

Award No. 9609
Docket No. MW-7949

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD COMPANY

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

1. The Carrier violated the effective Agreement when, beginning on April 10, 1951, and on dates subsequent thereto, it assigned work coming under the scope of the Maintenance of Way Agreement to employees of the Store Department.

2. Each Terminal Division Work Equipment Operator be allowed pay at his own respective straight-time rate for an equal proportionate share of the total man-hours consumed by the Store Department employees in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Beginning on April 10, 1951, and on dates subsequent thereto, the Carrier assigned Stores Department employees of the Billerica Shops, who hold no seniority rights in the Maintenance of Way Department under the effective Maintenance of Way Agreement, to unload cars of dirt and rubbish for the purpose of filling in and making usable certain railroad property adjacent to the Billerica Shop yards. This dirt and rubbish accumulates at various points on the Carrier's system as a result of ditching or general cleaning and maintenance operations and was loaded into cars by Maintenance of Way employees.

The Agreement in effect between the two parties to this dispute dated May 15, 1942, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Scope Rule of the effective Agreement governs the hours of service and working conditions of the employees represented by the Brotherhood of Maintenance of Way Employees in the Engineering Department, except for seven (7) classes of employees spelled out in the rule, the rule reading as follows:

In summary, the Carrier has shown that the Petitioner's claim should be denied for the following reasons:

1. There is nothing in Maintenance of Way Employees Scope Rule to support the claim.
2. The handling of Company material belongs to Stores Department employees and spelled out accordingly in Scope Rule.
3. The disposal of debris is not "maintaining of way".
4. This is strictly a Stores Department responsibility in both work and supervision.
5. No Engineering Department employee—either supervisor or otherwise—directing specific placement of the debris, as alleged by Petitioner.
6. Debris not dumped at this location to make the land usable—but because no other location to do so.
7. The Petitioner has no proof in support of its position.

The Carrier respectfully requests your Honorable Board to deny this claim because there is no possible merit nor rule to support the Petitioner's position.

All data and arguments contained herein have been presented to the Petitioner in conference and/or correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim is based on contentions that work in connection with collecting, loading, unloading and disposal of dirt and debris has been maintenance of way work; that the performance of such unloading work at the Billerica Shop Yards was for the purpose of filling in and making usable Carrier's property adjacent thereto; that in recognition of the work as maintenance of way work, Work Equipment Operators unloaded the dirt and debris prior to the change of the disposal area to Billerica Shop Yards in 1951; and that the work in question has been performed at the Billerica Shop Yards by employees outside coverage of the applicable Agreement under the direction of a Track Supervisor and Track Foreman. Carrier asserts that loading and disposal of dirt and debris has not been exclusive maintenance of way work; that the unloading of such material at the Billerica Shop Yard was not for the purpose of filling in and making usable adjacent land but because there was no other location on the railroad where debris could be dumped; that the assignment of the work prior to the change of the disposal area in 1951 was not in recognition of any exclusive right thereto; that the work in question has not been performed under the direction of a Track Supervisor and Track Foreman. In its Submission dated November 16, 1955, copy of which was forwarded to Petitioner, according to the record, Carrier asserted that "The Petitioner has no proof in support of its position".

Since the Agreement relied on does not expressly confine the disputed work to Claimants, these conflicting contentions and assertions present substantial and material factual disputes which cannot be determined on the

record because of the lack of evidence concerning them. "We have many times held that mere assertions cannot take the place of proof." Award 8065. And this Division has also repeatedly held that the burden of proving a claim rests on the party seeking its allowance. Awards 8206, 8376, 8486. Particularly pertinent here are the observations of this Division in Award 8486 where it was said that:

"The Railway Labor Act did not design that proceedings before the several divisions of the Adjustment Board should be technical but some actual proof besides uncorroborated statements which have been denied at least by implication in contrary statements is necessary to assist the Board in a proper decision. In this case there is none."

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 Employees involved in this dispute are respectively Carrier and Employees 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 record does not establish that the Agreement was violated.

AWARD

Claim denied in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 2nd day of November, 1960.