

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23861  
Docket Number MW-23994

T. Page Sharp, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(Illinois Terminal Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when It assigned an employe with no seniority as a Large Machine Operator (Mr. R. Keel) to the position of Large Machine Operator (backhoe) on January 30, 31 and February 1, 1980 instead of assigning Large Machine Operator W. R. Burg thereto (System File IERR 1980-14).

(2) Claimant W. R. Burg shall be allowed twenty-four (24) hours of pay at the large machine operator's straight-time rate, ten (10) hours of pay at the large machine operator's time and one-half rate and seventeen (17) hours of pay at the large machine operator's double-time rate because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: On January 30, 1980 a severe snowstorm hit the St. Louis area including southern Illinois. This snowstorm complicated the operation of the Illinois Terminal Company and made necessary extensive snow removal activities. Some snow removal was taking place at McKinley Junction Yards at Madison, Illinois, which is twenty miles from Alton, Illinois, where Claimant was working. There is conflict in the evidence whether operation of a backhoe machine was done in conjunction with a derailment or was utilized in snow removal, but the machine was utilized and operated by an employe who had seniority as a Laborer. The regular operator had been assigned to fill a vacancy as Track Foreman. The Organization claims that Claimant who held seniority as a Large Machine Operator should have been called to operate the backhoe.

Although many defenses for utilizing the laborer are raised in the submissions, the correspondence exchanged on the property establishes that the Carrier relied on the arguments that 1) the seniority districts of the Claimant and the Laborer were different, therefore Claimant would have no preferential right to the job and 2) this was an emergency condition and Rule 6 of the applicable Agreement specifically mandates seniority filling of vacancies if possible and does not apply in an emergency situation.

In the Agreement between the parties Rule 2 establishes classifications of employes. Rule 5 confines the seniority right of employes to their respective Department. Rule 4 states that seniority starts in bulletined positions from the date of the assignment. By inference the seniority which starts at the date of

such **assignment** establishes a seniority right in one of the classifications (A through G) under Group 2. Therefore Claimant had seniority in Group 2 B **and** the laborer in question had seniority in Group 2 F. Rule 6 concerns utilization of these employees. It reads:

"(a) Except as provided in **paragraphs (b) and (c)** of this rule, vacancies or **new** positions, if possible, **will be filled by** employees **holding seniority in the rank** in which the vacancy or new position occurs. If not so filled, they **will** then be filled by employees in succeeding lower ranks in that seniority group, subject to provisions of the promotion rule."

After the Organization refuted the Carrier's claim that Claimant had no preferential seniority rights because of differing seniority districts the matter was **dropped by the** Carrier, appearing **in no** further correspondence or the submissions of **Carrier**. As previously stated **many new matters** were raised in the submissions and these matters **will** not be considered by the Board. To raise new matters at that stage of the grievance process results in a procedural deficiency. The Board only considered the defense that the weather condition -ted an emergency which suspended the **mandate** of Rule 6.

The Board considered the facts that **Claimant had seniority as** a large machine operator **and** the **employee** who operated the backhoe only had seniority as a laborer. **Claimant** should have been assigned to this temporary position **unless** there was an emergency which would **make** it practically impossible to **make** such assignment. The Board **will take** judicial notice that severe snowstorms in this section of the **country** are **not** rare. Because of the necessary time involved in implementing the **assignment mandated by** Rule 6 **under** these circumstances, the Board **will grant** that the first day of the **storm** would make **it** practically impossible to assign **Claimant** to operate the backhoe. **However**, absent a showing by Carrier that it was not possible for Claimant to travel in a safe **and** reasonable manner the **twenty** miles to Madison, **Claimant** should have been assigned to operate the backhoe. No such showing was made, therefore the Agreement was violated.

**Nowhere does** the Organization point to any **provisions** of the Agreement that would entitle Claimant for the **payment** of the job that he worked plus the payment **for** the job **that he should have worked**. Some awards have held that if the **Carrier did** not refute such a claim it will be granted. See Award 21222. **In this case** the Carrier **specifically** challenged the right to **two payments** in its letter of April 9, 1980. This Board **holds** that the Agreement was violated and the Carrier should pay Claimant the difference **in what he would have earned** as the backhoe operator **and** what he **earned in his** regular assignment for the days of **January 31** and February 1, 1980.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees involved in** this dispute are respectively **Carrier** and **Employees** within the meaning of the **Railway Labor Act**, as approved **21, 1934**;

That this Division of the **Adjustment Board** has jurisdiction over the dispute **involved herein; and**

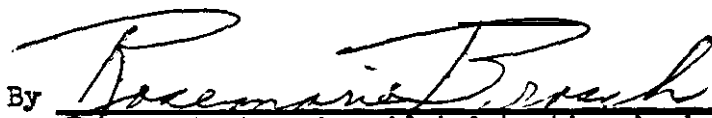
That the Agreement was **violated**.

**A W A R D**

**Claim** sustained in **accordance** with the Opinion.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By **Order** of Third Division

**ATTEST:** Acting Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at **Chicago, Illinois**, this **28th** day of **April 1982**.

