

PUBLIC LAW BOARD 5564

In the Matter of Arbitration between:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION – IBT RAIL CONFERENCE**

and

**NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD
CORPORATION**

Case No. 67

Award No. 67

THE ORGANIZATION'S STATEMENT OF THE CLAIM

This Decision resolves the Organization's claim as follows:

1. The Carrier violated the Agreement when it assigned Bridge and Building (B&B) Subdepartment employees G. Ponce and R. Vanmeter instead of Work Equipment Subdepartment employee V. Ferrusquia to perform work operating a speed swing machine and excavator machine beginning on February 1, 2016 and continuing (System File C 16 02 01/8-30-686 NRC).
2. As a consequence of the violation referred to in Part 1 above, Claimant V. Ferrusquia shall be compensated eight (8) hours' pay each day beginning February 1, 2016 and continuing at the Group A, Rank 1 work equipment operator rate of pay.

STATEMENT OF THE CASE

Based on the record developed by the Organization and the Carrier, this Public Law Board (Board) finds the Parties herein to be a Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the Parties and the dispute.

On February 1, 2016, G. Ponce and R. VanMeter, Carrier employees with seniority in the Bridge and Building Subdepartment (B&B), were assigned to work that lasted 41-

days and which BMW asserts required the use of a Mini-Excavator.^{*} V. Ferrusquia, the Claimant, holds seniority in the Carrier's Work Equipment Subdepartment as a Group A, Rank 1, Work Equipment Operator. Claimant was on furlough, awaiting recall, and ready and willing to work. Claimant was not assigned to operate a Mini-Excavator with regard to the work performed by Ponce and VanMeter. BMW's Claim asserts the Claimant was entitled to the work of operating the Mini-Excavator pursuant to Rules 2 and 3 of the Agreement.

On March 30, 2016, BMW filed a Claim alleging Metra violated Rules 2 and 3 by assigning Ponce and VanMeter to operate a Mini-Excavator when they do not have seniority on the Work Equipment or Track Department Rosters. BMW's Claim sought compensation for Claimant for 8-hours per day at the regular rate of pay as a Group A, Rank 1, Heavy Equipment Operator for 41-days.

On May 26, 2016, Metra denied the Claim responding that Ponce and VanMeter were performing B&B work and that B&B employees have historically operated the Mini-Excavator in connection with their work.

On July 25, 2016, BMW appealed Metra's Claim denial.

On September 13, 2016, Metra denied BMW's appeal.

On April 26, 2017, the Parties conferenced the Claim but were unable to resolve the dispute. This dispute is now before the Board for resolution.

BMW asserts that there is a contractual preference for senior Work Equipment Subdepartment employees to operate Mini-Excavators pursuant to Rules 2 and 3 of the Agreement. BMW argues that well-established precedent requires that the nature of the work performed in the instant case is reserved to Work Equipment Subdepartment employees with regard to operating Mini-Excavators.

^{*} Initially, the Claim asserted that Ponce and VanMeter operated a Speedswing and a Mini-Excavator. However, before the Board, Metra asserted that a Speedswing was not used and BMW accepted the assertion. For this reason, the Claim that a Speedswing was used on the work performed by Ponce and VanMeter's considered abandoned.

BMWE argues as well that Metra's defense, that a past practice exists establishing that Mini-Excavator work is not exclusively Track Department work, is invalid and without merit. BMWE argues that Rules 2 and 3 are clear and unambiguous and Metra has not produced a shred of evidence to support its past practice defense. As remedy, BMWE asserts that the Claimant is entitled to be compensated at the Group A, Rank 1, Work Equipment Operator rate for all hours worked by the B&B employees from February 1, 2016 and continuing for 41-days.

Metra asserts that BMWE has failed to demonstrate that Claimant should have performed the work pursuant to the language of Rule 3. Metra argues that Rule 3 does not reserve Mini-Excavator or Speedswing operations to any specific Subdepartment and there is no exclusivity for use of these machines to one Subdepartment.

Concerning BMWE's requested remedy, Metra argues that BMWE failed to prove that Ponce and VanMeter operated a Mini-Excavator for 8-hours a day as claimed.

