

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36932
Docket No. MW-36160
04-3-00-3-358**

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned a Federated Craft Welder to clean snow from switches at Bain, Wisconsin on January 4, 5, 6, 7, 8, 11, 12, 13, 14 and 15, 1999, instead of recalling furloughed Trackman J. L. Melsheimer (System File 8WJ-7257T/1188475 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, furloughed Trackman J. L. Melsheimer shall be allowed eighty (80) hours' pay at the trackman's straight time rate and twenty (20) hours' pay at the trackman'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 Claimant was a furloughed Trackman, who had established and held seniority in the Maintenance of Way and Structures Department, Track Subdepartment. On the claim dates, the Carrier's active Track Subdepartment employees performed snow removal work at Bain, Wisconsin, but a need for additional employees arose. According to the Organization, the Claimant stood to be recalled for the snow removal work. Instead, the Carrier assigned the work to active Federated Craft Welder D. E. Banwart.

The Organization states that Banwart assisted track section forces in removing snow from switches and did not perform the work of his craft, welding. Pursuant to Rules 1, 2, 3 and 4 of the Collective Bargaining Agreement, as the senior, qualified, furloughed, track maintenance employee, the Claimant was entitled to the work. Instead, the Carrier improperly assigned Banwart to the routine snow removal work, the Organization stresses.

The Organization also asserts that because Banwart held no seniority or work rights under the applicable Agreement, he possessed no entitlement to track maintenance work. Prior arbitral precedent on this property has established that snow removal work is track maintenance work reserved to employees of the Carrier's Maintenance of Way Track Subdepartment. Therefore, the Claimant should have been called and offered the work.

The Organization emphasizes there is no evidence that the Carrier reasonably attempted to contact the Claimant regarding the snow removal work. Even if the situation rose to the level of a "snow emergency," which the Organization avers was not the case, the Carrier still was required to make a legitimate effort to contact the Claimant for the work to which he possessed clear contractual entitlement.

Finally, the Organization points out that the statements offered by the Carrier as proof that the Claimant, in fact, was called, do not include any dates and times of the call attempts. In response to a request for documentary evidence and given the Claimant's statement that no one from the Carrier called or left messages, the Organization argues that the Carrier failed to submit any probative evidence, like a telephone call log or other records documenting the caller's attempts. In the

absence of such documentary evidence, the Carrier's general statements do not adequately refute the Claimant's contentions, and the instant claim must be sustained.

The Carrier maintains that two written statements prepared by the supervisor involved with the calling are substantial proof of the Carrier's good-faith efforts to notify the Claimant of the snow removal work. According to those statements, two supervisors called the Claimant several times and left messages on the Claimant's parents' answering machine. The Carrier stresses that the record demonstrates that the supervisors never received any answer, call, or message from the Claimant.

In its Submission, the Carrier emphasized that the instant dispute concerning whether the Claimant was notified of the snow removal work remains largely unresolved, because the statements of the Carrier and the Claimant simply contradict one another and thus are "irreconcilable." Citing various Board precedent, the Carrier emphatically contended that, "Dismissal of the instant claim is therefore appropriate given the irreconcilable conflict in material facts."

The Board carefully reviewed the entire record. We find this is not a case of irreconcilable conflict. In the Carrier's April 25, 1999 initial denial of the claim, the Manager Engineering Resources stated:

"... I understand that Mr. J. L. Melsheimer was called several times with no answer to the phone - messages were left that the MTM needed help with the snow emergency. He never got a response back..."

In the Organization's July 13, 1999 appeal of that denial, the General Chairman attached a statement from the Claimant that he was living with his parents at the time and that, according to him and his mother, no messages had been left. The General Chairman wrote:

"Mr. Dobrinska contends attempts were made to contact Claimant. However, the record is absent who attempted to make the calls, the number attempted or the dates and time of the attempts..."

The Board's review of the record confirms that the Carrier did not subsequently furnish any documentation resembling a telephone log or personal notes reflecting the actual dates and times of any call attempts. The Organization's "request" for specific documentation was reasonable, and shifted the evidentiary burden to the Carrier. The Board finds that the record of this case, as developed by the parties, does not include any Carrier documentation beyond the general statements that several calls were made and messages were left regarding the snow removal work available to the Claimant. Again, the statements do not include the specific dates and times of the calls purportedly made, or any particulars regarding the messages left. The majority of this Board thus rules that given the circumstances of this case, the Organization was entitled to, but did not receive despite its request, evidence of a specific and documentary nature. In the absence of such documentation, the Carrier's general defenses must fail and the instant claim must be sustained. See Third Division Awards 23401, 26448 and 28724.

Regarding the peripheral issue of whether a "snow emergency" existed on the claim dates, the Board finds that based on its review of the record as developed by the parties on the property, there is no evidence to document that this indeed was a fact. The Board likewise determines that there is no evidence to support any ancillary arguments concerning any "scope of work" issues concerning the Federated Craft Welder who worked the assignments.

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 March 2004.