Award No. 9634
Docket No. MW-8596

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, 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 Agreement when it employed a contractor to remove snow from the station platform at Woodsville, New Hampshire on February 10, 1955;

2. Trackmen H. Chapman, J. Bouchard, Rupert Millette and E. Hubbard, who were in a furloughed status as such on February 10, 1955 due to force reduction theretofore placed into effect, each be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by the contractor's forces in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Prior to February 10, 1955, Claimant Trackmen were furloughed from Section Crew 252 account of force reduction, thereby leaving three (3) laborers assigned to this gang.

The Carrier has a station at Woodsville, New Hampshire, which is located within the section territory of Crew 252. Trackmen, assigned to Crew 252, have always performed the work necessary in removing snow from tracks, switches, and station platforms at this point.

On February 10, 1955, while Claimant Trackmen of Crew 252 were furloughed, the Carrier assigned the work of cleaning snow from the station platform at Woodsville, New Hampshire, to employes of a contractor, who hold no seniority rights under the effective Maintenance of Way Agreement, and to the detriment of Claimant furloughed employes.

Claim as set forth herein was filed; the Carrier denying the claim throughout all stages of handling.

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.

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

OPINION OF BOARD: The claim is that the Carrier violated the agreement when it employed a contractor to remove the snow from the station platform at Woodsville, New Hampshire on February 10, 1955 and that Claimants Chapman, Bouchard, Millette and Hubbard, four furloughed trackmen, should each be allowed pay at their respective straight time rates for an equal share of the total man-hours consumed by the contractor's forces in performing the work.

The Carrier's Ex-Parte Presentation shows that several inches of heavy, wet snow had accumulated on the station platform in a two-day storm and had then frozen, and that the contractor "shoved the accumulations of snow into piles mechanically and disposed of same by snow loader and truck". The record does not show the man-hours used but does show that the work took one and one-half hours and was performed with the use of at least two pieces of equipment.

The Employes' Position is that this work is within the scope of the Claimant's work and that they should have been called to perform it so far as possible, for the following reasons:

1. The Scope Rule applies to "employes represented by the Brotherhood of Maintenance of Way Employes in the Engineering Department", with certain exceptions not here in question.

2. Rule 2 provides that "rights accruing to employes under their seniority entitle them to consideration for positions in accordance with their relative length of service", etc.

3. Rule 5-A entitles furloughed trackmen to return according to their seniority when forces are increased or vacancies occur.

4. That this Division held in Award 2716 that a similar rule was applicable to all positions, including temporary ones.

5. That under the exceptions to the Scope Rule included in the Special Agreement of May 15, 1942 (page 44 of the rules) "now 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". That this can only mean that the regular employes have the right to such work; otherwise there is no detriment to them whatever the carrier does about it.

6. That this work is therefore within the scope of Claimant's work, citing two awards of this Division, namely:

> (a) Award 5347 involving the same parties and even the same section crew, No. 252, and an analogous claim, in which this division held:
>
> > "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"; and that "It is therefore the obligation of the Carrier to afford to the employes covered by the Agreement as much of the snow removal work as it is within their physical capacity to perform."

(b) Award 6902, in which this Division held:

"A furloughed employe is one who is still under contract with the carrier * * * except the right to work and be paid * * * has been suspended during such time as the Carrier has no work for him or to which he can properly lay claim."

7. That in Award 4948 this Division said:

"The Organization contends that the removal of snow is work which belongs exclusively to maintenance of way employes. With certain qualifications and exceptions, we think this is true. We have held, correctly we think, that employes of other crafts may engage in snow removal when it is incidental to the work of their crafts. Award 4593. **But as a general proposition the work belongs to maintenance of way employes. As long as snow handling is a normal operation within the capacity of maintenance of way employes to perform, it is their work.**" (Emphasis ours.)

Carrier's Position is:

1. That prior awards of this Division do not support the claim that this work belongs to claimant for the following reasons:

That Award 5347 stated that the "removal of ice and snow on an interlocking was held to be properly performed by Signalmen, inasmuch as the same is in connection with and in furtherance of the work of their craft"; and that the removal of snow from a station platform was in furtherance of the work of station forces rather than of section forces.

That in Award 4948 this Division said that:

"Where snow removal has become emergent we have no hesitancy in saying that carrier may properly augment its maintenance of way forces with employes of other crafts and, if necessary, with persons not previously within the employ of the Carrier."

That therefore "the only reason that a section crew was used in the cleaning of a station platform was due to emergent conditions and that the instant claimants have no right, either by contract or by practice, to clean snow from the station platforms".

2. That the Special Agreement of May 15, 1942 (page 44 of the Rules) authorized exactly what was done in this instance.

3. That the provisions of that Special Agreement to the effect that new employes brought in to remove snow and ice "are not to be used to the detriment of regular employes' does not apply to claimants, who are not regular employes, but only furloughed employes.

4. That for the preceding fourteen years the local contractor had been called in with loader and truck to dispose of snow under these conditions.

In Carrier's Statement of Facts it says:

> "Claim was declined on basis that the cleaning of snow from station platforms is not the exclusive work of track forces, and that Contractor had been doing subject work for the past fourteen years without protest."

Thus the Carrier's first objection to the claim on the property was that the work is "not the exclusive work of track forces"; whereas here it contends that it was not the work of track forces at all. It is well settled that the parties may not "change their holds" on appeal here; however in any event, for reasons hereinafter stated, the new contention cannot be upheld here.

