

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41501
Docket No. MW-41426
13-3-NRAB-00003-100241

The Third Division consisted of the regular members and in addition Referee Brian Clauss 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 refused to allow Mr. B. Parker to work any of the duties of his assigned position on Gang 5019 headquartered at Lusk, Wyoming on February 3, 2009 and instead sent him home (System File D-0926U-204/1518282).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Parker shall now be compensated for eight (8) hours at his respective straight time 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 were given due notice of hearing thereon.

The record evidence establishes that the Claimant successfully bid to Gang 5019, which was bulletined with a headquarters at Lusk, Wyoming, and a start date of February 2, 2009. The Claimant did not report for the first day of the gang, but rather reported to Lusk on February 3, 2009. However, the gang was not at Lusk on February 3. Rather, the gang was in a Rules Class in Gehring, Wyoming. The Claimant phoned the Manager of the gang. According to the Organization, the Claimant contacted the Manager prior to the start of the workday. According to the Carrier, the Claimant contacted the Manager after the beginning of the workday and was advised to either come to the Rules Class or to go home and return the following day.

The Organization maintains that the Claimant was not allowed to work by the gang's Manager and was improperly sent home. The gang was bulletined for Lusk and the Claimant reported to Lusk. He reported to the proper location and should have been allowed to work. He should be compensated for the missed workday because he was not at fault. Rather, the Carrier was at fault for not allowing him to work.

The Carrier counters that the Claimant called after the start of the shift and was afforded the opportunity to either come to the training or to go home. The Claimant chose to go home. He did not contact the Manager prior to the gang's initial start date. Had he contacted the gang, he would have known that the Rules Class would be in Gehring.

The Board carefully reviewed the record evidence and finds that the Organization failed to prove a violation of the Agreement. The Organization cannot establish a violation of the Agreement given the fact that the employees who properly reported to the bulletined location on the initial start date of the gang were instructed to appear for a Rules Class at another location on the following day.

The Carrier's citation to Rule 20(f) is instructive. Rule 20(f) provides, in part, that employees are to report and protect their new assignment on the following Monday. The Claimant did not report for work on Monday. Rather, he reported on Tuesday. The Organization cannot point to a Rule to establish that the Carrier Manager's conduct in the instant situation violated an applicable Rule or Agreement provision. Accordingly, the claim is 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

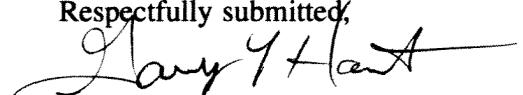
Dated at Chicago, Illinois, this 19th day of February 2013.

LABOR MEMBER'S DISSENT
TO
AWARD 41501, DOCKET MW- 41426
(Referee Clauss)

The Majority erred in this case and a dissent is required. The Claimant timely reported to work at his assigned headquarters and was refused the opportunity to work. Thus, a sustaining award should have followed like night after day. However, instead of relying on an analysis of the undisputed facts in the record and applying those facts in light of the Agreement, the Majority chose to deny the claim based on the specious arguments raised within the Carrier's submission.

A careful review of the record of on-property handling in this case discloses the following undisputed facts: the Claimant was awarded the position in question; he was advised by the designated Carrier personnel that he could report to the headquarters at Lusk, Wyoming on February 3; that he reported to his assigned headquarters in excess of one (1) hour early on that day; realizing that no one else had shown up, he placed a call to the Manager of Track Maintenance (MTM) well before starting time; the MTM failed to answer his cellular telephone; the Claimant left a message requesting information; and the MTM failed to check for missed calls and messages until well after starting time.

The Carrier raised several specious and irrelevant arguments. However, its central argument relied on an affirmative defense that the Claimant had been offered the opportunity to work and turned it down. Importantly, and contrary to the Majority's finding, the Carrier never offered competent first-hand evidence to support its affirmative defense. Inasmuch as the Carrier failed to establish its affirmative defense, the Majority erred when it failed to sustain the claim. The award is palpably erroneous and should be given no consideration in future cases.

Respectfully submitted,

Gary L. Hart
Labor Member