Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41639
Docket No. MW-41372
13-3-NRAB-00003-100269

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier allowed junior employes G. Robertson, Q. Kyle and M. Yost, instead of J. Espinoza, to continue to work on Gang 9199 on March 1, 2009 and continuing (System File UP-212A-WF09/1518857 MPR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Espinoza shall now be compensated at the respective and applicable rate of pay for any and all of the straight time and overtime hours that were worked by junior employes G. Robertson, Q. Kyle and M. Yost on Gang 9199 beginning March 1, 2009 and continuing."

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 Claimant and the three named junior employees were Trackmen working on Gang 9199 when they were displaced on February 20, but were permitted to remain and perform extra work until February 22, 2009. Thereafter, they went into furlough status. This claim arises from the fact that the three junior employees were permitted to continue to perform extra work on March 1, 2009 after they reported to the job site, but the Claimant, who did not report to the job site on that date, was not called or assigned the work.

In support of its contention that the Claimant was offered the same opportunity as the junior employees to take a chance and report to the gang on March 1, 2009 to see if there was extra work available, the Carrier submitted two statements, one from Supervisor Johnson and the other from Manager Noll. Johnson states that he told all the extra guys not to show up on March 1 because they were expecting a full head count, so as to prevent them from making the long trip and having no work, but he also said that they could call him later in the day to see if there was extra work or take a chance and just show up on March 1. Johnson notes that the three junior employees showed up on March 1 and were given the extra work that was available, but that the Claimant did not show up or call him until March 5, indicating that he had been trying unsuccessfully to get extra work closer to his home. Johnson's statement indicates that he told the Claimant to come over, but that he was called by the Claimant on March 7 to say that he was going to be able to work on a Texas District gang closer to his home. Manager Noll's statement confirms that the Claimant was offered the same opportunity to work extra on the tie gangs on March 1, but chose not to make himself available for that opportunity. The Organization submitted a signed statement from the Claimant indicating that Foreman Kurby told him that he was not allowed to come back and work as an extra, so he did not show up.

The Organization argues that the Carrier violated the Agreement, specifically the seniority Rules and Rule 20, when it failed to bulletin vacant positions on Gang 9199 and permitted junior employees to work extra on these jobs for more than ten days without calling or assigning the Claimant. It asserts that the Claimant, as a furloughed Trackman, had the seniority right to work these vacancies prior to the Carrier using junior Trackmen, and seeks compensation for the amount the Claimant would have earned if properly recalled or assigned the extra work available. The Organization notes that there is no real dispute in fact, inasmuch as the Supervisor admitted telling the Claimant not to report to work on March 1, which confirms his account of what he was told.

The Carrier contends that the Claimant was offered the same opportunity as the junior employees to work extra on Gang 9199, but chose not to avail himself of that opportunity by not showing up at the job site on March 1, 2009. It explains that, despite being told that they expected a full head count, discouraging the Trackmen from making a long drive - perhaps unnecessarily, the junior employees chose to make themselves available for whatever extra work there was, and they were rewarded by being assigned extra work that was present, for any number of reasons including waiting for bulletins awarded to be filled, or the temporary nature of the work needed. The Carrier points out that the Claimant chose not to make himself available for the work he now claims, but, rather, to try to get extra work closer to his home, and when he was unsuccessful, pursue this claim. It contends that the extra work was properly assigned, that there was no vacancy created, a managerial determination it is free to make when no full-time position exists, and that it had no obligation under the Agreement to bulletin the extra work in dispute. The Carrier also argues that there is an irreconcilable dispute of fact that the Board cannot resolve, and which prevents the Organization from meeting its burden of proof, citing Third Division Awards 33951, 37204 and 37478.

A careful review of the record convinces the Board that the Organization failed to sustain its burden of proving a violation of the Agreement. First, it failed to establish that there existed any vacancies or permanent positions that required advertising on Gang 9199 as of March 1, 2009. There is no dispute that the Claimant was performing extra work on that gang before February 22, and that the work assigned to the junior Trackmen was also extra work. The Carrier offered a number of reasons why the full head count expected on March 1, 2009 did not

materialize, but the fact that these employees may have received extra work on a number of days, even exceeding ten days, is insufficient to prove that a vacancy or new full-time position existed that the Carrier was obligated to bulletin pursuant to Rule 20(a). The fact that the Claimant chose to attempt to get extra work closer to home and not show up at the gang's headquarters on March 1 was his prerogative, but also made him unavailable for whatever work existed. Second, Supervisor Johnson and Manager Noll's statements detail that the Claimant was told not to show up to the gang on March 1, which the Claimant admits, but also that an option was given to all furloughed Trackmen concerning how they could find out about whether extra work was available - call in on March 1 or show up. The Claimant denies that he was given this option. Thus, at best, an irreconcilable dispute of critical fact exists that the Board has no way of resolving, thereby providing additional support for the conclusion that the Organization failed to meet its burden of proving a violation of the Agreement. See, Third Division Awards 37204 and 37478.

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 24th day of April 2013.