Award No. 12409
Docket No. MW-11989

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ERIE RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it required or permitted other than its Maintenance of Way employes to perform the work of removing snow and ice from the station platform at Warren, Ohio, on January 4, 1959.

(2) Maintenance of Way employes R. L. Thrasher and W. T. Hemphill each be allowed five hours' pay at his respective time and one-half rate because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On January 4, 1954, the Carrier required or permitted its station forces at Warren, Ohio to perform the usual and traditional work of its Maintenance of Way (Track) employes in removing snow and ice from the station platform at that location.

The work was performed by the station forces during hours outside of the claimants' regular assignment and one one of their designated rest days (Sunday).

The claimant Maintenance of Way (Track) employes, who were regularly assigned to the territory where the work was performed, were available and could have performed the subject snow and ice removal work but were not called or notified to do so.

The Agreement violation was protested and the instant claim was filed in behalf of the claimants. The claim was handled in the usual and customary manner on the property and was declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated 1/1/52, together with supplements, amendments, and interpretations thereto, is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The pertinent portion of Rule 1 reads:

"The difficulty with the Petitioner's position in the present situation is that it does not affirmatively appear either in the applicable Agreement or in custom or practice that the work of the Trucker position belonged exclusively to the incumbents of that position. The mere fact that Claimant may have performed Trucker duties over a long period of time does not give him the exclusive right to their performance. (See Awards 7954 and 7031.) Evidence submitted by the Carrier supports its assertion that even prior to Claimant's furlough on December 12, 1957, Class (a) employes were customarily called upon to perform trucking work at the Freight House."

Carrier submits that the foregoing facts and authorities cited categorically deny this claim.

V. CONCLUSION

Carrier has heretofore shown that there is no dispute concerning the fact that the parties agreement does not cover classifications of work. Thus, the sole dispute is — do maintenance of way employes have by way of past practice and custom on the property exclusive right to the work of removing snow from station platforms and other facilities? Awards 2436, 507, 1257, 1397, 3338, 4349, 5167, 5564 of the Third Division.

The Carrier submits that the answer to whether maintenance of way employes have exclusive right to this work by way of past practice and custom is an emphatic — no. It has been shown by facts, substantiated by authoritative proof, that maintenance of way employes do not now have and never have had exclusive right to this work. And, the work here claimed has never belonged to any single class or craft. Based upon the authorities cited together with the facts as they are, this claim must fall under the weight of the Board's own authorities. Awards 6007, 6222, 6379, 6788, 7970 and 8208 and many others.

Carrier reiterates that Petitioner by this claim is trying to write into the agreement a condition that it has never heretofore enjoyed. Consequently, if this Board would sustain this claim, it would in effect be making a new rule in the parties agreement that was never intended. This Board, as well as all the other divisions of the National Railroad Adjustment Board, has consistently held that under the Railway Labor Act, as amended, this power they do not have. Awards 8538, 8564 and 8676 to cite only a few.

Based upon the facts and authorities cited, Carrier submits that this claim is totally without merit and should be denied. Awards 7784, 8381, 9047.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants were employed as Section Foreman and as Trackman in Section Gang No. 7 with headquarters at Warren, Ohio. They were regularly assigned to work Monday through Friday with rest days of Saturday and Sunday.

On Sunday, January 4, 1959, it snowed intermittently throughout the day at Warren, Ohio. Baggagemen, assigned to the station, removed the snow from the station platform using a Gravely tractor equipped with a snow plow.

Petitioner contends that snow and ice removal is work which belongs to Maintenance of Way employes. Claimants were available and should have been called to remove the snow from the station platform. Carrier violated the Agreement when Baggagemen were assigned to do the work.

Rule 1 — Scope of the Agreement does not describe nor define the work of the employes covered thereunder. There is no mention of removal of snow and ice. In the absence of any specific description and definition of the covered work, the question whether that work belongs to Maintenance of Way employes must be determined from the historical, traditional and customary practice on the property.

On April 10, 1959 Carrier's Division Engineer wrote to Petitioner's General Chairman, in part, as follows:

> "It was agreed at our conference that our current agreement does not cover removal of snow at Station Platforms. On the basis of past practice, I consider that this work should be done by station forces since they have handled snow removal at this location for many years and our forces only being called in to furnish assistance when the snow was too heavy or when station forces were unable to handle the work."

Petitioner's General Chairman replied on April 21, 1959, in part, as follows:

> "In your letter you state that it was agreed at our conference that our current Agreement does not cover removal of snow at station platforms. I stated at our conference that the snow work is not in our present Maintenance of Way Agreement but due to the fact that our employes performed this work prior to the new Agreement being signed on January 1, 1952, the work automatically belongs to Maintenance of Way employes."

On September 22, 1959, Carrier's Assistant to the Vice President wrote to Petitioner's General Chairman that employes under the Clerks' Agreement have removed snow, that since December 19, 1951, a snow plow was assigned to the ticket agent and that station employes have since operated the snow plow and have removed snow from the station platform. Maintenance of Way employes sometimes assisted in removing the snow.

The burden of proof is upon Petitioner. It must show by a preponderance of evidence that only Maintenance of Way employes have been used to remove snow from the station platform. The question of emergency is not before us. The issue is whether or not, under normal operating conditions, Maintenance of Way employes had the exclusive right to the work of snow removal from the Warren station platform. The record does not support Petitioner's position. It has failed to meet the requisite burden of proof.

Petitioner relies heavily upon the statements of several employes who attest that Maintenance of Way employes have removed snow from the station platform. None of these statements categorically state that under normal conditions — not in emergencies — Maintenance of Way employes exclusively performed that work at Warren, Ohio. These statements, at best are self serving and may be considered only as supplementing the evidence adduced on the property. The record does not show whether these statements were pre-

sented on the property. The record does show that Baggagemen, Clerks, and other station employes had shoveled snow from the station platform. It also shows that Maintenance of Way employes sometimes assisted in this work. Further, the record shows that station employes operated the Gravely tractor equipped with a snow plow attachment. Nowhere in the record is there probative evidence that Maintenance of Way employes exclusively shoveled snow from the station platform at Warren, Ohio, with or without the snow plow, under normal general conditions.

In the absence of such proof, we are obliged to hold that the claim is not valid.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of April 1964.