Award No. 11242

Docket No. MW-10344

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

(1) Carrier violated the Agreement on January 9, 10, 11, 14, 15, 17, 18, 21, and 22, 1957 when it assigned snow removal work on Section 123 at Channing, Michigan, to Mr. Alvin Sitka, an individual who holds no seniority under the scope of this agreement.

(2) Foreman Engquist and Laborers Federspiel, Prosess, and Fredy each be allowed 14 hours' pay at his respective straight time rate because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Claimant employes have been assigned to their respective positions on Section 123 at Channing, Michigan as a result of having bid for and been awarded positions at that point.

During the month of January, 1957, the Carrier employed and used Mr. Alvin Sitka to remove snow from the territory which comprises Section 123 and contracted to pay him for his services and for the use of his bulldozer at the rate of $3.50 per hour.

During the month of January, 1957, Mr. Sitka consumed the following number of hours in removing snow from Section 123:

January 9, 1957 — 8 hours
January 10, 1957 — 8 hours
January 11, 1957 — 8 hours
January 14, 1957 — 8 hours
January 15, 1957 — 4 hours
January 17, 1957 — 5 hours
January 18, 1957 — 8 hours

as such and we maintain that the cleaning of snow from switches is exclusively trackmen's work.

Very truly yours,

/s/ J. G. James
J. G. James
General Chairman"

There were no further exchanges of correspondence in connection with this formal protest.

As indicated in the fourth paragraph of Carrier's Exhibit "F" a similar protest was made also in the year 1952 over the operation by employes within the scope of the Clerks' Agreement of a tractor equipped with a snow broom attachment to remove snow from the station platform and car department and round house walks and runways at Aberdeen, South Dakota, it being the contention of the Employes there as here that snow removal work was exclusive work of track forces within the scope of the Maintenance of Way Agreement and as such should be turned over to track department forces. Carrier under date of January 7, 1953 advised the Employes that favorable consideration could not be given their request and that complaint or protest by the Employes was also abandoned. We believe each of these "abandonments" to constitute full recognition by the Employes that they have never acquired an exclusive right to any and all snow removal work either by practice or by agreement.

As previously stated by the Carrier in this submission and as shown in this submission, the instant claim is the culmination of a series of unsuccessful attempts by the employes to have the Carrier, through handling on the property, reserve to employes holding seniority in the Maintenance of Way Track Sub Department the exclusive right to perform any and all snow removal work. Failing in that regard, the Employes now seek, through an award of this Division, that which they have never had and do not have now. Carrier is sincere in its belief, based upon evidence of record, that to sustain either or both parts of the Employes' Statement of Claim would require a power not vested in your Board.

The Carrier respectfully submits that the instant claim is not supported by the provisions of schedule rules, agreements or understandings and is contrary to interpretations thereof and practices thereunder and should therefore be denied.

All data contained herein has been made known to the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a dispute between The Brotherhood of Maintenance of Way Employes and The Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

It is apparent from the record that the removal of the snow from the track and switches is work that belongs to Maintenance of Way Employes. Award 5347 establishes the principle that such work that is an integral part of the removal "in the first instance" belongs to the Maintenance of Way Employes. In that case it could not be determined from the record that the removal of snow from gondola cars were a part of the removal "in the first instance".

We cannot find that the work involved herein was a part of the snow removal "in the first instance".

We must therefore look to practice on the property. The burden is upon the Petitioner to prove past practice. There is no evidence in the record. This work has not been done at the same locations previously as the snow has been allowed to accumulate. However, past practice on the system would be adequate. Without a showing of past practice anywhere on the system, the claim must fail.

For the foregoing reasons we believe the Agreement was not violated.

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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of March 1963.

STATEMENT OF CARRIER MEMBERS WITH REFERENCE TO AWARD 11242, DOCKET MW-10344

The Referee has indicated to us that the first sentence of the second paragraph of the Opinion refers only to the particular snow involved in this claim and that this is the reason for the insertion of the word "the" before the word "snow" in the phrase "removal of the snow from the track and switches is work that belongs to Maintenance of Way employes"; and we feel that this should be made a matter of record to avoid possible misunderstanding which may result from the fact that some of the record is not reproduced in the printed Award. Carrier admits in its Statement of Facts that the snow involved in this claim consisted of "accumulated snow piles [which were removed by contractors] following and resulting from the cleaning and removal of snow from switches and platforms by the Claimant Maintenance of Way Track Sub-department Employes". Portions of the record which will not be printed indicate that other classes of employes also clean snow from tracks and switches under various circumstances, and any rights which such employes may have to that work are in no way involved in this Award.

The reference to **Award 5347** is not appropriate because the amended Scope Rule in evidence in that case contained specific reference to the removal of snow and ice and imposed restrictions upon Carrier's use of other than regular employes for that purpose. The Agreement relied upon by Claimants in the instant case contains no similar provision, and as is correctly indicated in the Award, the rights of the employes to any snow removal work must be determined by looking to past practice on the property and the burden of proving a practice that supports a given claim rests upon the Claimant.

G. L. Naylor
W. M. Roberts
R. E. Black
R. A. DeRossett
W. F. Euker