, to fill a temporary vacancy from January 24 through February 7, 1997 (System File T-D-1284-H/MWB 97-04-23AK BNR).

(2) As a consequence of the aforesaid violation, the Claimant shall '. . . receive pay equal to that received by the junior employe a total of $2628.07. We further request that Claimant be accredited for any and all other benefits, including vacation accreditation, all insurance, retirement and unemployment accreditation and accreditation for the lost hours relative to lump sum payments and accreditation for job protection benefits.'"

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 were given due notice of hearing thereon.

There is no dispute on the following facts. The Manpower Call Sheet indicates that a request was called in by Roadmaster Busch on January 20, 1996 for the creation of a temporary position of less than 30 days of a Group 3, Snow Dozer to be operated around Stanley, North Dakota. The record is clear that the Carrier did not begin contacting employees for the position until 4:50 P.M. on January 23, 1996. The Claimant was the second employee called at 4:55 P.M. and the Carrier left a message that it attempted to call him. After six refusals and some messages left, the thirteenth employee (junior to the Claimant) was called at around 5:20 P.M. and accepted the position which began work the following morning.

The Organization alleged a violation of Seniority (Rule 2A) and Rule 9 in the failure of the Carrier to properly recall the Claimant in seniority order. It notes that the Claimant desired to work and called back at 8:00 A.M. the following day. The Organization notes that the Manpower Office did not receive calls after 5:00 P.M. It argues that both the Claimant and the junior employee were in furloughed status under the provisions of Rule 9 and argues on the property and before the Board that the Claimant lost work opportunity by the Carrier's actions. It argues that a single call is clearly improper and it is unreasonable to deny work to a senior employee who desires to work. Even if the junior employee worked the next day, the Carrier had an obligation to replace the junior employee with the Claimant at the first opportunity. Failing to do so, the Carrier violated the Agreement.

The Carrier not only denies that its actions were a violation of the seniority provisions, but also that Rule 9 is applicable. The Carrier maintains throughout this dispute that the applicable provision of the Agreement is Rule 19(a). It argues that Rule 9 does not apply. It is the Carrier's position that the vacancy was for less than 30 days and therefore Rule 19(a) was applicable. As such, the Snow Dozer position was to be filled first by those employees who had a written request on file for the vacancy. There were no employees who had filed a request. Therefore, and considering the blizzard conditions that occurred, Manpower could not wait for return calls and continued to call until the junior employee accepted. That employee was working by the time the

Claimant returned the call the next morning. The Carrier maintains that because the disputed vacancy was filled by Rule 19(a), it followed the voluntary basis of the Rule.

The Board finds that Rule 9 does not apply. It clearly was written to apply to either new positions or "vacancies of more than thirty (30) calendar days' duration. . . . " This position worked only for 15 days. Rule 19(a) applies to a new position or "vacancy of thirty (30) calendar days or less duration." Rule 19(a) has restrictions on the Carrier's obligations, but none that are applicable to this instant set of facts. There was no showing that a senior employee "who has on file a written request to fill such vacancy" was run around. Additionally, because there is no written provision requiring the Carrier to act as the Organization suggests, the Board looked for practice and found none provided by the Organization to support its position.

Rule 2 holds that:

> "Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided."

We find no evidence of record or argument therein that the Carrier failed to call for the temporary Snow Dozer position in seniority order. We find no evidence that the junior employee was called first when a volunteer was needed for the Snow Dozer position. Nor do we find any evidence that a single call for a position that can be refused without penalty provision in Rule 19(a) violates practice, the Agreement or is unreasonable under the conditions of this record. There is no rebuttal to the Carrier's position that the events of this record were precipitated by "emergency weather conditions [which] did not afford Manpower the luxury of waiting around until more senior employees returned their calls." Nor do we find any Rule cited or practice demonstrated that would permit the Claimant to remove the junior employee from the temporary position he had elected to accept and was already working. As such, the claim must be denied.

AWARD

Claim denied.

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 23rd day of April 2003.

LABOR MEMBER'S DISSENT
TO
AWARD 36521, DOCKET MW-35378
(Referee Zusman)

The findings of the Majority in this dispute has rewarded the Carrier for its failure to comply with the seniority provisions of the Agreement. The Claimant in this case was furloughed at the time this dispute arose and was awaiting recall to service. The record reveals the Carrier determined that it was necessary to fill a temporary machine operator vacancy. Under date of January 20, 1997, the Roadmaster contacted its Manpower Office to arrange for an employe to be called to fill the vacancy. Three (3) days later, the Carrier's Manpower Office called the Claimant at 4:55 P.M. The record clearly reveals that the Manpower Office accepts calls from employes between the hours of 7:30 A.M. and 5:00 P.M. The Claimant was not at home when the call was placed; however, the Carrier left a message for the Claimant to return the call. As the award reflects, the Claimant returned home, retrieved the message left by the Carrier and returned the call. By the time the Claimant returned the call the following business day, the Carrier had assigned the vacancy to a junior employe. The Majority strained at a gnat and swallowed a camel in its attempt to reason its way around the provisions of Rule 2, which states:

"RULE 2. SENIORITY RIGHTS AND SUB-DEPARTMENT LIMITS

A. Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided."

Ignoring the above-cited general consideration rule, the Majority then launched into a search for specific language in the Agreement that would defeat the Organization's position here. Rather than reinforcing **Award 5 of Public Law Board No. 4768**, involving these same parties, which was cited by the General Chairman during the on-property handling and attached to our Submission as Employes' Exhibit "D-1", it made the unbelievable conclusion that the Carrier was not obligated to contact anyone in seniority order when a purported emergency existed. The Majority ignored the findings of **Award 5 of Public Law Board No. 4768**, which held:

"*** Even if it was impractical to call the Claimant for work on Saturday, he clearly could have been notified in timely fashion to join the Gang on Sunday. Even in the face of the claimed 'emergency', this could have been accomplished, and the Claimant would have had the opportunity for overtime work being performed by junior employees."

We submit that the above-cited award is particularly pertinent here, wherein the Carrier was put on notice **THREE (3) DAYS** prior to the attempt to contact the Claimant herein, but chose to wait until virtually the 11th hour to attempt to contact him to fill the vacancy. The Carrier then claimed an "emergency" as an excuse to trample on the Claimant's seniority rights. Clearly, by

the Carrier's own actions of delaying the filling of the machine operator vacancy for three (3) days resolves against its assertion of emergency.

Rather than following the well-reasoned precedent cited above, the Majority has rewarded the Carrier for its sloth and as a result thereof damaged the Agreement. For the above reasons, I respectfully dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member