**Form 1** **NATIONAL RAILROAD ADJUSTMENT BOARD**
**THIRD DIVISION**

**Award No. 42968**
**Docket No. MW-42697**
**18-3-NRAB-00003-150314**

**The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.**

**PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division – (IBT Rail Conference**
**(BNSF Railway Company (Former Burlington Northern (Railroad Company)**

**STATEMENT OF CLAIM:**

**"Claim of the System Committee of the Brotherhood that:**

**(1) The Carrier violated the Agreement when it assigned Division Engineer S. Turnbull, Roadmasters J. Williams and J. Seagroves and Signal Inspector W. Strozzi to perform Maintenance of Way work (clear and remove snow) from around buildings, parking lots and roads at various locations in and around the Gillette Yards on January 4, 13, 31 and February 1 and 14, 2013 (System File C-13-J010-8/10-13-0303 BNR).**

**(2) As a consequence of the violation referred to in Part (1) above, Claimant G. Hackman shall be compensated for nine (9) hours straight time and five (5) hours overtime at his applicable rate of pay and Claimant D. Turner shall be compensated for two (2) hours straight time at his applicable rate of pay."**

**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.**

**This claim concerns whether it was proper under the Agreement to permit supervisors to perform snow removal. At the time this claim arose, Claimant G. Hackman was regularly assigned and working as a Group 3 Skid Steer Machine Operator, and Claimant D. Turner was regularly assigned and working as a Sectionman.**

**On several days in January and February 2013, the Carrier assigned supervisory personnel and a Signal Inspector to remove snow around Carrier owned-and-operated facilities at the Gillette, Wyoming, Yards on the Black Hills Subdivision. Specifically, the Organization has established that (1) on January 4, 2013, Roadmaster J. Williams worked for three hours using a pickup truck to plow snow; (2) on January 13, 2013, Division Engineer S. Turnbull worked two hours shoveling sidewalks with a skid steer and three hours using a pickup truck to plow snow; (3) on January 31, 2013, Signal Inspector W. Strozzi worked a total of three and one-half hours using a pickup truck to plow snow; (4) on February 1, 2013, Roadmaster J. Williams worked for three hours using a pickup truck to plow snow; and (5) on February 14, 2013, Roadmaster J. Seagroves worked for one and one-half hours plowing snow.**

**The Organization argues that it was a violation of the Agreement to allow Division Engineer S. Turnbull; Roadmasters J. Williams and J. Seagroves; and Signal Inspector W. Strozzi to perform Maintenance of Way work removing snow. Specifically, the Organization alleges that the Carrier violated Rule 1 Scope, Rule 2 Seniority Rights and Sub-Department Limits, Rule 5 Seniority Rosters, Rule 29 Overtime, and Rule 55 Classification of Work. As a remedy, the Organization claims that Claimant G. Hackman should be compensated for nine (9) hours straight time and five (5) hours overtime at his applicable rate of pay, and that Claimant D. Turner should be compensated for two (2) hours straight time at his applicable rate of pay.**

**The Carrier submits that the Rules cited by the Organization do not reserve snow removal work to Organization-represented employees, and to prevail on its claim the Organization must establish that the disputed work has**

**been exclusively performed by the Claimants on a system-wide basis. The Carrier argues that the Organization has failed to meet its burden to establish system-wide exclusivity of the work in question; that Claimants are not entitled to damages; and that the Claimants have not proven damages.**

**Both parties find support in prior awards for their respective positions on the merits. The Carrier cites to several awards to support its argument that the contract provisions cited by the Organization do not reserve any type of work to the Claimants. Typical of these awards is Public Law Board 4104, Award 1, in which the Board explained:**

> **"First, no rule in the Agreement specifically reserves the disputed work to the Organization. Rule 1, the Scope Rule, does not deal specifically with this issue. Furthermore, Rule 55, cited by the organization, is a Classification of Work rule. It is not a Scope Rule. It is well established that "Classification Rules do not reserve work exclusively to employees of a given class." (Third Division, Award No. 19922)**

**See also Third Division Awards 33938, 39646, 39859, 37280, 36061, 32020, and Public Law Board 4104, Award 13. Other related awards articulate the "exclusivity doctrine," under which if the Organization seeks to claim work for any particular classification, it has to prove that the disputed work has been exclusively performed by the claimants on a system-wide basis. The burden necessary to establish exclusive performance was articulated in Third Division Award 39646 as follows:**

> **"The majority of Awards indicate that for the Organization to claim that particular work is reserved for a particular classification, it must show not only that the work is by custom, practice and tradition performed by the classification claiming the work in the location of the claim, but that the work is performed exclusively by that classification system-wide. See Public Law Board No. 2206, Award 55: "[T]o prevail under a theory of reservation through practice the Organization is required by principles, not of our own making but imposed by the great weight of precedent in this industry, to show such exclusive performance on a system-wide basis." It is universally accepted that the Organization bears the burden of proof to establish its claim."**

