# Award No. 5347
# Docket No. MW-5218

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Francis J. Robertson, Referee.**

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

## BOSTON AND MAINE RAILROAD

**STATEMENT OF CLAIM:** (1) That the Carrier violated the Agreement by assigning to the employes of contractors work covered by the scope of the Agreement;

(2) That Work Equipment Operators D. W. True and A. A. Purdy, Terminal Division, be each compensated eight (8) hours per day at pro rata rate and one (1) hour per day at time and one-half rate for each day that two employes of the Contractor, T. Stuart & Sons operated cranes removing snow during the period January 21 to February 7, 1948;

(3) That the Claimants D. W. True and A. A. Purdy be each compensated nine (9) hours at time and one-half rate for each Sunday that the two employes of the Contractor were employed during the period and for the purpose stated in part 2 of this Claim.

**EMPLOYES' STATEMENT OF FACTS:** T. Stuart & Sons Company, General Contractors of Watertown, Massachusetts and employes of T. Stuart & Sons Company are not covered by the Agreement in effect between the Boston and Main Railroad Company and the Brotherhood of Maintenance of Way Employes.

On January 23, 1948, cranes owned by T. Stuart & Sons Company and operated by the employes of T. Stuart & Sons Company were engaged by the Boston & Maine Railroad Company to assist in snow removal work in the Boston area.

Considerable overtime work was performed by the employes of T. Stuart & Sons Company, such overtime work being performed at night and on Sundays.

During the period T. Stuart & Sons Company was employed on the Carrier's property, the Carrier's steam crane No. 3382 was withdrawn from maintenance work and sent to Ayer, Massachusetts to unload company coal.

The handling of Company coal is the responsibility of the Operating Department. The removing of snow is under the supervision of the Maintenance of Way Department.

The employes of T. Stuart & Sons Company were employed on the Carrier's property and assigned to snow removal work, for a period of time approximating 200 hours.

alternative is recognized in the rules (Memorandum of May 15, 1942, quoted under 3) and by past practice of long standing.

It is clear (Exhibit A) that the Contractor's cranes and men worked during essentially, the same hours that the Claimants worked; that the Contractor's cranes and men worked on the average less hours per day than the Claimants worked; that if the Claimants had been required to do, in addition to their own work, the work done by the Contractor's men each Claimant would have averaged twenty-two (22) hours per day for eighteen days. It could not be done.

The purpose of punitive rates is to penalize a Carrier for making a man work more than eight (8) hours a day, not to create work for which time and a half may be demanded (Third Division Award 4194) and this is particularly true in cases where the man lost no time and could not physically perform the necessary work.

The Claimants have the burden of presenting some theory which will entitle them to prevail. (Third Division Awards 3523, 2568). They have failed to sustain this burden.

On the other hand, Carrier has conclusively demonstrated that the claim in this docket is without merit because—

1. The work involved (snow removal work) is not an exclusive property right under the scope of claimants' agreement.

2. The Carrier has always contracted each winter with outside firms for assistance in removing snow and ice.

3. The Claimants were working full time and overtime to the limit of their ability with due regard for safety.

4. The Claimants were working generally during the same hours that the contractor's machines and men were working and on work which could not reasonably and safely be done at any other time.

5. No rule violation has been shown.

6. The rules, if any be applicable, support Carrier's action.

7. Past practice without complaint, also supports Carrier's action.

There is no justification for the claim in rule or equity and it should be denied.

(Exhibits not reproduced.)

**OPINION OF BOARD:** During the period January 21 to February 7, 1948, the claimants, work equipment operators, were engaged in snow removal work in the Boston area. During this same period Carrier, by contract, hired cranes operated by employes of T. Stuart and Sons to assist in the snow removal work. Employes claim that such hiring was in violation of their Agreement.

The Scope and Seniority Rules of the Schedule covers employes in the Engineering Department including the classification of work equipment operators. The Scope Rule of the Schedule was amended on May 15, 1942 by the following quoted provision of a Memorandum Agreement:

> "Exception—New Employes in Engineering Department Service.
>
> It is agreed that new employes brought into the service for the purpose of removing snow and ice, fighting fires, or in emergencies which disrupt traffic will be excluded from all the provisions of the

Schedule; with the understanding that such employes are not to be used to the detriment of regular employes."

