Award No. 5439
Docket No. MW-5470

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, 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 failed to assign Section Foreman Hoey and his crew to perform overtime service on their assigned territory on March 19, 1949;

(2) Section Foreman Hoey and the members of his crew be compensated for two hours and forty minutes, at their respective time and one-half rate of pay because of the Carrier's failure to assign them to perform this overtime service.

EMPLOYES' STATEMENT OF FACTS: March 19, 1949 was not a scheduled work day for the claimants, members of Section Crew No. 7, whose assigned territory includes Mystic Wharf. It was, however, a regularly scheduled work day for the B&B Crew at Mystic Wharf, who were assigned by the Carrier to clear snow from switches, crossings and walks on Section No. 7.

The Claimants, Section Foreman T. Hoey and Crew, were available for service on March 19th, had the Carrier called them. It was the contention of the Employes, that the failure to call the Claimants resulted in a monetary loss, as follows:

T. Hoey, Foreman	2	hours	&	40	min.	@	$2.07	per	hour
A. Ferraro, Trackman	2	"	"	40	"	@	1.59	"	"
T. Powers, "	2	"	"	40	"	@	1.59	"	"
P. Carroll, "	2	"	"	40	"	@	1.59	"	"
M. O'Toole, "	2	"	"	40	"	@	1.59	"	"

Claim was filed with the Carrier on behalf of the above named employes, for compensation listed, and claim was declined.

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

POSITION OF EMPLOYES: Sections 1, 2, 3 (a) and 5 (a) of the Seniority Rule of the effective agreement read as follows:

felt necessary for the removal of snow from its property and likewise, if necessary, to employ outside help.

Carrier asserts, without the slightest fear of contradiction, that the employes who **did** perform the work involved in this docket, have been assigned to perform exactly the same kind of work for many, many winters. They were not doing something which constituted a new departure. Bridge and Building Crews have been assigned to snow removal work whenever and wherever conditions dictated.

If Petitioner is attempting to raise a seniority issue here, it may be well to point out that the Bridge and Building Crew, here involved, hold seniority rights which are Division wide. They have the right to perform work to which they have been customarily assigned, in any territory on the Division (Terminal). They have customarily been assigned to perform "snow removal work". Therefore, they had precisely as much right (if anyone has the **right**) to perform "snow removal work" in the territory in which it was performed on March 19, 1949 as had claimants. In fact, as between claimants and the Bridge and Building Crew who performed the work, the Bridge and Building Crew had prior rights in accordance with the well accepted principle enunciated by numerous referees in decisions of the Third Division. This principle is to the effect that the overtime (punitive pay) rules were not designed for the purpose of **creating work for which punitive rates may be paid,** but for the express purpose of **coercing Carrier into refraining** from using employes for overtime work.

There is also the question of availability, which, though not highly important, is certainly pertinent. In fact, the only rock on which Carrier and Organization split, in attempting to reach agreement on a Joint Statement of Facts, was the Organization's desire to include a sentence therein asserting that claimants were available on the date of claim. At no time has any evidence been adduced that claimants were available on date of claim. The burden of proving this point lies with Petitioner. Customarily, many employes do not remain at home over the long weekend. Presumably some, or all, of claimants were unavailable. Even were there merit in the claim, which Carrier asserts there is not, a claimant, unavailable on date of claim, would be entitled to nothing.

The facts are clear and unquestionable. The work involved here (snow removal work) did **not** belong to claimants, even under the most strained and unrealistic interpretation of any seniority rule, it did not actually **belong** to any **class or craft.** It was performed by employes (B&B Crew), coming within the scope of the same agreement as claimants, who had as much, if not more, right to perform the work as claimants. It was performed during a regularly scheduled work day of the B&B Crew at regular straight time rates of pay. Petitioner asserts that it should have been performed by claimants, who were less entitled to perform it, **at punitive rates.**

There is no merit in the claim under the rules or in equity and it should be denied.

OPINION OF BOARD: In March, 1949, Section Foreman Hoey and Trackmen of his crew were regularly assigned to Carrier's Section No. 7 on a five-day work week, Monday through Friday, with Saturday and Sunday off. During the same period of time a Bridge and Building crew, with headquarters at Mystic Wharf within the territory of Section No. 7, consisting of a Foreman and five other employes, had a work week Tuesday through Saturday.

On Saturday, March 19, 1949, the Bridge and Building crew was used to remove snow from walks, crossings, paths, switches, etc. at Mystic Wharf.

The claim alleges violation of the current Agreement by reason of Carrier's failure to call Foreman Hoey and his crew to perform the work in question and seeks compensation at the Call rate for the members of such crew because they were not called to perform it.

The burden of all contentions advanced by the Employes in support of the claim is that the work of removing snow belongs to them under the Scope and Seniority rules of the Agreement.

It is true, as the Employes point out, we are committed to the rule that subject to certain qualifications, limitations and exceptions, not here involved, removal of snow is work which belongs exclusively to Maintenance of Way employes (See, Awards 4948, 4949 and 5347). However, it must be kept in mind that adherence to this principle does not mean the Agreement was violated for here the snow was removed by members of a Bridge and Building crew who were Maintenance of Way employes. Thus, it becomes apparent the question we have for decision is whether under the confronting facts and circumstances, the involved section crew had an exclusive right to perform such work.

We have no doubt work in connection with keeping tracks and switches clear of snow ordinarily belongs to section men. In fact, we have so held. See, Award 4593. Even so, the right to such work is not absolute and where—as here—it is not spelled out in the Agreement can be said to stem from custom and practice.

In the instant case we are satisfied from our examination of the record that long prior to May 15, 1942, it had been the custom and practice of the Carrier to use any or all of the Maintenance of Way employes to remove snow. Moreover, the same source convinces us that it had long been its custom and practice to require the Bridge and Building crew at Mystic Wharf to perform the very work that is now in question. In the face of such a situation, particularly since the current Agreement contains nothing which can be construed as in abrogation of the custom and practice existing on the date of its negotiation, we do not believe it can be said or held the Claimants had the exclusive right to the work in question or that the Carrier violated any rule of the Agreement by requiring the incumbents of the Bridge and Building crew at Mystic Wharf to perform it.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 6th day of September, 1951.