Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31254
Docket No. MW-30986
95-3-92-3-791

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation
((AMTRAK - Northeast Corridor)

STATEMENT OF CLAIM "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Supervisor J. Warden to perform truck driver duties (picking up and delivering supplies) on December 6, 7, 10 and 11, 1990 and January 5, 7, 11 and 14 through 18, 1991 (System File NEC-BMWE-SD-2958 AMT).

(2) The Agreement was violated when the Carrier assigned Supervisor R. Gill to perform truck driver duties on December 3 through 7, 10 through 14, 17 through 21, 27 and 28, 1990 and January 2 through 4, 7 through 11, 14, 16 and 17, 1991 (System File NEC-BMWE-SD-2959).

(3) As a consequence of the violation referred to in Part (1) above, Truck Driver W. Gibson shall be allowed five (5) hours pay for each date cited, a total of sixty (60) hours, at his respective time and one-half rate.

(4) As a consequence of the violation referred to in Part (2) above, Truck Driver W. Gibson shall be allowed four (4) hours pay for each date cited, a total of one hundred twelve (112) hours, at his respective time and one-half 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 waived right of appearance at hearing thereon.

At the outset, the Carrier protested new evidence provided by the Organization in its Submission to the Board. None of the information so provided will be considered by the Board in its deliberations on this matter.

This dispute concerns the driving of Carrier's pick-up truck by a Supervisor. The Organization maintains that such work has been traditionally and customarily performed by BMWE employees and is, therefore, properly assigned only to them. As remedy for the alleged violation, the Organization seeks four hours at the time and one-half rate for Claimants for each day cited in the above-referenced claim. In support of its position, the Organization cites Third Division Award 28185. In that Award, the Board held that the Carrier had erroneously permitted Training Instructors to set up and operate a pump for removing water found in the cellar of one of the Carrier's buildings.

The Carrier asserts that the Agreement does not support the Organization's position. It denies that the language of the Agreement reserves picking up and delivering supplies to vendors, or moving trailers of Mechanical Department material, exclusively to Truck Drivers. Carrier maintains that evidence on the record shows a practice of "mixed assignment" for all of the work in dispute. It refers to Third Division Award 26236, in which the Board found that:

> "... a review of the Agreement language in question reveals that the work in question is not work that accrues solely to Truck Drivers. The Scope Section of the Agreement states that 'The listing of work under a given classification is not intended to assign work exclusively to that classification.'"

As in that case, there is no showing in the matter currently before this Board that, by historical practice, the work at issue has been reserved to Truck Drivers.

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 1st day of November 1995.

LABOR MEMBER'S DISSENT
TO
AWARD 31254, DOCKET NO. MW-30986
(Referee Wesman)

One school of thought among railroad industry arbitration practitioners is that dissents are, for the most part, not worth the paper they are printed on or the postage to send them out because they rarely consist of more than a repeat of the arguments which were considered and do not prevail in the case. Without endorsing this school of thought in general, it must be pointed out that what we have in this instance is a dichotomy which is commonly found in the arbitration arena when similar cases are argued in front of different arbitrators at nearly the same time. While one case may be pending a decision, the other arbitrator could be the first to render a decision which, in the event the award is not palpably erroneous, should stand as precedent. Under date of September 26, 1995, Referee Eischen rendered a decision involving an identical circumstance as the instant case, wherein it was determined that:

> "There is no dispute that Carrier assigned a contract Supervisor to perform duties which the Organization amply demonstrated are reserved by custom, practice and tradition under Article I for performance by Agreement-covered employees in the Truck Driver classification headquartered at Amtrak's Bear facility. Claimant was employed on claim dates performing work assigned by Supervisor Warden, but there is no probative evidence that Claimant was 'unavailable' to perform this truck driving work. Claimant and his fellow Truck Drivers have traditionally performed the task at issue, and should have been used to do so on the dates claimed."

The Majority held that the Organization had met its burden of proof insofar as the Agreement violation was concerned; however, the remedy was adjusted to reflect one minimum call under the Call Rule for each claim date and is the appropriate remedy for the violations of the Agreement.

The dispute cited herein is nearly identical to that which was found within Award 31129. Generally, when decisions are rendered that have nearly identical circumstances and fact patterns as other disputes that are pending resolution at the NRAB, copies of those awards are forwarded to the referee who had not yet rendered a decision. As was the case here, Award 31129 was adopted on September 26, 1995, but the proposed award concerning the issue under review in this case was sent to the NRAB under date of September 19, 1995 and was adopted on November 1, 1995. Hence, there was no opportunity to send Award 31129 to this referee for consideration because the proposed award had already been issued. As it turns out, the Majority held that:

> "The Carrier asserts that the Agreement does not support the Organization's position. It denies that the language of the Agreement reserves picking up and delivering supplies to vendors, or moving trailer of M/E department material, exclusively to Truck Drivers. Carrier maintains that evidence on the record shows a prac-

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AWARD

Claim denied."

The error in the above-cited award is readily apparent. The authority under which the Majority premised its decision to deny the claim was based upon a class dispute between a foreman and a truck driver covered under the same Agreement. In the case under review here, the Carrier assigned a supervisor who holds no seniority within the Maintenance of Way Agreement to perform work reserved to employes covered thereunder. As stated in Award 28185 between these two (2) parties:

> "It is the Board's view, contrary to Carrier's position, that the work in dispute has customarily (though not exclusively) been performed by members of the B&B Department. <u>It would be wholly improper to assign such work to supervisory employees who are not covered by any Agreement</u> (See Third Division Awards 25991 and 15461)."

Rather than accepting the well-reasoned precedent cited within Award 28185 as controlling here, the Majority's convoluted reasoning twisted the findings of a class and craft dispute (Award 26236) to fit the circumstances present in this case. Again, this case was not a class and craft dispute where exclusivity may apply, but rather was the assignment of scope covered work to a supervisor. This Board has consistently held that supervisors are not to perform scope covered work and that an affirmative remedy is appropriate. Inasmuch as the Majority reached its conclusions based on flawed reasoning, Award 31254 is palpably erroneous and cannot be considered as precedent.

Respectfully submitted,

Roy C. Robinson

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Labor Member

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