

Award No. 9672

Docket No. MW-8113

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Howard A. Johnson, Referee

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**MISSOURI PACIFIC RAILROAD COMPANY**

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

1. The Carrier violated the effective Agreement when, on April 14, 15 and 16, 1954 and on July 14, 1954, it assigned the work of cleaning the tracks at its 7th Street Freight House, St. Louis, Missouri to employees who hold no seniority rights under the provisions of this Agreement;

2. Section Foreman Fred James and the members of his gang each be allowed pay equal to what they would have been paid had they been permitted to perform the work referred to in Part one (1) of this claim during the same hours in which the work was performed by other than track department employees.

**EMPLOYEES' STATEMENT OF FACTS:** The Claimants were regularly assigned to the position of Section Foreman and Section Laborers on Section No. 1, with headquarters at 12th Street, St. Louis, Missouri.

For more than thirty years, the work of cleaning the Carrier's tracks in and around Freight Houses, Stations, Yards and etc. has been assigned to and performed by Section forces assigned to the territory comprising the section where such work was performed.

In keeping with the established practice, on or about April 12, 1954, the Carrier's Assistant Roadmaster, Mr. Todd, instructed the claimant Section Foreman to inspect the tracks inside the 7th Street Freight House which was located on the territory comprising Section No. 1 and to advise if the tracks needed cleaning. After an inspection of the tracks, Foreman James reported to the Assistant Roadmaster that the tracks were badly in need of cleaning. The Assistant Roadmaster said, "Okay, we shall clean the tracks."

On or about April 17, 1954, Foreman James had occasion to be in the vicinity of the 7th Street Freight House and found the tracks had been cleaned. Upon inquiring further, Mr. James was informed that the night Freight Handlers at this Freight House, who hold no seniority rights under the provisions of this agreement, had been used to clean tracks Nos. 5 and 6 on

also did some of this cleaning work on the tracks from time to time between the heavier clean-ups by the section men. The situation has changed so that the rubbish is not allowed to accumulate to the extent of requiring a gang of men to clean it up. The work is now being taken care of fully by the freight house employe doing it from day to day in the same manner that portions of it were done by such employes from time to time in the past.

In Award 4446 your Board ruled that where work is done by both employes covered by an Agreement and those not covered, the covered position may be abolished even though this may result in increase in the work of the employes not covered. The situation here involved comes within the purview of that Award. Both section men and freight house laborers have been doing this cleaning work. The Carrier has not abolished any section laborer position but the award is clear to the effect that all of the cleaning work may be assigned to the freight house force without violation of the Maintenance of Way Employes Agreement.

There is nothing about this work that would identify it with the subject matter of the Agreement here involved, which is maintenance. When the tracks are cleaned there is no work whatever done on the tracks themselves. It is not maintenance in any sense of the word. It is freight house cleaning and it would not be practicable or efficient to call a section man away from his gang day by day to come into the freight house to do cleaning that is made necessary only by the activities of the forces actually employed in the freight house.

The Carrier does not see how it can be said the track forces have exclusive right to work which is not track work at all in preference to employes to whose work it is directly incidental and who have performed portions of it from time to time throughout the years.

As indicated by Award 4572 cited above it was proper to assign some of this work in the past to section men although not covered by the scope rule of the Maintenance of Way Agreement, but the situation has changed, as explained by the Carrier, so that it was no longer a satisfactory way to get the job done. Since the Carrier did not have an obligation under that Agreement to assign this work to section men in the first place it cannot now be said section men have exclusive right to it.

Furthermore, in dealing with practice, the Board said in Award 6912 that in order for practice to become binding on a carrier or be construed as having assumed contract status, it would have to be reduced to writing in subsequent revisions of the Agreement. There is no writing in this Agreement that deals with the performance of this work by Maintenance of Way Employes.

**OPINION OF BOARD:** The claim is that the Carrier violated the Agreement when it assigned the work of cleaning tracks at its 7th Street Freight House in St. Louis to employes without seniority rights under the Maintenance of Way Agreement.

The tracks run into the freight house so that the cars can be unloaded within the building. On the first occasion, at the Assistant Roadmaster's instructions, Foreman James, one of the Claimants, inspected the tracks inside the freight house, reported that they were badly in need of cleaning, and was told that they would be cleaned. However, the cleaning was done by freight house employes on that and another occasion, and this claim resulted.