This Board has had occasion to consider the right of employes in the Maintenance of Way Department to snow removal work on at least two occasions: Award 4593, Kansas City Terminal Company, Respondent, and Award 4948 with this Carrier as Respondent. In both Awards it was held, in effect, that with certain qualifications and limitations the removal of snow from tracks and switches is work which belongs to the Maintenance of Way employes. We are in agreement with the general principle established by these Awards. It is to be noted, however, that in Award 4593 the removal of snow and ice on an interlocking was held to be properly performed by Signalmen, inasmuch as the same was in connection with and in furtherance of the work of their craft. Further qualification of the principle is discussed at length in Award 4948.

The Carrier shows that in winter seasons since 1941 through 1949 it has expended considerable monies for "outside help" on snow removal and had contracted with "outside" concerns for snow removal work. This practice is consonant with the provisions of the exception contained in the Memorandum Agreement above quoted. The hire of "outside" equipment with their operators when snow removal becomes emergent in periods of excessive snowfall such as there was during the winter here in question is not in derogation of the Agreement. Carrier cannot be expected to gauge all of its equipment needs so as to be fully equipped to handle all eventualities arising from weather conditions. However, inasmuch as the removal of snow from tracks and switches, in the first instance, belongs to Maintenance of Way employes, the practice of using contract hire or hiring direct may not be permitted to operate to the detriment of the employes covered by the Agreement. It is, therefore, the obligation of the Carrier to afford to the employes covered by the Agreement as much of that snow removal work as it is within their physical capacity to perform. In Award 4948 involving this same Carrier, the employes involved therein were worked 16 hours a day. Presumptively, work of 16 hours per day would not be beyond the physical capabilities of claimants during an emergency period of approximately two weeks' duration. If not used to that extent, the burden should be on the Carrier to show why not. We find no adequate explanation of that in the record.

Upon the facts of record herein and solely thereon we find that the claim should be sustained to the extent of awarding claimants compensation at the pro rata rate for the number of hours less than 16 that they were not worked on each day during the period involved in the claim, except for Sundays when the rate shall be computed on the punitive basis. On those days when Claimants did not report for work, no compensation will be payable. This Award, however, must be conditioned upon the resolution of a question of fact not determinable from the record. Carrier asserts that the work which the contractor's employes performed was the unloading of snow from gondola cars and not in the removal of snow from tracks and switches. If that was a part of the operation of removing the accumulation of snow from the track and switches, it would still be work which accrued in the first instance to the Maintenance of Way employes and would not affect our Award. If otherwise, there is no basis for an affirmative Award. The matter will have to be remanded to the property for the determination of that question. If the parties are unable to agree on a disposition of this issue, the matter may be referred back to this Board with a proper record.

**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 issue of Agreement violation be determined on the property in accordance with views expressed in foregoing Opinion of the Board.

AWARD

Claim disposed of as indicated in Opinion of Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 24th day of April, 1951.

# NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

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## Interpretation No. 1 to Award No. 5347

## Docket No. MW-5218

**NAME OF ORGANIZATION:** Brotherhood of Maintenance of Way Employes

**NAME OF CARRIER:** Boston and Maine Railroad

Upon application of the representatives of the employes involved in the above Award, this Division was requested to interpret the same in the light of an alleged dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934.

As indicated in the last paragraph of the Opinion of the Board in Award 5347, payment of compensation to the employes involved was conditioned upon the determination of a question of fact. The question to be determined was whether or not the unloading of snow from gondola cars by contractor's employes on the days involved in the Statement of Claim was a part of the operation of removing accumulation of snow from the tracks and switches. If it were the claim was to be paid as indicated; if not we said there was no basis for an affirmative Award. The matter was referred back to the property for a resolution of that question with the proviso that if the parties were unable to agree upon a disposition of the question the matter might be referred back to this Board upon a proper record. The parties have been unable to agree.

In this request for an Interpretation the employes have submitted affidavits from employes indicating that the work performed by the contractor's employes in unloading the gondola cars was a part of the operation of removing the accumulation of snow from tracks and switches. The Carrier has submitted no affirmative evidence refuting these statements. On such a record we have no alternative but to conclude that the contention of the employes is correct and find that the work performed by the contractor's employes was a part of the operation of removing snow from the tracks and switches. Accordingly, Carrier should make payment to the claimants on the basis indicated in Award 5347.

Referee Francis J. Robertson who sat with the Division as a member thereof when Award No. 5347 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 13th day of March, 1952.