**See also Third Division Awards 37280 and 40502.**

**Two recent awards interpret the Rules cited by the Organization more expansively. In Public Law Board 7738, Awards 6 and 24, the Board held that Rules 1, 2, 5, and 55 place limitations on the Carrier's authority to make job assignments. As that Board explained,**

> **"Without doubt, the Carrier has the right to make job assignments. However, there are limits. Those limitations have been negotiated by the parties and incorporated into a collective bargaining agreement. In this case, Rules 1, 2, 5, and 55 are among the provisions of the agreement which not only provides guidance on job classifications but also places some limitations on the Carrier's authority to make job assignments. Specifically, the language in the contract provides for classification of work, seniority rosters, and seniority rights. These provisions support the Organization's position that there are clear lines of demarcation between the work performed by the various crafts. The contract does permit some marginal overlapping of job functions that are incidental to the work that each craft is permitted to perform."**

**In Public Law Board 7738, Award 6, the Board addressed the issue of whether Welders could properly be assigned to do work customarily performed by Sectionmen. In Public Law Board 7738, Award 24, the Board addressed the issue of whether a Truck Driver could properly be assigned to do work customarily performed by a Machine Operator. In both awards, the Board held that it was a contract violation to so assign the work, noting that there were "clear lines of demarcation" between these positions rather than overlapping tasks that may be "incidental" to the work of each craft. See also Third Division Award 40106.**

**The rationale of Public Law Board 7738, Awards 6 and 24, does not readily lend itself to the instant case. The evidence here included a report of over 850 pages showing the types of gangs assigned to snow removal during a six-month period in late 2012 and early 2013. This evidence shows that snow removal has been performed by various classifications and crafts, such that there is no clear line of demarcation tying this work to any class or craft. Rather, snow removal is more incidental to the work of various classes and crafts.**

**The fact that snow removal work has been performed by various classes and crafts not only renders the "clear lines of demarcation" rationale inapplicable to this case, but also means that the Organization cannot meet its burden under the exclusivity doctrine. Indeed, the Organization did not provide any evidence in an attempt to meet its burden to prove that snow removal is exclusively performed by the Claimants on a system-wide basis. For these reasons, the Organization's claim must fail, at least as it concerns the snow removal work done by the Signal Inspector, who is not an exempt supervisory employee, but, rather, is a Carrier employee in another represented craft. Therefore, that part of the Organization's claim alleging that the Signal Inspector was performing Maintenance of Way work is dismissed.**

**However, there is long-standing arbitral support for that part of the Organization's claim as it concerns exempt supervisors performing snow removal. Unless there are extraordinary or emergency circumstances, none of which were alleged here, the Carrier violates the Agreement when it permits supervisors to perform unit work. See, e.g., Third Division Awards 15461, 18808, 24435, 25469, 25991, and 28349. In these circumstances, it is unnecessary for the Organization to meet the exclusivity test. As the Board noted in Third Division Award 28349,**

> **"[T]his is not an appropriate instance for the exclusivity test. This is not a dispute as to which craft, subdivision of craft, or classification is appropriate; rather, it is a Claim concerning the performance of Agreement work by a non-represented supervisory employee."**

**Thus, the Carrier violated the Agreement when it permitted supervisory and exempt personnel – Roadmasters and a Division Engineer – to perform snow removal work covered by the Agreement, and that part of the Organization's claim is sustained.**

**The Carrier argues that the Organization has failed to prove damages because the Claimants were fully employed and Claimant D. Turner was absent and unavailable for work. It is an axiom in the law that there is no right without a remedy. Consistent with that principle, it is well-settled that compensation is an appropriate remedy when there has been a violation of the Agreement, notwithstanding that the Claimants may have been paid at the time of the violation. As the Board opined in Third Division Award 21340:**

> **"[W]ith regard to compensation, numerous prior authorities have held that an award of 'compensation is appropriate for lost work opportunities notwithstanding that the particular claimants may have been under pay at the time of violation.' Award No. 19924."**

**See also Third Division Awards 20633, 35169, 37470 and PLB 2206, Award 52.**

**As to the contention that Claimant D. Turner should not be eligible to receive compensation because he was unavailable for work, it is also well-settled that the Organization may select the Claimants to recover compensation for a violation of the Agreement. As the Board explained in Third Division Award 18557:**

> **"[T]his question of monetary payment to an unavailable Claimant has also been passed on by this Board in favor of the Organization. See Awards 10575 (laBelle) and 6949 (Carter). These Awards hold that one of a group entitled to perform the work may prosecute a claim even if there be others having a preference to it. The essence of the claim by the Organization is for Rule violation and the penalty Claim is merely incidental to it."**

**See also Third Division Awards 40563, 29313, and 32440.**

**In sum, the Organization's claim will be sustained insofar as it concerns the snow removal work performed by the Roadmasters and Division Engineer, and dismissed as it concerns the three and one-half hours of snow removal work performed by the Signal Inspector. Because part of the Organization's claim has been dismissed, the remedy requested for Claimant G. Hackman shall be reduced by three and one-half hours of straight time.**

## 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 February 2018.**