There is no question that the cleaning of tracks in general is within the jurisdiction of the Organization, but the Carrier contends that this cleaning work on tracks within the freight house is not really track work nor within the Maintenance of Way Agreement; that it is necessitated by the discarding of paper, cardboard, steel strapping and bracing material in the unloading of freight, is incidental to that work, and in any event has not been performed exclusively by the Organization. However, the Carrier submitted no evidence of the latter contention until its Reply to the Employees' statement which was filed at the Oral Argument before this Board. That evidence consisted of statements by two warehouse foremen of long service. One of them stated:

"It has always been a practice for the warehouse forces as well as the section gangs to clean up between tracks of warehouses.

Although these tracks were cleaned by the section men it has always been necessary periodically to also put warehouse laborers doing this work to protect against Fire and Safety Hazards."

The other foremen stated:

"The work of cleaning tracks at warehouse was generally done by Section Gangs, but it has always been a practice to also put warehouse laborers doing this work to keep tracks clean at all times."

This evidence is not properly before the Board since it was not considered on the property. In any event it shows that traditionally this work has been principally done by section gangs, and it is somewhat inconsistent, both witnesses stating in almost identical words that it has always been the practice for warehouse forces as well as Maintenance of Way employees to do the work, one adding in further explanation: "it has always been necessary periodically to also put warehouse laborers doing this work to protect against Fire and Safety Hazards". The latter statement indicated that warehouse laborers have performed this work not regularly but only when accumulations of material presented fire and safety hazards, which was not claimed in this instance.

In its Ex Parte Submission the Carrier stated:

"Prior to January 1952 the Carrier's general freight handling operation was carried on at the Seventh Street Freight House. A new freight handling facility was completed at Miller Street in 1951 and the general freight handling operation was transferred to that location in January 1952.

The Seventh Street facilities were then remodeled and the Universal Carloading Company moved its operations to this location.

Cars placed for loading in the freight house often contain debris such as paper, straps and bracing material which has to be removed therefrom the cars are loaded with merchandise. In the process of cleaning out these cars some of the debris falls on the tracks. Also in the course of the freight handling operation similar rubbish falls off the warehouse platform onto the tracks.

When the general warehouse operations were carried on at Seventh Street with six day service up to 1949 and five day service subsequently freight house tracks could be cleared of cars on Saturdays or

Sundays to permit removal of accumulated debris and a section gang was used for this purpose about every three or four months.

Sometime after the Universal Carloading Company took over at Seventh Street with Missouri Pacific employees under the Clerks' Agreement handling the freight, the service was put on a daily basis and a night shift was established. This made it impracticable to clear the tracks for cleaning purposes. The Carrier then had warehouse laborers do this cleaning on a more current basis as it was not considered practicable or efficient to frequently call section men from their regular work to keep the warehouse tracks clean.

After this plan was tried for a time it was decided a better arrangement would be to have the rubbish cleaned up on a day to day basis by the warehouse laborer who cleans out the cars and one man was assigned to this work. The cleaning of the cars and picking up the rubbish that falls on tracks is all one operation performed by the same employe. This is the arrangement that has continued to obtain up to the present time."

This statement conflicts with those of the foremen above quoted, and with the undisputed facts that in at least the April, 1954 incident here complained of, the cleaning was of an accumulation and not a regular day to day operation.

It also indicates that up to 1952 all of this work on tracks in the warehouse was performed by the section gang, apparently with track equipment necessitating the prior removal of freight cars, and that it was only when changed handling of freight work "made it impracticable to clear the tracks for cleaning purposes" that "the Carrier then had warehouse laborers do this cleaning on a more current basis \* \* \*".

Since thus, according to the record, the work in question had been done exclusively by section gangs until the changed freight handling, it is not apparent how by the change the Carrier became entitled to transfer the work from one Organization to the other.

The Claimants seek "pay equal to what they would have been paid had they been permitted to perform the work \* \* \* during the same hours" in which it was performed by others. The evidence is conflicting as to the time involved, but payment should be made at pro rata for the time as shown by records on the property.

**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

Claim sustained in accordance with final paragraph of Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois this 5th day of December, 1960.