

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40433
Docket No. MW-40032
10-3-NRAB-00003-070230
(07-3-230)**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(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 assigned junior employee J. Ochoa to perform snow removal service at Bensenville, Illinois on January 21, 22, 23 and 24, 2005 instead of calling and assigning Mr. A. Cardenas (System File C-05-05-C060-03/8-00219-128 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Cardenas shall be compensated a total of one thousand one hundred six dollars and sixty-four cents (\$1,106.64) for the straight time and overtime hours worked by junior employee J. Ochoa on January 21, 22, 23 and 24, 2005.”**

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.

On the claim dates in question, J. Ochoa was recalled from furlough to fill a Laborer's position added to assist the regularly assigned crew in performing snow removal work. The Claimant, who was also on furlough, possessed greater seniority than Ochoa. The Organization filed the instant claim, contending that the Carrier should have called the Claimant to perform the work.

The Carrier contended that there was no violation of the Agreement. Its denial of the claim was based on an asserted snow emergency. The Carrier argued that snow emergency service may be performed without regard to seniority.

The Carrier's argument was in the nature of an affirmative defense for which it bore the burden of proof. On this record, we find absent the probative evidence necessary to support the Carrier's claimed affirmative defense. On the contrary, the documentary evidence provided by the Organization indicates that approximately eight inches of snowfall had been predicated over a period of several days. The weather conditions on the claim dates were not unusual for the Chicago area in the winter season.

In addition, we find that the Claimant was available to perform the work in question. By letter dated January 10, 2005, he had informed his Supervisor of his continued interest in performing any available work opportunities, particularly within the Bensenville, Illinois, area.

Under these circumstances, we find that the claim has merit. The Carrier failed to establish the existence of an emergency situation that would have allowed it to assign the disputed work to a junior employee. The Carrier knew in advance that additional employees would be needed for the snow removal work. The Claimant had the requisite seniority and he was qualified and available to perform the work at issue in this case. The Organization has shown that the claim has merit and it is sustained in its entirety.

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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 14th day of May 2010.