Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35838
Docket No. MW-33364
01-3-96-3-869

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned Trainmaster S. Cohn to perform overtime service (plowing snow from roadways) in Massena Yard on December 11, 1994 and January 7, February 1 and 5, 1995, instead of assigning Maintenance of Way employe J. Moulton to perform said work (System Docket MW-3991).

2. As a consequence of the violation referred to in Part (1) above, Mr. J. Moulton shall be compensated for twelve (12) hours' pay at his 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 Claimant holds seniority as a Trackman on the Mohawk District of the Albany Division. The claim was filed because Roadmaster S. Cohn plowed the parking lot and roadways in and around Massena Yard between 4:00 A.M. and 7:00 A.M. on the dates set forth in the claim. The Carrier defended on the grounds that "[a] multiplicity of crafts in addition to contractors have historically been utilized to perform . . . " snow removal and because there was a "heavy snow emergency."

First, we reject the Carrier's assertion that it was entitled to assign the snow removal work to Roadmaster Cohn because of a "heavy snow emergency." See Third Division Award 35835 between the parties:

> "The fact that the Scope Rule defines 'heavy snow' as an emergency, does not relieve the Carrier of its burden to demonstrate the existence of an emergency. See Third Division Award 31752, supra [emphasis added]:
>
> > Given the Carrier's assertion that an emergency existed such an affirmative defense to a Scope Rule contracting out violation, the Carrier bears the burden of proving that an actual heavy snowfall occurred on January 11, 1991. The mere assertion that an emergency existed is insufficient to establish an affirmative defense on which the Carrier bears the burden of proof.
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> In this record, the Carrier merely asserted the existence of a 'heavy snow storm'. Aside from that general assertion, however, the Carrier has not met its burden to demonstrate that there was, in fact, a 'heavy snow storm' to a degree contemplated by the Scope Rule that would make such a storm an 'emergency.'"

As in Third Division Award 35835, there is nothing in this record beyond the Carrier's assertion that a "heavy snow emergency" existed. That is not enough to prove the existence of an emergency that would permit the Carrier to avoid the application of the Scope Rule.

Second, with respect to the merits of the Organization's argument concerning the alleged mis-assignment of work and consistent with the findings in Third Division Awards 31752 and 32344, we found in Third Division Award 35835 that "snow removal

work is scope covered work." In Third Division Award 35835 we sustained the claim because the Carrier did not give the Organization notice as required by the Scope Rule that it was going to contract out snow removal work. In that Award, we specifically rejected the Carrier's argument that the Organization had to demonstrate that covered employees exclusively perform the work:

> "The Organization's failure to demonstrate that covered employees exclusively perform the work is not a defense to contracting out claims. See Third Division Award 31752, supra ("The Carrier incorrectly argued that the exclusivity doctrine is applicable to the Scope Rule")."

But Third Division Award 35835 was a contracting out dispute. This is not. This dispute involves the Carrier's alleged misassignment of work to other employees. While the Organization does not have to demonstrate exclusivity of performance of the work in contracting out cases, in these kinds of non-contracting out cases, and because the Scope Rule is general in nature, the Organization is obligated to demonstrate that covered employees have in the past performed the work to the exclusion of others. See Third Division Award 35840:

> "The Scope Rule is general. The evidence shows that supervisors have performed the disputed work in the past on a regular basis. Indeed, even according to the covered employees, supervisors have performed this work 'for years.' Therefore, this Board cannot find that the Organization has established by probative evidence that employees covered by the Agreement have in the past performed the disputed work to the exclusion of others. See Third Division Award 21479."

The Organization submitted a statement signed by seven employees stating that "[w]e the undersigned have in the past and present always plowed the right of ways, yards, and roads and do not now, or ever have known Trainmasters to use company vehicles with plows to do this job." The Carrier asserted on the property that "[t]o the contrary, snow removal has been historically performed by all crafts and classes of employees, as well as non-agreement personnel and contractors across the system."

At best, this record is in conflict on the question of whether covered employees have exclusively performed this work. But the burden is on the Organization to demonstrate that covered employees have in the past performed the disputed work to

the exclusion of others. Because of the conflict in the record, that burden has not been met.

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.

LABOR MEMBER'S DISSENT
TO
AWARD 35838, DOCKET MW-33364
(Referee Benn)

The Majority erred in its finding in this Docket and a Dissent is required. Throughout the handling of this case, the Organization repeatedly pointed out that the work of removing snow was covered by the Scope of the Agreement and the assignment of such work to a supervisor was a violation of the Agreement. Awards **31752** and **32344** involving these same parties clearly held that snow removal work is Scope covered work. In both of those awards the Board considered and rejected the Carrier's argument that other classes of employes, as well as supervisors, have performed snow removal work in the past. Hence, the issue of whether snow removal work is Scope covered has been settled in favor of the employes covered by the Maintenance of Way Agreement.

Where the Majority erred here was when it considered that supervisors are a class of employes. This issue has also been decided on this property. Indeed, Award **24435** involving these same parties, cited at Pages 9 and 10 of our submission clearly held:

> "An analysis of the record before the Board shows that the Organization is correct in stating that the position of track supervisor is not cited under the Agreement Rules in question. On the other hand Carrier contention is that the track supervisor did the work for only a short period of time (i.e. 20-30 minutes) and that this was consistent with past practice. The record fails to support either contention of the Carrier and witness affidavits presented by the Claimant affirm the contrary. Track supervisor Thomas was not contractually authorized to perform the work herein in dispute. This Board has ruled on numerous occasions that work which belongs to those covered by a collective bargaining Agreement cannot be given away to others who are not covered by said Agreement except in extraordinary circumstances (Third Division Award 19268 inter alia). No evidence of a substantial nature has been presented to this Board to suggest that such circumstances herein hold."

A review of the above-cited quotation clearly shows that supervisors have universally been excluded from consideration as employes who are allowed to perform Scope covered work. Apparently, the Majority believed that a Supervisor was a "class" of employe and therefore the Organization was required to show that it had an exclusive right to perform snow removal work to the exclusion of supervisors. Again the three (3) on-property awards have held that snow removal work is Scope covered work reserved to Maintenance of Way employes. Once Scope coverage is established the Carrier is not allowed to give this work to any other class of employe, much less a supervisor.

The dispute cited herein is nearly identical to that which was found within Award **24435**. The authority under which the Majority premised its decision to deny the claim was based upon a dispute between this Organization and employes covered under the Indiana Harbor Belt Agreement and involved inspection of tracks. 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 clearly stated in the three (3) awards previously mentioned. Rather than accepting the well-reasoned precedent cited within Awards **24435**, **31752** and **32344** as controlling here, the Majority's convoluted reasoning twisted the findings of this case into a class and craft dispute. 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 35838 is palpably erroneous and cannot be considered as precedent.

Respectfully submitted,

Roy C. Robinson
Labor Member