

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42824
Docket No. MW-43178
17-3-NRAB-00003-150400**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

- “(1) The Carrier violated the Agreement when it assigned junior employee A. Bojorquez to fill a temporary vacancy operating a Russell Plow at various locations on the Jackson, Owatonna, and Mason City Subdivisions on January 27, 28, 29, and 30, 2014 instead of assigning senior Claimant K. Hauer thereto (System File B -1410D-101/8-0023 DME)**
- (2) As a consequence of the violation referred to Part (1) above, Claimant K. Hauer shall ‘*** compensated at the appropriate rate of pay for all hours worked as well as compensated for all hours. Reportedly thirty-two (32) hours of straight time and five and a quarter (5.25) hours overtime ***’ (Emphasis in original). ”**

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.

Both Claimant Hauer and employee A. Bojorquez maintain seniority under the Maintenance of Way January 1, 2013 Agreement. There is no dispute that Claimant's seniority is greater than Bojorquez' seniority. Rather, the instant dispute lies in whether Carrier was in violation of the following Agreement Rules as asserted by the Organization: Rule 1-Scope; Rule 10 (2) – Filling of Short Vacancies; and Rule 15 (1) – Overtime in making the decision to fill the vacancy with employee Bojorquez who has less seniority than Claimant.

On the four claim dates in question, Claimant and employee Bojorquez were working along the same territory, to wit, Northern Iowa and Southern Minnesota but each were working under a different manager. Due to snow conditions on the subject claim dates, Carrier created a Short Vacancy for the purpose of operating the Russell Snow Plow to clear snow from the tracks. Without ever contacting or making an attempt to call and assign Claimant to fill the short vacancy, Carrier Manager unilaterally made the decision to utilize Bojorquez, the employee junior in seniority to Claimant to perform the snow removal duties by operating the Russell Plow. At the time Carrier created the short vacancy and acted to fill it with other than the Claimant, possessing greater seniority than employee Bojorquez, Claimant was working a position in Wells, Minnesota and Bojorquez was working a position at Mason City, Iowa.

In filing the instant claim, the Organization asserted that Carrier filled the short vacancy with the junior employee without complying with the applicable provisions set forth in Rule 10 paragraph 2 which reads in whole as follows:

“The Manager will determine whether a vacancy or position is to be filled. If the decision is to fill, the manager will fill the position with a qualified employee who is readily available, can be released from his/her normal duties, and, everything being equal, is the senior employee. Failing that, the manager may appoint any qualified employee who is willing to accept the assignment.”

The Organization argues that Claimant met every aspect of what is required to fill a short vacancy. Claimant was qualified and readily available to fill the position of operating the Russell Plow. Claimant could have been released from his normal duties on the subject four claim dates and, of course, Claimant was the senior employee. The Organization notes that Carrier did not refute any part of its argument with regard to

Claimant's meeting all of the requirements set forth in Rule 10 paragraph 2. Instead, Carrier's first response in denying the claim and addressing Rule 10, was that removing Claimant from his position at Wells, MN would have created more hardship for it than utilizing employee Bojorquez to fill the Russell Plow short vacancy due to the fact that Bojorquez was working a position in Mason City where it had a larger pool of employees to support the winter operations. Additionally, Carrier noted, the Russell Plow originated in Mason City and the duration of the assignment was unknown upon the departure from Mason City as the Russell Plow was to be utilized on additional subdivisions than solely the Jackson Subdivision. In later responses denying the subject claim, the Organization notes that Carrier asserted the snow was weather deemed to be an emergency. The Organization cites the long held and accepted definition of an "emergency" "as an event that is sudden, unforeseeable and uncontrollable, which brings operations to an immediate halt." The Organization argues Carrier was unable to show by any substantive evidence that the snow conditions that were evident on the subject four claim dates met this definition of "emergency". Rather, the Organization maintains it is well known that the need to clear tracks from snow in Northern Iowa and Southern Minnesota in the winter months is a routine maintenance task and not an emergency.

A final argument asserted by the Organization is that the operation of the Russell Plow involved work performed on both straight-time hours worked and overtime hours worked. Insofar as overtime is concerned, the Organization argues that in filling the position with the junior in seniority employee rather than filling it with Claimant, Claimant is entitled as part of the remedy to be paid the overtime rate of pay for the overtime hours worked by Bojorquez per the provisions of Rule 15 paragraph 1 which reads in whole as follows:

"When operating requirements or other business needs cannot be met during regular working hours, employees will be given the opportunity to volunteer for overtime assignments. Employees must receive their manager's prior authorization for all overtime work. Overtime will be distributed first to the employees who regularly perform the work and, thereafter, as equitably as practical to all employees qualified and reasonably available to perform the required work (emphasis by the Organization)."

Carrier argues counter to the Organization's position noting Rule 15 makes reference to employees volunteering for overtime assignments and, in this instance, Claimant did not volunteer for the overtime work of operating the Russell Plow.

Carrier's second argument with respect to the cited Rule 15 is to the provision emphasized by the Organization pertaining to overtime distributed first to employees who regularly perform the work noting that since a Russell Plow is only used on an "as needed" basis due to extreme snow conditions, there are no employees who regularly perform this work. The Organization maintains that had Carrier properly filled the short vacancy with the Claimant, he would have been paid at the overtime rate for the overtime hours worked just as employee Bojorquez was compensated for the overtime hours he worked.

Upon its review of all argument asserted by the Organization and Carrier, the Board finds the Carrier's position to be not at all persuasive. The evidentiary record makes quite clear that in filling the short vacancy of operating the Russell Plow, Carrier paid no heed to its contractual obligations set forth in Rule 10, paragraph 2 and willy nilly unilaterally filled the vacancy with an employee who had less seniority than Claimant and worse yet, made absolutely no attempt to contact Claimant and provide him the opportunity to accept the Russell Plow assignment. Carrier's position that in utilizing Claimant to fill the position would have caused it hardship we note hardship is not an element comprising the obligations set forth in Rule 10, paragraph 2. As to the issue of overtime pay, we concur with the Organization's position that since employee Bojorquez was compensated at the overtime rate of pay for the overtime hours he worked the Russell Plow assignment, Claimant would have been compensated at the applicable overtime rate of pay for the same number of overtime hours worked had Carrier correctly filled the assignment with Claimant in accord with his relative seniority standing.

Accordingly, the Board upon all evidence and argument reviewed, rules to sustain the subject claim and concurs in the remedy requested by the Organization.

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 28th day of November 2017.