

**BEFORE
PUBLIC BOARD No. 7097**

**Award No. 2
Case No. 2**

BROTHERHOOD OF MAINTENANCE OF WAY)	)	
EMPLOYES)	)	
	)	
vs.)	)	PARTIES TO DISPUTE
	)	
UNION PACIFIC RAILROAD COMPANY)	)	

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned and used regularly assigned Track Foreman R. K. Dunbar and regularly assigned Assistant Track Foreman M.D. Hanus to operate a Class ‘B’ Machine (snow goose regulator) on the Tara, Fort Dodge, Eagle Grove, Jewell, Estherville and Klemme Subdivisions beginning on January 2, 2001 through February 11, 2001 and continuing instead of furloughed Class ‘B’ Machine Operators D.P. Walker and M. A. Kuzmicki (System File 2RM-9245T/1264845 CNW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants D.P. Walker and M.A. Kuzmicki shall now each be compensated for two hundred thirty-two (232) hours’ pay at the respective straight time rates of pay and for seventy-six (76) hours’ pay at their respective time and one-half rates of pay for the period beginning January 2, 2001 through February 11, 2001 and they shall each be compensated for all straight time and overtime hours expended in the performance of the aforesaid work beginning February 12, 2001 and continuing.”

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the

Employe and Carrier involved in this dispute are respectively Employe and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

Claimant D.P. Walker holds seniority on Seniority District T-2, Zone B, as a Class B Machine Operator dating from April 27, 1981. Claimant M.A. Kuzmicki holds seniority in the same District and Zone as a Class B Machine Operator dating from October 9, 1998. Both Claimants were furloughed and awaiting recall at all times relevant to this dispute.

Between January 2 and February 11, 2001, the Carrier needed two Class B Machine Operators to operate a Class B Machine (a Snow Goose Regulator) to plow snow on the Tara, Fort Dodge, Eagle Grove, Jewell, Estherville and Klemme Subdivisions. The Carrier assigned a regularly assigned track foreman (R.K. Dunbar) and a regularly assigned assistant foreman (M.D.Hanus), both qualified Class B Machine Operators, to operate the Class B Machine. Dunbar worked a total of 33 days on the Snow Goose during the period; Hanus worked 31 days on the machine. The Organization contends that the Carrier violated the Agreement by assigning the work to the Track Foreman and the Assistant Foreman instead of recalling the Claimants from furlough.

Resolving this claim requires a close reading of Rules 12, 14, and 16. Paragraph (e) of Rule 14, "Recall of Forces," states that "Furloughed employees will be called in seniority order for extra and relief work." However, paragraph (a) of Rule 16, "Bulletining New Positions and Vacancies," provides for bulletining of new or vacant positions "known to be of thirty (30) calendar or more days duration," (paragraph (a)), while under paragraph (b) of the same rule, "[v]acancies of less than thirty (30) calendar days duration may be filled without bulletining by the senior qualified employees in the district and group making request in writing, consistent with operational requirements." More specifically, Rule 16(b) states:

Vacancies of less than thirty (30) calendar days in machine operator positions will first be filled by employees holding seniority as Machine Operators but not working as such. If there are no such employees holding seniority as Machine Operators, consideration will then be given to Track Department employees who have on file written request with Assistant Division Manager-Engineering for such consideration, prior to assignment of others. . . .

The Carrier contends that the Foreman and Assistant Foreman had greater seniority as Class B Machine Operators than the Claimants, and that they were properly assigned the snow plow work under Rule 16(b), because the Carrier had no way of knowing in advance that the snow removal work would last 30 calendar days or more and was therefore entitled

to fill the positions the Foreman and Assistant Foreman who were “employees holding seniority as Machine Operators but not working as such.”

Situations similar to the one here have been address by PLB No. 2960, in its Case Numbers 88 and 168. In Case No. 88, the assignment of a foreman to operate a class B machine “intermittently” between July 18, 1983 and October 31, 1983 was disapproved under Rule 16(b) because the foreman lacked machine operator seniority. In this case, the Foreman and Assistant Track Foreman do have Class B Machine Operator seniority, so Case No. 88 is not determinative here.

