Award No. 4673
Docket No. MW-4707

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Mortimer Stone, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON & MAINE RAILROAD

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

(1) That the Carrier violated the agreement by not properly compensating Trackmen Richard H. Whitcomb, Ernest H. Sherman, Walter B. Hancock, Osmo E. Mattson, Leo A. Lackey, Warren E. Hayens, John McCauley, Peter J. Zelinski, and Mike Kostiuk for services rendered on July 11th and 14th, 1947, while handling freight at Bardwell, Massachusetts;

(2) That the above mentioned employes be reimbursed for additional compensation due them as a result of the Carrier's violation of the effective agreement.

JOINT STATEMENT OF FACTS: On July 5, 1947, freight train MB-2 derailed at Bardwell, Mass. Freight car NYC 130787 was loaded with a shipment of salt. This salt spilled into a gulley along right of way.

On July 11 and again on July 14, 1947, certain forces on the Fitchburg Division were assigned to the picking up of this freight and transferring same to Boston and Maine freight car No. 72275.

The forces referred to and the time spent in the performance of the above described work is as follows:

Leo H. Lackey—Extra Crew Foreman	16	hours straight time
	6½	hours overtime
Osmo E. Mattson—Extra Crew Asst. Foreman	16	hours straight time
	6½	hours overtime

Richard H. Whitcomb	—	Trackman	16	hrs.	straight time	—	6½	hrs. overtime
Ernest H. Sherman	—	"	16	"	"	"	6½	" "
Warren E. Hayens	—	"	8	"	"	"	1	" "
John McCauley	—	"	8	"	"	"	4	" "
Peter J. Zelinski	—	"	16	"	"	"	3½	" "
Mike Kostiuk	—	"	16	"	"	"	4	" "

These employes were paid at the rate of pay of their positions during the performance of this work.

POSITION OF EMPLOYES: Rule 46 of the current Agreement is as follows:

(Exhibits not reproduced.)

OPINION OF BOARD: On July 5, 1947 a freight train was derailed and a car loaded with bulk salt spilled its contents into a gully along the right of way. On July 11 and again on July 14 a crew of trackmen was assigned to the work of shoveling the salt which could be retrieved into bags and loading them in another car. This gully does not appear to have been in proximity to a station or other building of Carrier.

Claim here is based on the contention that such work was not that of maintaining the right of way or picking up wreckage or debris, properly required of trackmen, but constituted "transferring a consignment of revenue freight in order that this revenue freight may be sent on its way without further delay to the consignee," thus coming under the scope of the Clerks' Agreement, and entitling the employes to the rate of a loader or trucker on the Clerks' roster, under the composite rule, while so employed.

Carrier first insists that the claim is barred by delay in progressing on the property as required by Rule 23 of the Engineering Department which reads:

> "Employes who are dissatisfied with decisions will have the right to appeal in writing in succession up to and including the highest official designated by the Management to handle such cases, provided notice of appeal is given the next higher official in writing within ten (10) days thereafter with copy to the official rendering the decision. Employes may be represented by duly accredited representatives of the Brotherhood of Maintenance of Way Employes."

This rule, however, must be construed together with the three preceding and next following rule since each is a part of the common subject of "Hearings and Grievances." Therefrom it appears that the word "decisions" in Rule 23 applies to cases of dismissal or personal grievances and not to decisions in connection with claims arising under Agreements concerning rates, rules or working agreements. Moreover, we think Carrier waived any such procedural defense, not bearing on the merits, by failure to decline the claim on that ground.

Carrier further denies that the work performed was within the scope of the Clerks Agreement. As Referee Carter said in considering a claim arising under similar circumstances resulting in Award No. 3003, "The claim necessarily resolves itself into the question whether the work belonged exclusively to employes coming under the Clerks' Agreement. If it does, the claims should be sustained; if it does not, it is just as evident that the claims must be denied. * * * We think the correct rule is that the Clerks' Agreement reserves all work usually and traditionally performed by this class of employes, and all work in addition thereto which has been specifically reserved to them by the Agreement and subsequent negotiations."

In the attempted application of this rule, we find that here there is no reliance on usual or traditional performance of similar work by employes under the Clerks' Agreement in the past, and from the record connected with Award No. 4465 it would appear that such work was not traditionally performed by them even when a wreck occurred adjacent to a station platform. Here Claimants rely, as they must, on the claim that this work is specifically reserved to Clerks by the Agreement. The part of the Clerks' Scope Rule on which they must rely is Rule 1(a) (4):

> (4) **Laborers:** All laborers employed in and around stations, freight houses, warehouses, storehouses and stock rooms, such as sealers, loaders, truckers, stowers, coopers, station cleaners, and other employes in places named whose duties are the handling of freight or company material (including both supplies and scrap).

Such work as here performed is not specifically named as within the rule. Further, we think it is not within the purview of the rule. The class of employes named in all four pertinent paragraphs of the Scope Rule appears to comprehend only those whose work centers about "stations, freight houses,

warehouses, storehouses and stock rooms"; the types of laborers specifically included are all such, and the General Clause includes only other employes "**in places named.**" (Emphasis supplied.) The limiting phrases of the rule, "employed in and around" and "in places named" limit the locus both of the employe and of the work, and wrecks are not localized "in and around" any places.

Even if we assume that the value of the salt retrieved was sufficient to make its salvage rather than the cleaning up of the right of way the chief concern, still the work here was not primarily that of handling freight or company material, but rather that of salvaging freight from a wreck. There is nothing in the record to indicate that the consignee of the bulk car of salt would or should accept the salt in the bags so salvaged from the gully.

For all these reasons we must conclude that Claimants have failed in proof that the work performed came within the Scope Rule of the Clerks' Agreement.

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

Claims 1 and 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 22nd day of December, 1949.