Regarding the form of the Claim, Metra asserts that BMWE's Claim failed to provide essential facts regarding: what work was performed; where the work was performed; the dates of the work; the duration of the work; and who performed the work, Ponce or VanMeter. Without these essential facts, Metra says BMWE has not met its burden of proof and the Claim is without necessary facts to sustain a Rules violation.

Based on extensive precedent, Metra argues that BMWE's unsupported contentions of a Rules violation does not shift the burden to the Carrier. Since the record contains no proof that Ponce or VanMeter operated a Mini-Excavator, BMWE cannot prove an alleged Rules violation of any kind.

Citing precedent, Metra asserts that B&B Subdepartment employees have historically operated Mini-Excavators and the Agreement does not establish Mini-Excavator operation is exclusive to the Work Equipment Subdepartment. Metra insists that no exclusivity exist as to which employees can operate machines. Metra says it is not restricted to use solely Work Equipment Subdepartment seniority to select and to assign employees to Mini-Excavators.

Metra asserts that without support or evidence from BMW to demonstrate that Ponce and VanMeter operated a Mini-Excavator at all or even every day, 8-hours for 41-days, the Board cannot grant BMW's requested relief.

DISCUSSION AND FINDINGS

BMW bears the burden of proof to sustain a Rule violation in its Claim. Each element of the Claim must be supported by material, probative evidence supporting the essential facts of the Claim. The Board cannot sustain a Claim which alleges a rule violation without supporting, probative and material evidence which proves each essential, relevant fact and circumstance of the Claim.

The on property record of BMW's March 30, 2016 Claim reveals the following complete statement of the alleged Rule violation:

We are hereby submitting a claim/grievance in accordance with **Rule 33**, of the current working agreement between **Northern Illinois Regional Commuter Railroad Corporation (NIRCRC)** and its employees represented by the **Brotherhood of Maintenance of Way Employees of the International Brotherhood of Teamsters (BMWED-IBT)**. This claim is on behalf of the below mentioned **Metra** employee because the Carrier violated the current working agreement portions of **Rule 2. Subdepartments - Seniority Groups and Ranks, and Rule 3. Classification of Work.**

Ferrusquia, V10317

(All Emphasis the Organization's)

From February 1, 2016 and continuing the Carrier violated **Rule 2. Subdepartments - Seniority Groups and Ranks, and Rule 3. Classification of Work, when** it allowed B&B Subdepartment employees (G. Ponce, and/or R. VanMeter), who have no seniority rights on the Work Equipment Subdepartment Roster, or the Track Department Roster to operate machines. These machines (Speedswing, and Mini Excavator) are covered under, and/or historically operated by employees holding seniority on the Work Equipment Subdepartment Roster, or the Track Department Roster. The above mentioned claimant has a Work Equipment

Subdepartment Roster seniority date of 3/27/15 and Track Subdepartment Trackman date of 5/12/2014, and was on furlough during these dates, and should have been allowed this opportunity to work, before allowing a B&B employee to perform said work.

Other than this allegation of a Rule violation stated in the Claim, BMW produced no supporting material evidence to the Claim during the on property handling.

The Board agrees with Metra that the Claim is devoid of the essential facts of what work was performed; where the work was performed; the dates of the work; the duration of the work; and who performed the work, Ponce or VanMeter. Moreover, and in particular, there is no evidence in the on property handling that a Mini-Excavator was used to perform the work by Ponce and VanMeter at all.

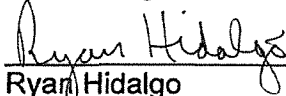
Simply stated, the Claim is vague and lacks sufficient specificity to meet BMW's burden of proof.

The Claim must be denied.

AWARD

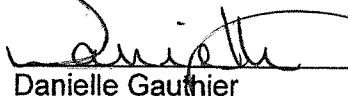
Claim denied.

For the Organization:



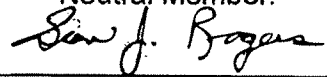
Ryan Hidalgo
Public Law Board Advocate
BMWE-IBT

For the Carrier:



Danielle Gauthier
Director - Labor Relations
Metra

Neutral Member:



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October 31, 2019