

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35823
Docket No. MW-35143
01-3-98-3-889**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(CP Rail System (former Delaware and Hudson
(Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Assistant Terminal Manager J. Penzone to perform snow duty, cleaning switches in the East Binghampton Yard, Conklin, New York on November 14, 1997 instead of assigning Foreman A.H. Hyde, Sr. and Trackman M.E. McNamara (Carrier's Files 8-00079 and 8-00078 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, Messrs. A. H. Hyde, Sr. and M. E. McNamara shall each be allowed seven (7) hours pay at their respective time and one-half rates.”**

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.

On November 14, 1997, the Carrier assigned Assistant Terminal Manager J. Penzone to clear snow from track switches at the East Binghamton Yard. The Organization contends that, in so doing, the Carrier was in violation of Rules 1, 4, 11 and 15 of the Agreement. The Organization further argues that the work should have been performed by the Claimants, track employees who ordinarily and customarily perform snow removal work during their regularly scheduled hours during the week.

The Board finds that the Organization's claim has merit. Rule 11.8 provides as follows:

"11.8 Preference of Overtime Work

Employees will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them during the course of their work week or day in the order of their seniority."

The Organization asserted that the snow removal work performed by the Assistant Terminal Manager was work ordinarily and customarily performed by the Claimants during their regular workweek. Significantly, the Carrier did not directly refute that assertion. Instead, it claimed during the on-property handling of this dispute that other forces have been used when Maintenance of Way employees have not been readily available due to snow related or track related activities. In this case, there has been no showing that the Claimants were not readily available or were assigned to other duties when the snow removal work was performed. On the contrary, the evidence suggests that the Claimants were off duty and could have been called in to work in accordance with Rule 11.8.

The Carrier also argued that emergency conditions precluded compliance with the overtime preference Rule. The Carrier's assertion is in the nature of an affirmative defense for which it bears the burden of proof. There are Awards, cited by the Carrier, which recognize that snowfall may be cause for an emergency, thereby relieving the Carrier of its contractual requirements. See Third Division Award 28822 (blizzard conditions) and Third Division Award 28651 (severe build up of ice and snow threatened to delay impending arrival of train). However, the mere assertion of snow conditions is

insufficient to carry the Carrier's evidentiary burden. See Third Division Awards 32397, 32344 and 31752. In this case, there has been no evidence to support the assertion that the snowfall on the claim date caused emergency weather related problems to support the Carrier's noncompliance with Rule 11.8. Under such circumstances, the Board finds that the Carrier violated the Agreement by failing to give preference to track employees to perform the overtime work.

The remaining issue centers around the question of remedy. There is a dispute as to how many hours the Assistant Track Manager performed snow removal work which cannot be resolved by the Board from an examination of the record. Moreover, both Claimants demand payment for the same time worked by one employee. Awarding both Claimants the same number of hours worked by the Assistant Track Manager would effectively amount to a double penalty. Accordingly, the case will be remanded to the parties to determine the number of hours the Assistant Track Manager performed snow removal duties on November 14, 1997. The Claimants will each be paid one-half the number of hours at the appropriate overtime rate.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 14th day of November, 2001.