Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41740
Docket No. MW-41648
13-3-NRAB-00003-110104

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 Mr. G. Pfau to perform overtime snow removal service along with his regularly assigned Minot section crew on January 10, 2009 and instead called employes of the maintenance crew and the welding crew to assist in said work (System File C-04-09-060-02/8-00219-155).

(2) As a consequence of the violation referred to in Part (1) above, Claimant G. Pfau shall now be compensated for twelve (12) hours at his respective 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.

Claimant G. Pfau established and maintains seniority in the Track Sub-department and at the time of this dispute, Saturday, January 10, 2009, he was assigned and working as a Material Truck Driver headquartered in Minot, North Dakota. The Carrier asserts that the Claimant's position was not assigned to a specific section crew but, rather, the Material Truck Driver position was assigned to Track Maintenance Supervisor (TMS) T. Kroll's territory covering the Portal and Newtown Subdivisions. On this day and date, the Claimant was observing a rest day.

The Carrier asserts that on January 10, 2009 a snow emergency occurred due to maximum wind gusts of 45km causing snow drifts that resulted in making track impassable between Mile Post 419 and Mile Post 469 from Voltaire to Minot, North Dakota, on the Portal Subdivision. The Carrier deemed the situation as a "snow emergency" and responded to the circumstances by utilizing regularly assigned crews headquartered at Minot, North Dakota, which included employees assigned to Maintenance, Welding and Section Crews, along with Snow Fighters and outside contractors to plow and remove the snow.

It is undisputed that employees from the Minot Maintenance, Welding and Section Crews each performed the work of plowing and snow removal between 7:00 A.M. and 7:00 P.M., for a total of 12 hours of overtime. However, according to the Organization, the Claimant, who should have been called along with those who performed the subject work (which is work within the scope of the Track Sub-department) was not called, whereas employees in the Welding Sub-department, whose scope of work does not include snow removal, were called to perform the work. In any event, the Organization contends that the weather conditions extant on January 10, 2009 did not constitute an "emergency" as defined by the Board in numerous previous Awards as, "an event that is sudden, unforeseeable and uncontrollable which brings operations to an immediate halt. As a result, the Organization asserts that the Carrier cannot raise as a defense, as it so contends, that it was not contractually obligated pursuant to Rule 11 (f) of the controlling Agreement to call the Claimant to perform the work at issue, which states, in pertinent part, the following:

> "Emergency service may be performed without regard to seniority. It is understood that when employes are readily available, efforts will be made to utilize the senior employee."

The Organization argues that even if the circumstances that existed on January 10, 2009 did constitute a snow emergency, the Carrier was obligated in accordance with the provision of Rule 11 (f) to make every effort to call the Claimant to perform the overtime work before it called other Sub-department and contractor personnel. The Organization asserts that the Carrier presented no probative evidence that it made any effort to call the Claimant pursuant to its contractual obligation to utilize a senior employee. In not calling the Claimant to perform the subject snow removal work, it precluded him from earning 12 hours of overtime pay.

The Carrier raises as a first defense the argument that the Statement of Claim presented before the Board is not the same claim as that originally presented on the property, that the original claim is in material variance with the claim now before the Board and, therefore, according to established precedent, should be dismissed by the Board. The second defense raised by the Carrier is that given the circumstances of an emergency, the burden of proof befalls the Organization to prove that it did not make an effort to call the Claimant as the senior employee as provided by Rule 11 (f). Because the Organization did not present any substantive evidence that the Carrier did not make an effort to call the Claimant to perform the subject snow removal work, the Organization failed in its burden of proof and, therefore, the instant claim should be denied in its entirety.

As to the Carrier's position that the claim presented before the Board is in material variance with the original claim presented on the property, upon a reading of the difference in the language of the two claim statements, we do not concur with the Carrier's position. The original claim presented reads as follows:

> "The Agreement was violated as a result of Carrier's failure to utilize claimant to perform snow removal on Saturday, January 10, 2009."

The Statement of Claim presented here reads, in pertinent part, as follows:

> "Carrier violated the Agreement when it failed to call and assign claimant to perform overtime snow removal service . . . ."

Although we concur that there exists a difference in the language, we do not concur that this difference rises to the standard of a material variance. The Carrier's failure to call and assign the Claimant resulted in the Carrier's failure to have utilized the Claimant to perform the snow removal work in question. Thus, while the

language of the two claim statements is not identical, their meaning is identical. Accordingly, we reject the Carrier's first defense and we now turn our attention to the merits of the case.

The record evidence makes quite clear that contrary to the Organization's position, the circumstances prevailing on January 10, 2009 support the Carrier's determination that a snow emergency existed. The proof of this is, that it required the Carrier to summon a substantial number of employees to remove the snow drifts so as to clear the extensive distance of track affected in order to make the track passable. Additionally, the substantial number of employees utilized by the Carrier to accomplish the snow removal required said employees to work continuously for 12 straight hours. If there was no snow emergency in effect as the Organization contends it would not have been necessary for the Carrier to utilize so many employees for so long a period of time to perform the snow removal work in question.

Having determined that an emergency existed, we concur with the Organization's position that under the provision of Rule 11 (f) the Carrier is still obligated to expend an effort to secure the services of the senior employee, here the Claimant. However, we concur with the Carrier's position that the burden of proof to show that it did not extend such an effort shifted to the Organization. In the instant case, the Organization successfully met this burden by highlighting the fact of the Carrier's own admission that it was at a loss to provide any reasonable explanation as to why the Claimant had not been among the employees called to perform the subject snow removal work. Given the number of employees called to perform the work at issue and the fact that it was not within the scope of work for some of the employees utilized by the Carrier to perform snow removal work, we can only conclude that the Carrier failed in its obligation under Rule 11 (f) to expend the effort necessary to secure the services of the Claimant as the senior employee, albeit the possibility that the Carrier's failure was due simply to inadvertence.

Based on the foregoing findings, we direct the Carrier to pay the Claimant 12 hours of overtime at the rate of pay in effect on January 10, 2009.

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 30th day of September 2013.