Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41057
Docket No. MW-41173
11-3-NRAB-00003-100017

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES 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 improperly changed the first half July 2008 work schedule of System Gang 9066 and when it failed and refused to properly compensate the employes of said gang for their service on July 8, 2008 (System File R-0840U-301/1507692).

(2) As a consequence of the violation referred to in Part (1) above, the Claimants (all employees assigned to System Gang 9066) shall now each '***be compensated for the differential in pay from that of straight time and overtime rates, for all hours worked on July 8, 2008 at their applicable rates 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 were given due notice of hearing thereon.

The facts are that Gang 9066 is an "on line" System Tie Gang established under the provisions of Rule 40 of the Agreement. The gang was working a compressed "T-1" alternate work schedule pursuant to the provisions of the aforementioned Agreement. Gang 9066 finished a tie project in California and was in the process of moving to the next project located in Missouri. The last day worked by the gang on the project in California was June 23, 2008. Gang 9066 then observed their accumulated rest days of June 24 through 30, 2008, returning to work on July 1, 2008. The normal "T-1" work schedule for the gang during the first half of July 2008 (which includes a holiday) was July 1 through July 6 (11.5 hours each day) July 7 (11 hour day) and July 8 (8 hour holiday).

It is the position of the Organization that the members of Gang 9066 were informed 20 minutes before the end of the work day on June 23 that they would be required to observe the Independence Day holiday on July 4, instead of July 8, 2008, as scheduled. The Organization attached a statement signed by 20 members of the gang which asserted that no written vote was taken. According to the Organization, most members of the gang had already made prior arrangements for lodging and family activities in advance based upon the posted work days. Consequently, the members of the gang were denied an opportunity to work a scheduled work day on July 4, and instead, they were required to work a scheduled observed holiday on July 8. Because they were not given a proper notice, the Organization contends that the Claimants who worked on July 8, 2008, are entitled to be compensated at the applicable overtime rate for service performed on a holiday. It concluded by requesting that the claim be sustained as presented.

It is the Carrier's position that due to the travel distance between work locations (California to Missouri) the Agreement required that Gang 9066 be afforded what equates to (3 1/2 travel days to be observed on July 1, 2 and 3, with a 1/2 day deferred start on July 4, 2008. It asserted that because July 4 was normally the recognized holiday, the members of Gang 9066 approached Manager Neuner regarding whether or not the holiday should be observed on July 4 or on July 8. According to the Carrier, after the discussion was held, the majority determined by voice vote that the first half of July 2008 holiday (scheduled for July 8, 2008) would be observed on July 4, 2008, as allowed by Rule 40(f)(1) of the parties' Agreement. By agreeing to observe the holiday on July 4 in lieu of on July 8, the 1/2 day deferred start was moved to July 5, 2008, which afforded the members of Gang 9066 11 1/2 consecutive days off in a row. In

addition, by rescheduling July 4 as a holiday, July 8, 2008, became a regularly assigned workday. The Carrier argued the change was done in accordance with the Agreement and there is no merit to the Organization's arguments. It closed by asking that the claim remain denied.

The Organization argued that the majority of the gang did not elect by written vote to agree to the change in the work schedule and, absent a written vote to make that change, it was not contractually acceptable. The Organization's argument that a written vote was a necessity was rejected in Third Division Award 39275 involving the same parties to this dispute. Therein the Board held, in pertinent part, as follows:

> "We find that whether the election to change the compressed halves was in writing or verbal is immaterial. In Rule 40(a) the parties specifically provided for employee votes in writing for establishment of the compressed halves ('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') as well as establishment of a compressed workweek in Rule 40(b) ('As an alternative to paragraph (a), again with the election in writing from the majority of the employees working on a project and with the concurrence of the appropriate Manager, a compressed work week period may be established where operations permit') [Emphasis added]. However, for certain changes to those already established compressed halves or holidays for gangs working compressed periods, the parties did not, as they did for the establishment of compressed work periods, provide for an '. . . election in writing from the majority of the employees working on a project.' Instead, the parties only provided for change '. . . by mutual agreement between the Manager and a majority of the employees' (for commencement of the compressed half - Rule 40(a)) or '[u]nless agreed otherwise by a majority of the gang members and the appropriate Manager. . .' (for observance of a holiday at the end of a compressed work period - Rule 40(f)(1))."

The Board reaffirms Third Division Award 39275 and likewise concludes that under Rule 40(f)(1) whether the vote was written or oral is not material in the resolution of this matter. Instead, the question at issue is whether a vote was held and did the majority of the gang agree to the change. The Board has been furnished two

conflicting statements regarding the June 23, 2008 incident and how the schedule change was established.

The Organization furnished a statement from 20 members, which stated the following:

> "This paper states that on June 23rd Joe Russell (ARASA Supervisor) told the gang 9066 that we were going to take our Holiday on July 4th instead of taking it on July 8th. It was scheduled for July 8th on our monthly schedule. He changed it twenty minutes before the end of our shift. Our gang (9066) never voted to change the holiday (and never agreed). July 4th was a 11 ½ hour day."

In response to the Organization's statement the Carrier furnished a statement from Manager Neuner, which stated:

> "Gang 9066 had a work calendar based on what would happen on a normal work half. The Gang finished in Cal. on June 23 and had to move to the next project in MO. that equalled 3 1/2 days travel that would be observed on 7/1, 2, 3, and 4 (coming in at noon on 4th) since there was a holiday in this half the gang requested to take the holiday on 7/4 and take the 1/2 day travel on 7/5 which meant working 7/8 as a regular day. Though we did not get this on paper the majority of the gang did want the holiday on 7/4 giving them 11 1/2 days off in a row. There is approximately 82 employees associated with Gang 9066 but only 20 signatures on this claim that is not the majority of the gang."

The parties offered their respective arguments as to why their statement is superior to the other and should be followed in resolving this case. However, our close examination of the record reveals that the Board has not been offered any compelling logic and/or evidence as to why one recitation of the facts is correct and the other is in error. As we stated in Third Division Award 41051 this dispute comes down to conflicting statements. In a similar dispute involving contradictory statements (Third Division Award 33895) the Board ruled:

> "The Board is confronted on this record with an irreconcilable conflict in material fact, set forth in diametrically opposed written statements from the two primary witnesses. In such situations of evidentiary

> gridlock, it is well settled that the Board must dismiss the claim on grounds that the moving party has failed to establish a prima facie case. See Third Division Awards 21423, 16780, 16450, 13330; Second Division Awards 7052, 6856; Public Law Board No. 4759, Award 3." (Emphasis added)

The logic and reasoning of Award 33895 is on target with the case at hand and will be followed because there is no way for the Board to verify the accuracy of either parties' statement, both of which must be accepted at face value. Therefore, the Board finds and holds that the claim must be dismissed.

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 23rd day of August 2011.