Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36523
Docket No. MW-35384
03-3-99-3-258

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(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 sectionmen for overtime service at the Grand Forks Section on January 11 and 12, 1997 and when it recalled junior Sectionman D. L. Kemnitz to work at Grand Forks and subsequently on the Crookston Section beginning January 13, 1997 and continuing, instead of assigning senior District 13 Sectionman G. J. Garcia (System file T-D-1316-H/MWB 97-06-05AK BNR).

(2) As a result of the violation referred to in Part (1) above, Claimant G. J. Garcia shall now ' . . . receive twenty-four hours pay for January 11, and 12, 1996, at one and one-half times the sectionman's rate of pay. We further request that Claimant receive pay equal to that received by D. L. Kemnitz from January 13, until he is replaced with Claimant, or until Mr. Kemnitz is furloughed. We further request that Claimant be accredited for any and all other benefits, including holiday and 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.

The Organization alleges violation of the Claimant's seniority rights to recall, when on January 10, 1997, "he filed his name and address via fax" under Rule 9 to allow his recall under furloughed status and was not recalled in seniority order. The Organization maintains that although the Claimant contacted the Manpower Office as to whether junior employees were working on January 9 and 10 and was told no, they were in fact working on January 11, 12 and 13, 1997. Because the Claimant was the senior Sectionman on the Track Subdepartment Roster in Dakota Seniority District 13, the six identified junior employees who were recalled violated his seniority rights.

The Carrier denied any violation of the Agreement. It asserts that the Organization's facts are incorrect and further argues that the recall was proper. The Carrier argues that the Claimant was correctly informed on January 9 and 10, 1997, that there were no junior employees working, and that inasmuch as the Claimant did not have a Rule 9 form on file until January 13, 1997, he was not called for the positions that needed to be filled, including the position called to work on January 13, 1997. It further argues that the recall was proper under Rule 19(a).

The Board's review of the facts reveals that the evidence of record and the Rules in dispute support the Carrier. There is no evidence whatsoever that the Claimant complied with Rule 9 and filed his Rule 9 paperwork indicating his desire to be recalled. In fact, in the Organization's initial claim letter of March 7, 1997, it states:

"On January 9, and 10, Claimant contacted the Minneapolis Manpower Office seeking information as to junior employes retained in the service of the Company. Claimant was informed that there were no junior employes retained that he could displace. During discussions, Claimant informed the Manpower Office that blizzard conditions precluded him from filing his Rule 9 form via fax on Friday, the 10th, but he would be forwarding his form the following work day, which he did."

Clearly, the Claimant failed to file his Rule 9 paperwork on either January 9 or 10, 1997. Additionally, there is no proof in this record that any junior employees were working on January 9 or 10, 1997. Because the Claimant did not file his Rule 9 form, he was not available to be recalled for work on January 11, 1997.

The Carrier presented payroll records on each of the six junior employees. The facts prove that they were not in service on January 9 and 10, 1997. From this record, the Board must conclude that the junior employees properly filed and became furloughed employees subject to recall for temporary service due to the blizzard. As indicated by the Carrier's letter of April 30, 1997, these were vacancies of less than 30 days and filled by Rule 19(a). We reviewed the full facts of this record and must conclude that the Claimant's failure to file his Rule 9 form made him an improper employee to be called by the Carrier.

In the full facts of this record, the Carrier complied with the Agreement. There is no evidence that proves that the Claimant was the senior employee properly in line for recall. There is no evidence to indicate that the manner of recall violated the language or practice on the property. 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 36523, DOCKET MW-35384
(Referee Zusman)

The findings of the Majority in this dispute has left a gaping wound in the Agreement. The record reveals that the Carrier assigned at least five (5) junior employes to work on January 11 and 12, 1997 and junior employe Kemnitz to perform service at Grand Forks, North Dakota beginning January 13, 1997 and continuing. The Claimant in this case had his job abolished and contacted the Manpower Office on January 9 and 10, 1997 to inquire if there were any junior employes working that he could displace. The Manpower Office informed him that no junior employes were working. What the Manpower Office failed to mention was the fact that it had contacted at least five (5) junior employes to report for duty on January 11 and 12, 1997. Clearly, the Claimant was actively seeking employment and desired to work. Apparently, the Majority considers his inquiries as insufficient because he did not ask if anyone junior to him was going to be recalled. The Manpower Office had to know that on January 9 and 10, 1997, when the Claimant called, that it had recalled the junior employes to report for duty the very next day. We are perplexed as to what more the Claimant could have done on January 9 and 10, 1997 to inform the Carrier of his desire to perform service. If this is not a carnival shell game, one could hardly be imagined. In this connection, we invite attention to Third Division Award **36156** wherein the Board held:

> "For its part, the Carrier urged that the General Chairman should have 'assumed' that water and sewer line installation was encompassed in the above-quoted June 14, 1994 notice and/or that during the ensuing conference the Organization representatives were obliged to ask whether the Carrier intended to subcontract such water and sewer line installation work. We do not find the Carrier's position tenable because the plain intent of the Note to Rule 55 and Appendix Y is to place on the Carrier the duty of disclosure in such a case, so that the Organization can make an informed judgment about exercising its conference rights and the Parties can make a good-faith effort to reach a meeting of the minds.
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> **It would be contrary to the manifest mutual intent of the contracting Parties for the Board to accept the Carrier's theory that it can transform its contractual duty of full disclosure and good faith discussion into an obligation on the Organization to interrogate the Carrier about subject matters not reasonably included in the notice served by the Carrier**. In that regard, the record amply demonstrates that in other such new construction cases the Carrier has served and discussed advance disclosure notices, inclusive of water and sewer work, prior to subcontracting. In this case, the Carrier's failure to do so effectively precluded any possibility of discussion of the Carrier's reasons for subcontracting the water and sewer service work now in dispute and thus prevented good faith effort to reach an understanding concerning the contracting out of that work. For that reason, we shall sustain this claim." (Emphasis added)

Although the instant case does not involve a contracting out of work dispute, the basic principle is relevant that the Claimant should **not** be required to interrogate the Carrier concerning every possible scenario relative to his desire to exercise his seniority. To makes matters worse is the fact that the Majority bought the Carrier's hocus pocus lock stock and barrel. The Majority's findings were much to the detriment of the Claimant and the integrity of the Agreement. Had the Carrier informed the Claimant that it had scheduled at least five (5) junior employes to perform work on January 11 and 12, 1997 the Claimant would have worked those days and then been available to perform service beginning January 13, 1997 when it assigned junior employe Kemnitz to work at Grand Forks, North Dakota. The bottom line is that the Carrier simply hid the work opportunities from the Claimant and the Majority facilitated the improper actions.

Rather than following logic and the clear and unambiguous provisions of the Agreement, the Majority embarked on its campaign to mete out its own form of industrial justice. For the above reasons, I respectfully dissent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member