Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35376
Docket No. MW-34071
01-3-97-3-610

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railway Company (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 Roadmasters Reiss and Milewsky to perform Maintenance of Way work (assist Mr. G. Wagner to operate the Russell Snow Plow) between Mile Posts 0 and 117.0 on the Mason City sub from Mason City to Marquette and return on January 28, 1996 (System file C-08-96-S330-02/8-00272 CMP).

(2) As a consequence of the violation referred to in Part (1) above, Mr. E. Becker shall be allowed twelve (12) hours' pay at the appropriate 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 were given due notice of hearing thereon.

The pivotal issue in this dispute is whether the Scope Rule covers the work in question. The Organization asserts that it does and that the Rule specifically excludes supervisory personnel from performing reserved work. The Carrier, to the contrary, maintains that the snow plowing in question is not reserved and may be properly performed by any Carrier personnel.

The Scope Rule involved is general and the Rule pertaining to job classifications does not specifically mention the work of snow plowing or the operation of snow plowing machinery.

Where, as here, there is a dispute over the reach of general Scope Rule language, the Organization has the burden of proof to demonstrate a certain level of past performance of the work in question. That level must produce the conclusion that the work has traditionally, customarily and historically been performed by employees covered by the Agreement. Except between rival crafts, it is not necessary that exclusivity be established, but the evidence must show the requisite predominance of performance to warrant the previously described conclusion. Mere general assertions about past performance, without proof of actual instances, are not enough to demonstrate scope coverage.

On this record, the Organization failed to establish Scope coverage. Indeed, the record contains no specific examples of past performance by Agreement covered employees. At best, the Organization's May 30, 1996 contention that Scope coverage ". . . is clearly identified within past exchange of correspondence between. . . ." Such statement is but another general assertion unsupported by evidence. This lack of supporting evidence was raised by the Carrier several times during the development of the on-property record without an evidentiary response from the Organization.

Accordingly, we are compelled to deny the claim for lack of Scope coverage.

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 20th day of March, 2001.

LABOR MEMBER'S DISSENT
TO
AWARD 35376, DOCKET MW-34071
(Referee Wallin)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the on-property handling and prior precedent between the parties. Such is the case here.

This case involved the Carrier assigning supervisory personnel to perform machine operator work. The Carrier called and assigned Maintenance of Way Machine Operator G. Wagner to operate a Russell Snow Plow. Hence, the initial assignment of Machine Operator Wagner to perform the work clearly established that the work is Scope covered. A Russell Snow Plow requires two (2) operators to properly perform snow plowing work. Rather than calling and assigning an additional Maintenance of Way machine operator to assist Machine Operator Wagner, the Carrier assigned supervisory personnel to perform the work. During the handling of this dispute on the property the General Chairman stated, without refutation, that:

> "Mr. Howard 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) employees within the Track Sub-department to operate Russell snow plows, Glossip snow plows, snow flangers, snow fighters, and the like. Apparently Mr. Howard has forgotten that this correspondence still exists."

The Carrier never refuted the General Chairman's statement cited above. Thus, the issue of whether Maintenance of Way employes had ever operated such machinery in the past was clearly established when the Carrier assigned Machine Operator Wagner and substantiated by an unrefuted past practice. The Majority's findings that the Organization failed to establish Scope coverage was clearly not based on the facts of the record.

This Board and other Section 3 tribunals have consistently held that supervisors have absolutely no right to perform Scope covered work. This is true, especially where, as here, the Scope Rule specifically excludes them from performing Scope covered work. There is no doubt that this Scope Rule clearly excludes supervisors from performing any Maintenance of Way work.

In this connection, we invite attention to Award **34053**, presented during panel discussion which involving these same parties, that held:

> "It is the Board's opinion that Rule 1, the Scope Rule, was violated when the Carrier assigned a Supervisor to perform routine B&B maintenance work. Therefore, the Claimant must be made whole for this lost work opportunity. ***"

The Board sustained the claim for the work performed by the supervisor in the above-cited award. In this case, the Majority's erroneous findings have done damage to the Agreement and the Claimant's right to perform this work.

Therefore, I dissent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member