

Award No. 7945
Docket No. MW-7664

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Whitley P. McCoy, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

READING COMPANY

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

(1) The Carrier violated the Agreement when it failed to call and utilize Section Laborer Louis J. Folino for snow removal work on his assigned territory on February 12, 1953;

(2) Section Laborer Louis J. Folino be allowed four hours' pay at the pro-rata rate of his position account of the violation referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On February 12, 1953, prior to the regular starting time of Maintenance of Way Employees, Mr. Francis Weiss, a Station employe at Pottsville, Pa., who held no seniority rights in the Maintenance of Way Department, was used by the Carrier to clean snow and ice from the walks and Station platform.

Claim for a call of four hours at pro rata rate under Rule 18 of the effective Agreement was filed on February 17, 1953, in behalf of section laborer Louis J. Folino. The Carrier has denied the claim.

The Agreement in effect between the two parties to this dispute dated January 1, 1944, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: The Scope Rule of the effective Agreement reads as follows:

"RULE 1—SCOPE

The rules contained herein shall govern the hours of service, working conditions and rates of pay of the following classes in the Maintenance of Way Department, including those employes at Port Richmond, Port Reading and Reading Frog Shop:

Bridge and Building Foremen, Inspectors, Gang Leaders, Mechanics and their helpers, viz: Carpenters, Painters, Masons, Blacksmiths, Plumbers, Tinsmiths.

"Crossing and other Watchmen, Drawbridge Tenders, Pumpmen, Lampmen, Frog, Switch and Rail Repairmen, Crane and other machine operators, including Chauffeurs."

Carrier does not concur or agree with the Brotherhood's contention and submits that the above quoted rule provides that the rules of agreement govern the hours of service, working conditions and rates of pay of employees specified therein. Nowhere in the scope rule is there set forth the class or character of work employees are to perform. Carrier maintains that there is no provision in the scope rule or any other rule of the agreement indicating that Maintenance of Way forces have the exclusive right to clear snow from station platforms and sidewalks.

Further, Carrier submits that historically on this railroad, it has been customary for station forces to clear snow from station platforms and sidewalks in the vicinity of stations. At Pottsville Station the baggage handler duties were to load and unload baggage, U. S. Mail and parcel post to and from trains and in addition remove debris, snow and ice from the pavement and station platform when required to do so. In addition to the baggage handler, there was a warehouseman and depot hand on duty at the Pottsville Station baggage room during the night, and incumbents of these positions have, if necessary, cleared snow and ice from the station platform and pavements for many years. While Maintenance of Way forces have been used to perform such work on occasions, Carrier submits that no craft on this property has the exclusive right to clear snow from station platforms and sidewalks. The removal of snow from such locations is merely incidental service which has been performed in the past by station employees or section laborers from the Maintenance of Way force.

In view of the foregoing, Carrier submits that the instant claim is not supported by rules of Agreement or by practice on the property and is in effect an attempt on the part of the Brotherhood to obtain by decision from your honorable Board a new rule not bargained for by the Parties to the Agreement. Further, Carrier submits that it was proper to use station forces during their tour of duty at Pottsville Station to clear snow from platforms and sidewalks and Carrier maintains the claim here before the Board is without merit and should be denied.

This claim has been discussed in conference and handled by correspondence with representatives of the Brotherhood of Maintenance of Way Employees.

OPINION OF BOARD: Commencing late in the evening of Wednesday, February 11, 1953, there was a snowfall at Pottsville, Pennsylvania, located on Carrier's Shamokin Division. The Claimant, a section laborer, whose regular tour of duty was 7:00 A. M. to 3:30 P. M. was called out at 10:15 P. M. February 11, to clear snow from tracks and switches, and be marked off duty at 1:15 A. M., February 12. For this service he was paid in accordance with the call-out provision of the Agreement, Rule 18 (a). The present claim does not involved this incident, but the incident is stated merely as background.

