

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41777
Docket No. MW-41369
13-3-NRAB-00003-100243**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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 Carrier violated the Agreement when it failed to call and assign Common Class Machine Operator R. Pruess and instead directed Track Foreman S. Syring to operate a backhoe on the Clinton Subdivision on a regular basis beginning on March 26, 2009 and continuing and when it failed to properly bulletin said machine operator position (System File R-0916C-304/1518642 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Pruess shall now be compensated, beginning March 26, 2009 and continuing, for “* * * forty (40) hours per week at the straight time rate and any overtime hours that this back-hoe worked, until the position is properly bulletined and assigned.”**

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 filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the parties' Agreement when it failed to call and assign the Claimant to operate a backhoe on a regular basis beginning on March 26, 2009, and instead directed a Track Foreman to perform this work.

The Organization contends that the claim should be sustained in its entirety because (1) the Carrier failed to recognize the Claimant's superior seniority and assign him to the vacant Backhoe Operator position at issue, (2) the Carrier violated the Agreement when it failed to bulletin the vacant position at issue, (3) there is no merit to the Carrier's defenses, and (4) the requested remedy is proper. Conversely, the Carrier contends that the claim should be denied in its entirety because (1) the record does not establish that the Carrier was obligated to recall the Claimant to operate a machine, or that the Claimant knew how to operate or was qualified on the machine, (2) the work at issue was incidental to the work that the Track Foreman was performing and was less than full-time work, (3) none of the Rules cited by the Organization apply to less than a full workweek, and (4) the requested remedy is excessive.

The Board reviewed the record and finds that the Organization failed to meet its burden to prove that the Carrier violated the Agreement when it assigned a Track Foreman to operate the backhoe on an intermittent basis. There are no records that show that the Foreman had operated the backhoe on a regular basis over the 30-day period. The Carrier is not required to bulletin a position if a full-time position does not exist. Moreover, there is no evidence in the record that the Claimant was qualified to perform the work at issue. In the final analysis, the Board finds that the work was incidental work and, as such, the Carrier had a right to assign it to a Track Foreman on an intermittent basis.

Because the Organization failed to meet its burden of proof, the Board has no choice but to deny the claim.

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 25th day of November 2013.