

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36089
Docket No. MW-34775
02-3-98-3-354**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier called and used junior employee M. Corkill to operate the snowfighter from 7:00 A.M. to 10:00 P.M. on Saturday, January 4, 1997, instead of assigning senior Machine Operator R. J. Shimek (System File C-01-97-C060-01/8-00219-012 CMP).
- (2) The Agreement was further violated when the Carrier called and used junior employee E. Becker to operate the snowfighter from 7:00 A.M. to 6:00 P.M. on Sunday, January 5, 1997, instead of assigning senior Machine Operator R. J. Shimek (System File C-02-97-C060-02/8-00219-011).
- (3) As a consequence of the violations referred to in Parts (1) and (2) above, Machine Operator R. J. Shimek shall be allowed twenty- six (26) hours' pay at the machine operator's time and one-half rate.”

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 instant dispute was initially filed as two separate claims during the on-property handling. The first claim concerns the Carrier's assignment of a junior employee to overtime service on January 4, 1997 and the second claim involves the Carrier's assignment of a junior employee to overtime on January 5, 1997. The claims have been combined for presentation to the Board.

At the time of the incidents in question, Claimant R. J. Shimek established and held seniority in the Track Sub-Department as a Machine Operator dating from May 18, 1976. E. Becker and M. Corkill established seniority as Machine Operators dating from May 26, 1981 and June 1, 1988, respectively. At the time of the incidents in question, the Claimant was regularly assigned to the Track Sub-Department on the section crew headquartered at Mason City, Iowa. Becker was regularly assigned to a Track Sub-Department position headquartered at Austin, Minnesota and Corkill was regularly assigned to a Track Sub-Department position on the section crew headquartered at Rosemont, Minnesota. All employees were assigned to a Monday through Friday workweek with Saturday and Sunday as assigned rest days, and worked under the supervision of Roadmaster H. J. Reiss who was headquartered at Mason City, Iowa.

The facts in this matter appear to be uncontested. The Carrier has a self-propelled snow plow, known as the "Snowfighter," located at Mason City, Iowa. The Snowfighter was used on January 4 and 5, 1997. On Saturday, January 4, 1997, Corkill operated the Snowfighter from Mason City, to Lawler, Iowa, and then returned the machine to Mason City. Corkill received compensation for a total of 11 hours at the time and one-half rate. On Sunday, January 5, 1997, Becker operated the Snowfighter from Mason City to Spencer, Iowa, and returned the machine back to Mason City. Becker received compensation for a total of 15 hours at the time and one-half rate.

The Organization takes the position that the Carrier failed to recognize the Claimant's superior seniority in assigning overtime service on January 4 and 5, 1997. While the Carrier contends that there was an emergency, the Organization takes the position that no such emergency existed. The Organization claims that the burden to prove an emergency is on the Carrier and it has not been able to meet that burden. Further, even if such emergency actually existed, the Claimant was still available and entitled to be called for work. Finally, while the Carrier contends that the positions in question were new positions which the junior employees had requests on file to fill, the Organization disagrees, contending that neither of the employees had ever requested to fill the alleged openings. According to the Organization, both of these situations involved routine overtime that should have been assigned to the Claimant. Because of this error, the Claimant is entitled to be made whole for all time lost.

Conversely, the Carrier takes the position that this was a vacancy, which under Rule 8(c) requires that the senior employee with a request on file obtain the position; however, the Claimant did not have a request on file. The Claimant contends that those employees, who in fact had a request on file to fill such a vacancy, properly obtained the position. Further, the Carrier contends that an emergency existed on the dates in question and, therefore, had broad discretion to select who would complete the work. The Carrier was not required to assign by seniority and was well within its rights to select the relevant individuals. Thus, the Carrier requests that the claim be denied.

After a review of the evidence, the Board finds that it must agree with the Organization that the Claimant is entitled to overtime for January 4 and 5, 1997. Both of the arguments which the Carrier has asserted are affirmative defenses and the Carrier must meet its burden of proof. First, the Carrier asserted that the positions using the Snowfighter were temporary vacancies and as such, had to be filled pursuant to Section 8(c). According to the Carrier, a junior employee with a request on file was able to obtain the position. However, we find that there is no evidence that this was a temporary vacancy, rather than simply overtime as the Organization contends. Therefore, the Carrier failed to meet its burden of proof to show that a vacancy existed.

Further, as to the contention that an emergency existed that allowed the Carrier to select any employee it chose, we cannot find that an emergency actually existed. Here, the Carrier must prove not only that there was an emergency, but also that it was not reasonable to contact the most senior employee prior to the other employees. No such proof has been offered in this case.

The Board addressed a similar issue in Third Division Award 35843 when it discussed that the burden of proof is on the Carrier to show that an emergency existed and that the Carrier was not obligated to contact the Claimant. Therein the Board quoted from Third Division Award 32419, which held:

"The Carrier bears the burden to demonstrate the existence of an emergency so as to allow it to avoid the requirements of the Agreement concerning the use of employees. . . . An emergency is an unforeseen combination of circumstances that calls for immediate action.

* * *

Further, even if an emergency existed, see Third Division Award 21222 involving an emergency situation: ' . . . It has been held repeatedly that Carrier has the obligation to make a reasonable effort to communicate with employees in a situations analogous to that herein. . . . Even with the broad latitude

permitted Carrier in an emergency situation, the obligation still persists to make a reasonable effort to call the employees provided by rule for the work. . . .’ There is nothing to show that efforts were made to contact the Claimant. The Carrier therefore cannot prevail on its assertion that an emergency existed as a justification for avoiding assignment of the work to the Claimant.”

We agree with that analysis. In this case, the Carrier has not shown that there was a bona fide emergency and even if there was, that there was a good reason not to contact the Claimant. For these reasons, we believe that the Claimant should have been called to fulfill the overtime duty with the Snowfighter on January 4 and 5, 1997.

Based on the record in the instant case, we find that the Organization met its burden of proof and the claim will be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of July 2002.