Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40689
Docket No. MW-39546
10-3-NRAB-00003-060332
(06-3-332)

The Third Division consisted of the regular members and in addition Referee Daniel F. Brent when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(BNSF Railway Company (former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned Machine Operator L. Potter, who was headquartered at Freemont, Nebraska, to operate a machine (motor grader) headquartered at Gibson Yard in Omaha, Nebraska on January 26, 27, 28, 29, 30, February 2, 3, and 4, 2004 [System File C-04-J010-34/10-04-0229(MW) BNR].

(2) As a consequence of the violation referred to in Part (1) above, Group 2 Machine Operator J. Buelt shall now be compensated for sixty-four (64) hours at his applicable straight time rate of pay and for twelve (12) hours at his applicable time and one-half rate of pay."

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 Organization contends that the Carrier violated the Agreement when it assigned Machine Operator L. Potter to operate a motor grader headquartered at Gibson Yard in Omaha, Nebraska, on January 26, 27, 28, 29, 30 and February 2, 3, 4, 2004, thus depriving Group 2 Machine Operator J. Buelt of 64 hours of straight time pay and 12 hours at his applicable overtime rate. The Organization claims that the Carrier violated the Agreement by failing to recall the Claimant for motor grader work available at Gibson Yard on January 26 through 30 and February 2 through 4, 2004. The Carrier contends it was not required to recall an employee from furlough to perform such work, especially as it was performed on an emergency basis.

The Organization contends that Claimant Buelt was furloughed and waiting recall for duty on the dates involved in this dispute. Machine Operator Potter was headquartered in Freemont, Nebraska, and working as a Group 2 Machine Operator assigned by bulletin to operate a backhoe. According to the Organization, the Carrier abolished the position of Group 2 Machine Operator on the motor grader headquartered at Gibson Yard prior to the dates at issue in the instant case. Rather than recall the fully qualified and readily available Claimant for this work, the Carrier instructed Group 2 Machine Operator Potter "to forego his assigned duties as backhoe operator at Freemont, Nebraska and operate the motor grader at Omaha, Nebraska." This assignment required 64 hours of straight time and 12 hours of overtime.

According to the Organization, the Claimant, who is headquartered in Omaha but was on furlough, should have been recalled from furlough rather than assigning Machine Operator L. Potter, who was headquartered in Freemont,

Nebraska, to operate the motor grader in question. It was undisputed that the Claimant was fully qualified and readily available to perform the work in question. The Organization contends that by requiring Machine Operator Potter to forego his assigned duties as a Backhoe Operator in Freemont, Nebraska, and travel to Omaha to operate the motor grader, the Carrier improperly deprived Claimant Buelt of a work opportunity.

The Organization cited Rules 1, 2, 5, 19, 37, and 55 of the Agreement in support of its position. Rule 2B provides "seniority rights of all employees are confined to the sub-department in which they are employed, except as otherwise provided in this Agreement." Rule 19 provides that "a new position or vacancy of thirty (30) calendar days or less duration, shall be considered temporary and may be filled without bulletining."

The Carrier contends that the motor grader was used for emergency work and that the Carrier was not obligated to recall a furloughed employee for such a short assignment.

The Carrier is obligated to fill vacancies in accordance with the Agreement. While acknowledging that the Carrier may not be required to recall furloughed employees for short term vacancies, the Organization asserts that the Agreement makes no provision for removing an employee from his assigned position at one headquarters point and forcing that employee to fill a short-term vacancy at another headquarters location. The Organization cites Rule 37 as establishing the proposition that headquarters may not be changed more often than once a year for Roadway Equipment Operators and Helpers on the five seniority districts indicated in Rule 6A. According to the Organization, the Carrier may only substitute employees to operate different machinery at the same headquarters point, as "this Board has consistently held that where the rule contains no exception, none may be applied or where the rule contains certain express exceptions, no others may be applied."

The Organization cited Rule 19 in support of its position, contending that the Carrier was obligated to fill the vacancy in the Machine Operator position by giving it to the senior qualified employee who has on file a written request to fill such

vacancy. The Organization contends that the Carrier has presented no evidence nor argued that Machine Operator Potter had filed a written request to fill a group two Machine Operator position at Gibson Yard.

The Carrier contends that the accumulation of snow in Gibson Yard created an urgent situation that had to be addressed in order for the Carrier to resume normal operations. The Organization disputed the Carrier's contention that snow removal on the days in question constituted an emergency. According to the Organization, snowfall in Nebraska during January and February is clearly foreseeable, and thus the definition of an emergency as a "sudden, unforeseeable and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt" established by the Board in Third Division Award 2440 precludes finding an emergency in the instant case, because the Carrier presented no evidence that its operations were brought to an immediate halt or disrupted. The Organization's assertions in this regard are persuasive. Thus, the emergency exception or defense is inapplicable in the instant case.

Notwithstanding several of the arguments advanced by the Carrier, the instant case is not a jurisdictional dispute in which an assertion that the work was reserved for the bargaining unit and was being performed by an outside vendor or non-bargaining unit employees. The essence of the Organization's case is that seniority lists are maintained by Sub-department and that the Claimant was entitled to be recalled from layoff before any employee headquartered elsewhere was assigned the work. Even if the Organization's assertion was correct with regard to the right of a furloughed employee to be recalled within a Sub-department or assigned headquarters, this principle is not determinative of the outcome of the instant case.

This case turns on whether the Carrier was obligated to return an employee from furlough before temporarily transferring an active employee from one location to another. The Carrier correctly asserts that it is not obligated to recall an employee for a vacancy lasting fewer than 30 days, and thus the Carrier did not violate the Agreement.

The Carrier also correctly asserts that snow removal is not exclusive to the Maintenance of Way Department or restricted to certain Sub-departments. Even if the Carrier's assertion that this work is not exclusively BMWE work or that Roadway Equipment Operators have exclusive jurisdiction over the work within the BMWE were discounted, the Organization has not met its burden of persuasion by demonstrating that failure to recall an employee from furlough to fulfill an assignment lasting fewer than 30 days violates any provision of the Agreement. Therefore, the claim is denied.

Although an employee on furlough is entitled to recall when a vacancy arises, where a temporary vacancy lasting less than 30 days occurs, the Carrier need not recall an employee from layoff within a particular district rather than assign the work to qualified bargaining unit employees. The Board, after consideration of the dispute identified above, hereby orders that the instant claim be denied.

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 1st day of November 2010.