Case No. 168 is more instructive: There, the foreman assigned to operate a Class B machine for 10 days did have seniority standing to operate the machine. The Board noted that a foreman frequently serves as a lead worker performing both supervisory and work functions, but also that an employee cannot occupy two positions simultaneously, and concluded that under Rule 16(b) “it is permissible for a Foreman with Machine Operator seniority to operate that class machine **on an incidental and intermittent basis** when dictated by the practicalities of the individual circumstances.” In Case No. 168, the Board concluded that 80 hours worked in a two-week period exceeded what “under these circumstances, could be considered a reasonable amount of intermittent and incidental machine work for a Foreman without infringing on the work opportunities of other Machine Operators.” In sustaining the claim, that Board also noted that “there were no circumstances apparent which made it impractical to use a machine operator.”

The Carrier contends that Case No. 168 is inapplicable because it involved the regularly scheduled work of tamper and regulator operation, while this case deals with emergency snowstorms. Even though there is no evidence in this record that the Carrier was dealing with “emergency conditions” that caused the shutdown of its operations in whole or in part, its point about the irregularity of snow removal work has some merit. Nonetheless, this Board finds that Case No. 168 of PLB 2960 defines the inquiry to be made in this case: whether the work is being done merely “on an incidental and intermittent basis...without infringing on the work opportunities of other Machine Operators” where there are no circumstances that make it impractical to use a machine operator. The irregular and unpredictable extent of snow removal work is merely a factor to be considered in evaluating the reasonableness of this extended assignment.

The Board fully recognizes the difficulty in forecasting accurately the extent of snow removal work that will be required and acknowledges management’s quandary in deciding early in the winter how to staff the task. However, the Agreement allocates rights to the work and the Carrier, by choosing to assign the snow plowing work to a foreman or assistant

foreman otherwise regularly assigned, takes the risk that the work will prove so extensive that the assignment exceeds a reasonable amount of intermittent and incidental work and effectively infringes on the work opportunities of other Machine Operators. That is what happened here. While the Carrier is not being required to meet a standard anywhere close to perfection in forecasting the weather, this Board finds that the 31 and 33 days worked by the Foreman and Assistant Foreman within a 41-calendar-day period exceeded what could be considered a reasonable amount of intermittent and incident machine work without infringing on the work opportunities of other Machine Operators.

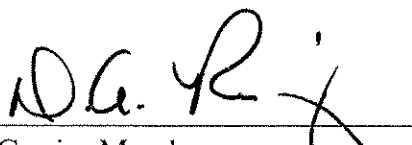
The Carrier contends that there was at most a technical violation because management, limited by budget to 15 positions, "in effect" abolished the foreman and assistant foreman positions under Rule 12 and assigned the employees to operate the Snow Goose as the senior employees in class. However, there is no evidence that there was a emergency that shut down Carrier operations in whole or in part, so Rule 12 did not apply. More important, the 15-position limitation cited by the Carrier was unilateral rather than contractual, and does not excuse the Carrier from complying with Rules 14 and 16. At some point, management should have recognized that the work was likely to exceed 30 days, and regularized the assignment pursuant to the Agreement.

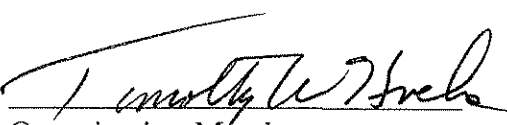
The Carrier also contends that the Organization has failed to prove that it was the Claimants who lost the opportunity to work, because there were other employees with greater Class B Machine Operator seniority, including the Foreman and Assistant Foreman, who would have gotten the work ahead of the Claimants in the absence of a contract violation. However, of the eligible employees, it is the Claimants who filed claims. As noted in Third Division Award Number 32440, where the Board has found a violation, "the Organization is privileged to name any Claimant it chooses to be compensated for this Agreement violation."

AWARD

Claim sustained.


Lisa Salkovitz Kohn
Neutral Member


Carrier Member
Dated: June 6, 2008


Organization Member


CARRIER DISSENTS