The Employes deny the Carrier's fourth contention, that for the preceding fourteen years the matter of snow removal had been handled by the local contractor, as in this instance; on the contrary, they cite a letter written by the local chairman while the claim was being handled on the property, stating as follows:

> "The basis for the claim is that after the crew on Section 252, Woodsville, N. H., had been reduced to three trackmen there wasn't crew enough to keep the switches clear of snow and the station platform too. Therefore, when there was a snow storm a contractor was called in to keep the platform clean. This work has always been done by the section crew at this point, therefore establishing the precedent that this work belonged to them. So I contend that the named laid off trackmen are entitled to the time that the contractor was used."

They contend on the contrary that the work of section forces extends to work necessary to the safe condition and proper maintenance of other railroad property including station grounds and driveways. In support of that proposition they cite Rule 1026 (b) of the Carrier's Operating Rules, which provides that Track Supervisors "have charge of, and are responsible for, the safe condition and proper maintenance of roadbeds, tracks, tunnels, rights-of-way, station grounds, driveways, crossings," etc., "and must make frequent inspections to insure that same are kept in safe and neat condition"; Rule 1030 (a) requiring Section Foremen to report to and receive instructions from the Track Supervisor and his assistants; and Rule 1052 requiring Section Foremen to "devote sufficient time each week to cleaning and putting things in order on their sections, especially around section house, station grounds, yards, sidings, public and farm crossings, etc."

As the record contains no evidence of the Carrier's allegation of fourteen years practice of snow removal by the local contractor, and as it is disputed we cannot assume its correctness. Awards 757, 4671, 4701, 4920, 4921 and 5421.

In any event the Special Agreement of May 15, 1954 (page 44 of the Rules) shows that at least as far back as 1942 it was agreed that outsiders could be brought in "for the purpose of removing snow and ice", etc. It also shows that such work is considered the proper work of the Employes; otherwise the provision is meaningless that such outsiders, are not "to be used to the detriment of regular employes". That provision can mean only that the employes under the Agreement are to be used so far as possible for the work, and that it is only when further help is needed because of emergencies, that outside help

can be called in. Awards 4948 and 5347. As quoted by the Carrier, Award 4948 states that "Carrier may properly augment" the Maintenance of Way forces with outsiders.

The contention that Claimants, because furloughed, are not "regular employes" within the intent of this Rule would tend to make the Rule largely meaningless, for clearly, to the extent that furloughed employes are available it is not necessary either to use regularly assigned employes on an overtime basis, or to call in outsiders.

While the Carrier contends that furloughed employes are entitled to be called under Rule 5-A only when force is increased or vacancies occur, it is clear under Award 2716 that the provision is applicable to all positions, including temporary ones. Consequently it applies to the temporary increase of force. Certainly furloughed employes are entitled to be called in for such temporary work in preference to overtime use of regularly assigned employes or to the use of outsiders. Thus furloughed employes must logically be considered as "regular employes", to whose detriment outsiders shall not be used.

Webster's New International Dictionary defines the word "regular" as "Governed by rule or rules; steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation; * * * usually or generally received, used, etc., * * *. Constituted, selected, conducted, made, etc., in conformity with established or prescribed usages, rules or discipline; * * *."

We find nothing in the general definition of the word "regular" to indicate that it means those presently employed, to the exclusion of furloughed employes.

Certainly furloughed employes come as fully within the definition as those in active employment; and as above noted they are the ones most directly concerned in the possible employment of new employes under the Special Agreement (p. 44 of the Rules). We conclude, therefore that its provision that "new employes * * * will be excluded from all the provisions of schedule" * * * but "such employes are not to be used to the detriment of regular employes" was intended to contrast new employes not subject to the rules with employes who are subject to the rules, which clearly include furloughed employes. Thus we cannot sustain Carrier's contention that as used in that Rule "regular employes" does not include furloughed employes.

Awards 4948 and 5347, both relating to these same parties, confirm the contentions of the Employes.

In Award 4948 this Division said:

> "The Organization contends that the removal of snow is work which belongs exclusively to maintenance of way employes. With certain qualifications and exceptions, we think this is true. We have held, correctly we think, that employes of other crafts may engage in snow removal when it is incidental to the work of their crafts. Award 4593. But as a general proposition that work belongs to maintenance of way employes. As long as snow handling is a normal operation within the capacity of maintenance of way employes to perform, it is their work. It must be borne in mind, however, that snow storms in certain parts of the country become emergent when considered in connection with

the movement of railway traffic. Under emergency conditions, snow removal cannot be delayed in order that it may be wholly performed by maintenance of way employes. The duration of such emergencies are unpredictable and available forces must be used with contingencies in mind which may never occur. Management is not required to guess correctly on such matters at its peril.

Where snow removal has become emergent, we have no hesitancy in saying that a carrier may properly augment its maintenance of way forces with employes of other crafts and, if necessary, with persons not previously within the employ of the Carrier. It necessarily follows that under such circumstances, track forces from other sections may be utilized in overcoming the emergency in order to keep trains moving. It was entirely proper, therefore, for the Carrier to utilize Section Crew 253 to augment Section Crew 252 in snow removal during the period of the emergency at Woodville, New Hampshire.

* * * * *

We must again reiterate that the purpose of the overtime rule is not to create work for which punitive compensation can be demanded. Its purpose is to penalize the Carrier for working an employe for more than eight hours in any day and thereby coerce it into avoiding so doing. Award 4194. Consequently a Carrier should use an extra or furloughed man rather than to work another employe more than eight hours."

The Carrier is in error in its reference to Award 5347. The reference to Signalmen therein related to Award 4593 in which it was applicable. This Division said:

"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."

Here the claim is only that the Claimants should "each be allowed pay at their respective straight time rates for an equal proportionate share of the total man hours consumed by the contractor's forces in performing the work referred to" in the claim. They should certainly have been used at least to that extent; otherwise the use of outsiders was clearly to their detriment. The claim must therefore be sustained.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of November, 1960.