Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35843
Docket No. MW-34260
01-3-97-3-838

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned Roadway Equipment and Machine Subdepartment Brushcutter Operator R. Hammer to perform Track Subdepartment work (operate the Russell Snow Plow) on the Mason City, Austin and Jackson Subs on January 30, 31 and February 1 and 2, 1996 instead of assigning Track Subdepartment Machine Operator R. Shimek to perform said work (System File C-19-96-C060-05/8-00219-005 CMP).

2. As a consequence of the violation referred to in Part (1) above, Machine Operator R. Shimek shall be allowed twenty-three (23) hours' pay at his time and one-half rate and seven (7) hours' pay at his double time rate."

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 Claimant is a Machine Operator with a seniority date of May 18, 1976 in the Carrier's Track Sub-Department. R. Hammer has a Machine Operator seniority date of September 4, 1984 in that Sub-Department. On the relevant dates, Hammer was also assigned as a Brushcutter Operator in the Roadway Equipment & Machine Sub-Department.

On January 30, 31, February 1 and 2, 1996, junior Machine Operator Hammer was assigned to a Russell Snow Plow instead of the Claimant. At the time of the assignment of the work to Hammer, the Claimant was working his regular position on the Mason City Section.

Citing Rule 8 ("[e]mergency service may be performed without regard to seniority") the Carrier first contends that "[t]his work was done under emergency. . . . " In support of that assertion, the Carrier points to the fact that overtime hours were necessary in order to clear snow from the line so that train traffic could be restored. We reject that argument. There is insufficient evidence in the record to support the Carrier's assertion that the snowfall in question rose to the level of an "emergency."

See Third Division Award 32419:

> "The Carrier bears the burden to demonstrate the existence of an emergency so as to allow it to avoid the requirements of the Agreement concerning the use of employees. . . . An emergency is an unforeseen combination of circumstances that calls for immediate action."

Standing alone, then, the fact that there was a good deal of work necessitating overtime cannot equate with a demonstration of an "emergency."

Further, even if an emergency existed, see Third Division Award 21222 involving an emergency situation:

> " . . . It has been held repeatedly that Carrier has the obligation to make a reasonable effort to communicate with employes in situations analogous to that herein. . . . Even with the broad latitude permitted Carrier in an emergency situation, the obligation still persists to make a reasonable effort to call the employes provided by rule for the work. . . ."

There is nothing to show that efforts were made to contact the Claimant. The Carrier therefore cannot prevail on its assertions that an emergency existed as a justification for avoiding assignment of the work to the Claimant.

The Carrier also contends that the Organization has not met its burden to demonstrate that the Carrier was obligated to assign the work to the Claimant. We agree with that argument.

See Third Division Award 26548 involving the assignment of the driving of and work with a crane normally performed by that Carrier's system work equipment *subdepartment employees to track subdepartment employees:*

> " . . . The basic issue herein is whether the disputed work belongs exclusively to Crane Helpers. In the absence of clear Agreement language that specifically reserves identifiable work to members of the Organization, the Organization is obligated to show by reference to systemwide past practice that the work has historically been performed by covered Agreement employes. See, e.g. Third Division Awards 25693, 25409, 25077. In the instant case, there is nothing in the Agreement which reserves the work at issue to the classification herein. Therefore, it was incumbent upon the Organization to prove that a past practice existed, since, as noted, the Agreement does not guarantee the assignment to Claimant. What this Board said in Third Division Award 20425 is applicable here:
>
> > 'It is well established that Claimant must bear the burden of proving exclusive jurisdiction over work to the exclusion of others. This Board has also found that when there is a jurisdictional question between employees of the same craft in different classes, represented by the same Organization,

> the burden of establishing exclusivity is even more heavily upon Petitioner. (Awards 13083 and 13198).'"

The Agreement does not specifically reserve the work on the Russell Snow Plow to Machine Operators in the Track Sub-Department. Given that the assignment here "is a jurisdictional question between employees of the same craft in different classes, represented by the same Organization, the burden of establishing exclusivity is even more heavily upon Petitioner" (Third Division Award 20425, supra). That burden has not been met.

On the property, the Organization asserted that:

> "[The Carrier] contends that BMWE offers no evidence of where in the agreement it is stated where work on a Russell snow plow falls. To the contrary, agreement standing for the work in question falling to claimant is clearly identified within past exchange of correspondence between Carrier and BMWE. In fact, there has been a historical, long recognized practice, and custom of Carrier allowing Maintenance of Way (MOW) within the Track Sub-department to operate Russell snow plows, Glossip snow plows, snow flangers, snow fighters, and the like. Apparently [the Carrier] has forgotten that the correspondence still exists."

That same statement was recently found insufficient to meet the Organization's burden in a similar dispute between the parties arising at the same time as this dispute. See Third Division Award 35376 involving the performance of Russell Snow Plow work by Roadmasters in January 1996 with the Carrier's contention that snow plowing is not reserved and may be properly performed by any Carrier personnel. In denying the claim, a majority of the Board (with the Organization dissenting) referred to the Organization's similar " . . . contention that Scope coverage ' . . . is clearly identified within past exchange of correspondence. . . . '" However, the Board found that there was a " . . . lack of supporting evidence . . . " for that assertion. This record likewise does not contain such "supporting evidence" for the Organization's assertion of the existence of "a historical, long recognized practice, and custom of Carrier allowing Maintenance of Way (MOW) within the Track Sub-department to operate Russell snow plows. . . ." Given the burden is "even more heavily upon Petitioner" in these kinds of cases (Third Division Award 20425, supra), without having the "past exchange of correspondence" the Organization relies upon as part of this record for our evaluation,

we cannot find in this case that the Organization has met its required burden to demonstrate a past practice whereby employees in the Claimant's classification performed the work of operating Russell Snow Plows.

A statement from the Claimant also asserts that:

> "In 23 years I never saw a heavy equipment operator run a russell plow. It has always been in the track department, or done by maintenance people."

For the same reasons, the Claimant's assertion, by itself, does not measure up to meeting the Organization's required burden. The fact that the Claimant "never saw" someone other than employees in his Sub-Department perform the work, does not mean that it has not happened on the Carrier's system.

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 18th day of December, 2001.