

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36057
Docket No. MW-34449
02-3-98-3-75**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Mr. A. R. Speten to perform service with the Russel Snow Plow on the Carrington and Portal Subdivisions on January 2, 3, 6 and 7, 1997 instead of assigning Mr. T. A. Ternes who had properly registered his name on the call list for such vacancies and assignments in accordance with Rule 14 (System File R1.104/8-00303).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant ‘ . . . shall now be reimbursed for any and all lost income he would have received had he been properly assigned to operate the Russel Snow Plow on January 2, 3, 6, and 7, 1997, including lost time overtime, and have all other rights restored which were lost to him as a result of the above violation.’”**

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 held seniority as a Road Equipment Machine Operator in Group 2, Rank (a) dating from July 5, 1994. The machines in this classification group include the Russel Track Snow Plow. This claim arose when the Carrier assigned an employee

without Group 2(a) seniority to serve as Helper on the Russel plow on the claim dates. The Claimant was on furlough immediately prior to these dates.

The record establishes certain facts. Rule 14(b) provides for a call list procedure to protect short vacancies. The Claimant properly placed his name on the call list to protect work arising in Group 2, Rank (a), which encompassed the disputed work. The procedure specified in the Agreement also required that "Qualified employees will be called in seniority order." (Emphasis added) The Carrier did not attempt to call the Claimant to protect the vacancy in question.

The Carrier advanced several defenses to the claim. On this record, we find that those unrelated to the Claimant's qualifications lack merit. For example, the Carrier raised the affirmative defense of emergency circumstances. When this assertion was challenged by the Organization, however, the Carrier failed to provide any probative evidence to support its assertion. The burden of proof to do so was the Carrier's. As a result, the asserted emergency stands unproven.

The same is true of the Carrier's assertion that the Claimant lacked familiarity with the territory to be plowed. Once again, this affirmative defense remained unsupported by probative evidence after the Organization refuted it and went on to show that the Claimant had held five different positions over seven years on the Carrington and Portal Subdivisions. Accordingly, the Claimant's lack of familiarity with the territory in question has not been established by this record.

The Carrier also maintained there had been past difficulties contacting the Claimant. He apparently lived in a mobile home without a phone and could only be reached through either his parents or his girlfriend. But prior Award authority on this property held that such past difficulty does not excuse the failure to make an attempt to make contact - even in emergency circumstances. See Third Division Award 31358.

The Carrier's contention that the Claimant was unavailable for the assignment is similarly unpersuasive. While it is undisputed that the Claimant attended diversity training on the third claim date, some 400 miles away from the work site, this was an assignment by the Carrier. There is no evidence it was an unmovable date that could not have been rescheduled.

The remaining defenses deal with the Claimant's qualification to perform the specific work of the vacancy in question. As written, Rule 14(b) references two kinds of qualification. In its first paragraph, the Rule establishes the qualification necessary to be placed on the call list for a given group and rank. The requisite qualification is either retention of seniority in the group and rank or 30 days of work in the group and rank.

In the second paragraph, quoted in part earlier, the Rule refers to the qualification of employees, who are already on the list, to perform the work of a specific

vacancy within the group and rank. As written, an employee's qualification to be on the call list does not confer qualification to perform work with all pieces of equipment in the group and rank.

On this record, the Carrier asserted that the Claimant was not on the list of qualified Helpers for Ditchers and Snow Plows. It went on to assert that the Claimant had never regularly worked on the plow. Indeed, examination of the on-property record fails to reveal any evidence that the Claimant had ever worked on the plow as either an Operator or a Helper.

Accordingly, we must find that the Claimant was not qualified to perform the work of the short vacancy in question. As a result, the Carrier was not remiss in failing to call him in seniority order.

Third Division Award 30452, cited by the Organization, is inapposite to these facts. That Award dealt with the opportunity to qualify on new equipment in connection with a bulletined vacancy of ten months duration and involved Rule 14(d).

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 21st day of May, 2002.