Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41698
Docket No. MW-41517
13-3-NRAB-00003-110133

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
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(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to call and assign Machine Operator S. Robinson to fill a short vacancy in the Engineering Services Equipment and Machine Sub-department Group 4 Rank (a) (tractor) position on the Paynesville Subdivision on January 16, 23 and 28, 2009 and instead assigned employe G. Neumann (System File C-03-09-060-01/8-00460-022).

(2) As a consequence of the violation referred to in Part (1) above, Claimant S. Robinson shall now be compensated for a total of twenty-four (24) hours' straight time at the applicable Group 4-Rank (a) machine operator's 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.

Review of the record evidence reflects the following basic facts are not in dispute:

- The Claimant maintains a seniority date of May 1, 1997 within Group 4-Rank (a) of the Engineering Services Equipment & Machine (ESEM) Sub-department;

- The Claimant had properly placed his name on several call lists, one of which was a call list to protect short vacancies within Group 4-Rank (a) of the ESEM Sub-department compiled by the Carrier dated December 26, 2008. Among the machines listed in Group 4 (a) is Tractors (Wheel) as set forth in Paragraph (d), Rule 23, the Seniority-Sub-department Limits clause of the Controlling Agreement.

- On the three claim dates in question, January 16, 23, and 28, 2009, the Carrier directed G. Neumann to operate the Tractor for the purpose of snow removal on the Paynesville Subdivision. Neumann was regularly assigned as Foreman on the Paynesville Maintenance Crew and was not assigned to any position in the ESEM Sub-department on the claim dates at issue.

- The Machine Operator position on the three claim dates in question was deemed to constitute a "temporary/short vacancy" as defined by Paragraph 3, Rule 10, the Bulletins clause of the Controlling Agreement.

Throughout the winter of 2009, the Carrier assigned a Maintenance Crew on the Paynesville Subdivision to work in the Glenwood Yard to perform snow removal in order to clear the tracks and keep the yard operational. The Carrier submits that on the three claim dates in question snow conditions were such as to result in a snow emergency. As indicated above, the Carrier admits that on those three claim dates, it did not summon the Claimant off the appropriate call list to operate the Tractor but, rather, it utilized Foreman Neumann to operate the Tractor notwithstanding the fact that he was neither assigned to any position in the ESEM Sub-department, nor was he, like the Claimant, listed on the Group 4 (a) call list.

At the outset, the Carrier argues the merits of the claim should not be addressed by the Board because the claim before it is not the same claim that the

Organization presented on the property. The Carrier asserts that the claim presented on the property alleged that the Agreement was violated as a result of its failure to fill the temporary Group 4-Rank (a) Machine Operator's vacancy on the Tractor whereas, the claim now before the Board alleges it failed to call and assign Machine Operator S. Robinson [the Claimant] to fill a short vacancy on the Group 4-Rank (a) tractor position and instead assigned employee Neumann. As such, numerous Awards support the proposition that such claims should be dismissed on grounds that there is a material variance between the claim as originally presented on the property and the claim presented before the Board.

The Carrier defends its action of not calling the Claimant and utilizing Neumann instead to operate the Tractor on two grounds. First, contending that there was an immediate need due to snow drifts formed by substantial wind gusts thereby making track impassable, to clear the tracks to keep the yard operational and therefore it could not wait to contact the Claimant off the call list and then wait another period of time for his arrival at work to perform the service of operating the Tractor whereas, Neumann was already at work in the yard at the time. Second, Rule 11 (f) permits it latitude in emergency situations to have work performed without regard to complying with seniority. With respect to this latter defense, the Carrier asserts that the obligation pursuant to Rule 11 (f) to engage in efforts to utilize the senior employee when said employees are readily available is not mandatory but, rather, directory in nature, thereby relieving it of any such contractual obligation.