Later in the morning of February 12, namely, at 5:45 A. M., a Baggage Handler on duty was assigned to clear the snow from the walks and platform at the Pottsville station. The claim is based upon the failure of the Carrier to call out the Claimant to perform this work. The Brotherhood claims a violation of the Scope Rule of the Agreement.

As is usually the case, the Scope Rule does not spell out the particular duties of the employees covered. In such case, according to the repeated decisions of this Board, the Scope Rule is to be interpreted as conferring on the classifications named in it the usual and customary duties of such employees as shown by practice.

The Brotherhood contends that by practice the work of such snow clearing belongs to the laborers of the Maintenance of Way Department and in support of that contention it cites Rule 529 of the "Rules For The Government Of The Maintenance Of Way Department" which reads as follows:

"Switches, platforms at stations, subways, overhead foot-bridges and principal highway crossings must be cleaned during and immediately after snow storms."

The Brotherhood quotes from Award 3685 as follows:

"In construing the scope of work included in their Agreement, where the disputed work has not been definitely included therein, the employes of the T. & S. Department are entitled to consider effective rules promulgated by the Carrier which are then in effect, as they may relate thereto. These rules place this work as a duty of the 'Supervisor of Telegraph and Signals or his representative.' To that extent they clarify the scope of the parties' Agreement on the question here involved."

The Brotherhood also quotes from Award 4848 as follows:

"We think the placing of responsibility for the installation, repairs, and maintenance of gasoline, gas distillate, fuel and other oil handling facilities, with water service foremen places this work within the Maintenance of Way Agreement."

The Carrier offered no proof of any rule placing the duty or responsibility of removing snow from station platforms upon the Baggage Handler or any other station employe. But in an effort to overcome the force of Rule 529 and the awards cited, it contends that in practice employes other than Maintenance of Way Forces have been used to perform this work. In its Submission it states:

"In addition to the baggage handler, there was a warehouseman and depot hand on duty at the Pottsville Station baggage room during the night, and incumbents of these positions have, if necessary, cleared snow and ice from the station platform and pavements for many years. While Maintenance of Way forces have been used to perform such work on occasion, Carrier submits that no craft on this property has the exclusive right to clear snow from station platforms and sidewalks." (Emphasis supplied.)

It will be noted that the above statement concedes that Maintenance of Way forces have been used for this work in the past. And according to the Carrier's own statement the Baggage Handler, warehouseman and depot hand have been used "if necessary."

Considering this statement of the Carrier in connection with Rule 529, and the absence of any such rule referring to other classifications, we conclude that the Carrier considered the work to be the responsibility of the Maintenance of Way forces except where none was available and an emergency existed. Of course, as argued in the Carrier's brief, the Carrier is under a duty to the public and to its employes to keep the premises safe. No doubt in an emergency, where a dangerous condition existed, the Carrier could with propriety correct such dangerous condition by the use of other employes until such time as a Maintenance of Way employe could be got hold of.

The Carrier supports its position that others have performed this work with two affidavits. No statement in these affidavits is inconsistent with the conclusion above stated, namely, that under the applicable rule and practice the work was primarily that of the Maintenance of Way employes and was to be performed by others only "if necessary". There was no showing of necessity or emergency in this case. It was not a case where a Main-

tenance of Way man was sent for and emergency work performed pending his arrival. The Claimant was not called at all.

We think that when the Carrier seeks to establish a practice contrary to its Rules and Regulations, it assumes the burden of establishing it by clear evidence, and that these affidavits are too meager and ambiguous to meet that burden.

We realize as stated in Award 4889 that operating rules are unilateral in character and not contractual in their nature. But they are proper to be considered in determining conflicting questions of fact and in determining the duties of the assigned position named in the Scope Rule. They are of especial importance in this case in interpreting the Scope Rule, for Rule 529 was in effect, and therefore presumably being enforced and complied with, when the Agreement was executed.

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 Agreement was violated.

AWARD

Items (1) and (2) of the claim are sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of June, 1957.

