Award No. 6251
Docket No. MW-6285

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

(1) The Carrier violated the effective agreement when they assigned a contractor to transport men and materials to various crossings on Terminal Division District No. 2, on Saturday, January 5, and Sunday, January 6, 1952;

(2) Mr. E. Pacheco, regular assigned Chauffeur of Boston and Maine truck No. 628, be compensated in the amount of $47.53, based on eleven and one-half (11½) hours at punitive rate for Saturday, January 5 and eight (8) hours at punitive rate for Sunday, January 6, 1952, on account of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: All work in connection with the transportation of men and materials, which is directly connected with the work to be performed by the Carrier's employes, has heretofore been assigned to the proper classes of employes as provided by the agreement between the parties.

The transportation facilities customarily utilized by track sub-department employes are track motor cars, and highway trucks. Chauffeurs are regularly assigned to the track sub-department to operate highway trucks used for the transportation of track sub-department employes and materials. Bridge and Building Chauffeurs and Track Department Chauffeurs are considered as being in the same seniority class, irrespective of the sub-department in which employed.

Because of inclement weather on Saturday, January 5, 1952 and on Sunday, January 6, 1952, it became imperative to call out certain track forces for the purpose of cleaning highway crossings and spreading salt thereon and also on the approaches to the highway crossings.

This work was necessary because of the ice formation on the crossings and approaches thereto.

This same ice formation also made the carrier's track motor cars inoperable over the Carrier's tracks, because of insufficient weight to break through the ice formation to secure proper traction between the steel rails and the steel wheels of the track motor cars.

In the paragraph following in same docket, it is stated from the records that the total paid by Carrier and chargeable to snow removal in the winter season 1947-1948 was $1,209,786.82. A substantial part of this expenditure each winter has been paid to outside forces. It would be physically impossible to service all the crossings with the regular force of employes and, at the same time, do necessary snow removal work.

Thus, there is a clearly defined and long established practice under which Carrier has always contracted with outside transportation concerns to move men and materials. Unless, there is a specific, unambiguous rule in the controlling agreement forbidding this practice, Carrier is entitled to continue it. Let us consider the rules of the controlling agreement to determine if there is such a rule.

(2) **Agreement Rules.** It is important first to note that these rules do not include a **Classification of Work Rule.** Thus, there is no rule which specifically spells out work which is to be **exclusively** performed by employes coming within the scope of this agreement.

Under such an agreement (Maintenance of Way, Clerks, Telegraphers, etc.) the only work which it can be said must **completely** and **exclusively** be performed by the employes within its scope is work which has customarily and traditionally been performed exclusively by said employes. The citation of awards of the Third Division supporting this statement are too numerous to mention.

Likewise, where a carrier has customarily and traditionally contracted certain items of work, even though a class or craft of its employes has also performed the items of work on occasions, the performance of the items of work on occasions **does not** serve to bar the practice of contracting. See Award No. 5747, Docket MW-5686 of the Third Division, where Referee Wenke states in the Opinion of Board:

> "When a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself."

This is a statement of principle which is derived directly from the obvious truism that Carrier's right to operate its business as it sees fit is limited only by rules to which it has agreed (except where restricted by law). See Award No. 733, Fourth Division where referee Carter expresses this truism in the following language, appearing in the "Opinion of Board":

> "It must be borne in mind that it is the prerogative of Management to direct the work of its employes and, except as it may have limited itself by agreements, this prerogative remains complete and all inclusive. Consequently, in all matters that have not been limited by agreement, the Carrier's authority remains unrestricted. This simply means that if no agreement is made which restricts the action of the Carrier, then no basis for a complaint exists as to the manner of its handling."

Here, the evidence is overwhelming that carrier was contracting with outside transportation concerns for the moving of men and materials many years prior to the effective date of the first agreement between the parties to this dispute.

Nowhere in the controlling agreement can there be found a rule restricting or changing this practice. Therefore, there can be no violation of the agreement when Carrier continued its practice.

There is no merit in this claim and it should be denied.

OPINION OF BOARD: The claim involved herein arises out of the fact that during an emergency on January 5 and 6, 1952, the Carrier used an

independent contractor, A. G. Roderick Taxi Company, to transport Carrier employes to highway crossings within Terminal Division District No. 2. Due to the emergency caused by severe snow and ice storms on these dates, it was necessary to call out track forces for the purpose of cleaning highway crossings and approaches thereto, and of spreading salt on the approaches. The ice formation made the Carrier's track motor cars inoperable over the tracks, the cars being too light to break through the ice formation so as to secure proper traction between rails and wheels.

The Carrier emphasizes that the use of independent contractors to transport employes in the circumstances of this case is a "practice * * * of absolute necessity." Also, that "Contracts have been made each fall with contractors in various cities and towns to work with track forces for snow removal, in order to afford transportation at an instant's notice for many small groups of employes at the same time." The Carrier further explains that under severe snow conditions it is necessary to get one or two employes to crossings, switches, electric track circuits and various other vital points as quickly as possible; that a section crew is not taken as a unit, but one or two men are taken to one point, others to a second point and still others to other points and that usually they take a bag of salt with them.

The Employes rely upon the scope, seniority and other rules of the applicable agreement. The Carrier relies upon very extensive past practice, clearly evidenced by the record, which continued for many years both prior to and after adoption of the rules relied upon by the Employes. This past practice involves much use of independent contractors to transport employes in special or emergency circumstances such as those involved here. The agreement between the parties was renegotiated numerous times during the continuance of this practice, without objection to the practice by the employes.

Under the circumstances of this case, many awards of this Division could be cited to require denial of the claim. Typical of these is Award 4791, in which this Division said, in part:

> "We are fully cognizant of, and are in agreement with, the many Awards of this Board holding that repeated violations of an Agreement do not change it, or stated differently, that a long existing practice does not change the clear terms of an Agreement. However, it is also a well-established rule of contract construction that the re-adoption of a rule generally has the effect of re-adopting the mutual interpretation placed upon it by the parties themselves. In fact, it evidences an intent not to change the existing interpretations. Both parties at the time of the adoption of the Scope Rule into the current Agreement were fully cognizant of the fact that under the previous Agreements the work * * * [involved in the dispute] was not being treated as exclusively reserved to the classes of employes listed therein. Consequently, it must be held that the re-adoption of the rule, in the instant Agreement as well as in other earlier Agreements, was not intended to change the meaning previously given to it."

But the Employes contend that even if past practice on this property has existed as contended by the Carrier, the practice "was terminated September 1, 1949, the effective date of Rule 30-C * * *." This contention must be dismissed as being totally without merit. This rule, which pertains to work on unassigned days, was placed into the agreement in connection with the advent of the 40-hour week and quite certainly did not have the purpose of amending the scope rule so as to change the practice on this property regarding use of independent contractors to transport employes in emergency circumstances such as are involved here. It must be concluded that while the Carrier has in the past assigned a small percentage of this type of emergency transportation work to its own chauffeurs, they have not acquired an exclusive right to the work.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the agreement.

AWARD

Claim (1) and Claim (2) both denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 7th day of July, 1953.