

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39903
Docket No. MW-40637
09-3-NRAB-00003-0080430**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**
PARTIES TO DISPUTE: (
**(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 failed to call and assign System Machine Operator C. Whitesell to perform system machine (Jordan ditcher) operator duties in connection with plowing snow on the Mason City Subdivision on March 1, 2, and 3, 2007 and instead assigned said duties to Boom Truck Operator R. Pond (System File R-0714C-303/1472754 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Whitesell shall now be compensated for eight (8) hours at the applicable straight time rate of pay, twenty-five (25) hours at the applicable time and one-half rate of pay and three (3) hours at the applicable double time 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.

Asserting the existence of an emergency due to a snowstorm affecting the Mason City Subdivision, the Carrier assigned R. E. Pond on the dates set forth in the claim to help operate a Jordan Ditcher plowing snow between Mile Posts 78 and 189.

Under Rule 7 of the Agreement, the classification of System Machines includes “[h]eavy machines such as . . . Jordan Ditcher . . .” with “. . . [a] separate seniority roster . . . for operators of such machines” with the further requirement that “[a]ssignment to the vacancy shall be based upon their oldest retained seniority date.” Rule 14 of the Agreement provides that “[f]urloughed employees shall be called in seniority order for extra and relief work.”

Pond was assigned as a common class Machine Operator operating a Boom Truck. Pond did not have seniority in the classification of System Machines. The Claimant has seniority on System Machines and, according to the Organization, at the time of the snowstorm the Claimant was in furlough status. According to the Carrier’s August 10, 2007 letter, the “. . . Claimant’s employee records indicate that on the dates referenced within your claim, he was fully employed or unavailable.” According to Manager Track Projects Thomas Foxen:

“Claimant is not qualified, to my knowledge, to operate a Jordan Ditcher. Need to operate ditcher came up very quick and operation was staffed with known operators. Mr. Whitesell has never worked on my territory.”

The evidence shows that the Claimant held seniority as a System Machine Operator, which classification has separate seniority and includes the Jordan Ditcher. With that seniority, there is nothing to show that the Claimant was not qualified to operate the Jordan Ditcher. Manager Track Projects Foxen’s statement that “Claimant is not qualified, to my knowledge, to operate a Jordan Ditcher” (emphasis added) is not enough to show the Claimant was not so qualified. Foxen clearly did not know the Claimant - “Mr. Whitesell has never worked on my territory.” But Foxen’s lack of knowledge of the Claimant does not defeat the

Organization's showing that the Claimant held seniority as a System Machine Operator and was qualified to operate a Jordan Ditcher. Therefore, in ordinary circumstances and by rule, because the Claimant held seniority in the System Machine classification, he would have been entitled to perform the work over Pond who did not hold seniority in that classification, even though Pond may have been able to operate the equipment.

Under well-established authority, an emergency is “. . . ‘an unforeseen combination of circumstances which calls for immediate action. . . .’” Third Division Award 20527 (quoting Third Division Award 10965). Similarly, it is well established “. . . that the Carrier, in an emergency, has broader latitude in assigning work than under normal circumstances; in an emergency Carrier may assign such employees as its judgment indicates are required and it is not compelled to follow normal Agreement procedures.” *Id.*

For the sake of discussion, we will assume, as the Carrier argues, that the snow conditions on the dates in dispute constituted an “emergency” which, therefore, gave the Carrier broader latitude with respect to assignments as discussed. However, “[e]ven 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 . . . prior to resorting to other expedients.” Third Division Award 21222 (and Awards cited therein). There is nothing to show that the Carrier even attempted to find out if there were qualified employees such as the Claimant who might have been available to perform the Jordan Ditcher work assigned to Pond. That being the case, the claim has merit.

With respect to the remedy, the record is somewhat in conflict. The Organization asserts that the Claimant was in furlough status. The Carrier asserts that the Claimant “. . . was fully employed or unavailable.” The Carrier's records will resolve that conflict. The purpose of a remedy is to restore the status quo ante and to make employees who have been adversely impacted by a contract violation whole. In the exercise of our discretion to formulate remedies, the matter is remanded to the parties to determine whether the Claimant was on furlough or working elsewhere on the dates in dispute. If the Claimant lost work opportunities or compensation as a result of the Carrier's failure to attempt to even contact him to see if he desired the work, the Claimant shall be made whole for the difference between what he would have earned had he been given the work (based upon the

number of hours worked by Pond) and what he actually earned on the dates Pond performed the work.

AWARD

Claim sustained in accordance with the Findings.

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 31st day of August 2009.