The Organization contends that the snow conditions that existed on the three claim dates in question did not constitute an emergency but, rather, the snow depths and wind speeds were not at all unusual, uncommon or unexpected for Minnesota in the month of January. The Organization further contends that in attempting to meet its burden of proof to support its position that a snow emergency existed on the three claim dates in question, the Carrier misrepresented the wind speed on each claim date referencing the wind speed in miles per hour (MPH) rather than in kilometers per hour (KM/H) as reported by data collected by the Weather Underground Website. In so doing, the Carrier overstated the wind speed on each of the three dates in question, to wit, the Carrier asserted the wind speed on January 16 to be eight MPH when in fact eight kilometers converts to a wind speed of 4.97 MPH; on January 23 the Carrier asserted the wind speed to be 29 MPH when in fact, 29 kilometers converts to a wind speed of 18.02 MPH; and on January 28 the Carrier asserted the wind speed to be ten MPH when in fact, ten kilometers converts to a wind speed of 6.21 MPH. Additionally, the Organization notes that although there was a considerable amount of

snow already on the ground prior to the claim dates in question, nevertheless it asserts no new additional snow fell on either the claim dates nor on the dates preceding each claim date, which is supported by documentation compiled by the National Weather Service - documentation it presented to the Carrier when conferencing the instant claim.

Finally, the Organization asserts the snow conditions extant on each of the three claim dates at issue did not meet the definition of an "emergency" used by the Board to make such a determination. Said definition of an "emergency" is "an unforeseen combination of circumstances calling for immediate action." The Organization submits that the subject snow removal work performed on each of the three claim dates was not the result of uncommon and unforeseen circumstances but, rather, was snow removal work typical of that performed during the winter in the Midwest.

In addressing the Carrier's argument asserting the Board is barred from considering and therefore ruling on the merits of the claim because of a material variance from the claim originally presented by the Organization on the property, we respectfully do not concur with this argument. While it is evident that a side-by-side comparison of the pertinent language of the two claims reads differently, we find that it is a difference without a distinction. We hold that the phrase, failing to call and assign the Claimant to fill a short vacancy not to be in material variance with the phrase, failure to fill the temporary Group 4-Rank (a) Machine Operator's vacancy on the Tractor. We are of the view that anyone with reasonable knowledge of the railroad industry would conclude after reading both statements of the claim that their meaning and intent is the same if not identical, because a failure to call and assign an employee to fill a short vacancy is identical to a failure to fill a temporary vacancy. We therefore reject this argument in its entirety and, in so finding, now address the merits of the claim.

The most cogent and persuasive evidence to support the Organization's position that the snow conditions that existed on each of the three claim dates did not rise and meet the definitional attributes of an "emergency" is not that snow conditions were such as to require the Carrier to remove whatever drifts of snow resulted in the need to clear the tracks and make the Glenwood Yard operational, as surely the record evidence shows that was the case but, rather, by the Carrier's own admission, it retained an on-going effort at this type of snow removal through-out the entire winter of 2009, and also, it was fully aware of the coming snow fall on the nights preceding the claim dates in question. That knowledge negates its core argument that the snow

fall that occurred constituted "an unforeseen combination of circumstances calling for immediate action." In knowing what the weather would be the preceding night of each of the claim dates at issue, we find that the Carrier had sufficient forewarning of its snow removal needs and, therefore, sufficient time to utilize the call list to summon the Claimant to perform the snow removal work required of a Tractor Operator.

We find further that based on the facts brought forth in adjudicating this claim that the Carrier, given its belief that the snow conditions constituted an emergency acted to evade its contractual obligation by not making any effort to utilize the services of the Claimant, who was both a senior employee and was readily available to perform the needed work of a Tractor Operator, as evidenced by his having placed himself on the appropriate call list. Accordingly, we hold that the Carrier did, as claimed here, violate the applicable cited provisions of the Controlling Agreement, and by so doing, deprived the Claimant of three work opportunities. In so holding, we direct the Carrier to compensate the Claimant a total of 24 hours' straight time at the applicable Group 4-Rank (a) Machine Operator's rate of pay.

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 16th day of September 2013.