DISSENT TO AWARD NO. 7945, DOCKET NO. MW-7664

This award is in error and conflicts with well-established principles followed by this Division.

The majority correctly holds herein as follows:

"As is usually the case, the Scope Rule does not spell out the particular duties of the employees covered. In such case, according to the repeated decisions of this Board, the Scope Rule is to be interpreted as conferring on the classifications named in it the usual and customary duties of such employees as shown by practice."

However, the majority places an erroneous construction upon the partial statement quoted from Carrier's submission. Carrier's complete statement in this respect was as follows:

"Further, Carrier submits that historically on this railroad, it has been customary for station forces to clear snow from station platforms and sidewalks in the vicinity of stations. At Pottsville Station the baggage handler duties were to load and unload baggage, U. S. Mail and parcel post to and from trains and in addition remove

debris, snow and ice from the payvment and station platform when required to do so. In addition to the baggage handler, there was a warehouseman and depot hand on duty at the Pottsville Station baggage room during the night, and incumbents of these positions have, if necessary, cleared snow and ice from the station platform and pavements for many years. While Maintenance of Way forces have been used to perform such work on occasions, Carrier submits that no craft on this property has the exclusive right to clear snow from station platforms and sidewalks. The removal of snow from such locations is merely incidental service which has been performed in the past by station employes or section laborers from the Maintenance of Way force."

Construed in its entirety, Carrier's statement shows that station forces have historically cleared snow from station platforms and sidewalks in vicinity of stations; that, at Pottsville, it is a part of the baggage handler's regular duties to do so, and that, if necessary, the warehouseman and depot hand assist him therein. While it concedes that Maintenance of Way forces have performed such work on occasions, Carrier states that no craft has the exclusive right to clear snow from station platforms and sidewalks. Nothing therein lends any support to the majority's conclusion herein that this work may be performed by other than Maintenance of Way Employees only in emergency.

Carrier filed affidavits to support its position in this respect, which the majority herein brush aside by reading into the Scope Rule something which it admittedly does not spell out and which is not supported by practice. In effect, by interpretation, the majority has changed the Agreement to grant section laborers exclusive right to snow removal except in emergency. It is not within this Board's authority to enlarge the coverage of the contract. As we held in Award 5079:

"This Board has consistently held by a long line of awards that the function of this Board is limited to the interpretation and application of agreements as agreed to between the parties. Award 1589. We are without authority to add to, take from, or write rules for the parties.

"As said by the Board in Award 2622:

"Far better for all concerned is a course of procedure which adheres to the elemental rule, leaving it up to the parties by negotiation or other proper procedures to make certain that which has been uncertain."

Awards 3685 and 4848, cited by the majority herein, are not comparable to the instant case. Rule 529 in the instant case is distinguished from the rules referred to in those awards in that it does not confer jurisdiction over work to Maintenance of Way forces, but in any event the dissents to those awards show that they were in error.

In Award 6168, we held:

"In this respect we have not overlooked certain cited instructions issued by the Company to the district offices and what is claimed has been the practice of the Company thereunder. But these instructions, which are not a part of any agreement, and the practice of the Carrier in accordance therewith created no rights which Claimant can have enforced. The Company could follow them if it desired but it was free to disregard them at any time it saw fit to do so and could do so without penalty."

Obviously, the instant claim should have been decided on the Agreement rules and practices thereunder. Since Carrier's rules are established unilaterally

ally by the Carrier, they may be changed unilaterally, and a departure therefrom is not comparable to a violation of Agreement rules (Award 7770).

When Rule 529 is considered in light of the work involved it can readily be seen that its purpose is to emphasize the importance of immediate snow removal. It does not state that Maintenance of Way employes have rights, exclusive or otherwise, to remove snow. Obviously Carrier would not limit its removal exclusively to a particular class of employes through such a unilateral rule, and this Division is without authority to interpret Rule 529 so as to place such an unreasonable burden on Carrier.

For the foregoing reasons, we dissent.

/s/ W. H. Castle

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ J. F. Mullen