

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Benjamin C. Hilliard, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ST. LOUIS-SAN FRANCISCO RAILWAY**

STATEMENT OF CLAIM: "1st: That the Carrier violated current agreement in effect by removing crossing watchmen Lige Slawson and Mark Sanders from the service as watchmen at the Jefferson Street crossing, Springfield, Mo. and assigned in their place two switch tenders, employes who do not come within the Scope of the Maintenance of Way Agreement, nor hold seniority rights in the Maintenance of Way Department.

"2nd: That crossing watchmen Lige Slawson and Mark Sanders be reimbursed for any losses in earnings resulting from this improper displacement.

"3rd: That the senior employes in the Maintenance of Way Department, who had filed application for and were awaiting assignments to positions as crossing watchmen but deprived of such assignments because of the two switch tenders being assigned to the Jefferson Street crossing, be paid at the rate applicable to crossing watchmen at the Jefferson Street crossing, Springfield, Mo. for the period that the two switch tenders were assigned to the Jefferson Street crossing."

JOINT STATEMENT OF FACTS: "There are two main line tracks between Jefferson Avenue and Main Avenue, Springfield, Missouri. Eastern Division passenger trains use one of these main lines, Southern Division passenger trains use the other main line. In May, 1939, work of rebuilding these main tracks which are located in a street between Boonville Avenue and Main Avenue, and repaving between the tracks, was started. Boonville is between Jefferson and Main Avenues.

"The work necessitated taking one of the main tracks out of service and operating both Eastern and Southern Division passenger trains, as well as switch engines and transfers, on one track while the work was being performed on the other. At Jefferson Avenue crossing prior to this work there were maintained two crossing flagmen, one assigned 10:45 P. M. to 6:45 A. M., the other 12 noon to 8:00 P. M. Effective May 8, 1939, in order to cross passenger trains over at Jefferson Avenue, the Railway displaced the two crossing flagmen with switch tenders, assigning one of these switch tenders from 10:45 P. M. to 6:45 A. M., the other from 1:00 P. M. to 9:00 P. M. The crossing flagmen were displaced and switch tenders performed crossing flagman duties at Jefferson Avenue in connection with their switch tender duties. Work on the main tracks was completed, switch tenders discontinued and crossing flagmen reinstated effective August 1, 1939."

POSITION OF EMPLOYES: "Article 1, Rule 1, of agreement in effect between the Carrier and the Brotherhood of Maintenance of Way Employes reads:

The employees did not question our right to permit employe from the other Department to displace a crossing flagman but contended this employe from another Department should have displaced any one of three other crossing flagmen, instead of the woman. The Railway contended promotion and seniority rules did not apply and the Decision of the Board was:

'DECISION: In view of the fact that these positions have been exempted from the promotion and seniority rules of the Agreement then in effect, it is the opinion of the Railroad Labor Board that the action of the carrier was not in violation of existing rules. The claim of the employes is therefore denied.'

This decision was dated July 6, 1923. Since that date new agreements have been entered into between the carrier and the employes without any change in the rule in effect on July 6, 1923 and without any change in the National Agreement rule, except the addition of the sentence, 'These positions will not be bulletined.' In this connection attention is also called to the fact that combination switchtender-crossing flagmen positions were in existence at Jefferson Avenue, Springfield, at the time each and every agreement entered into with the employes was effective, including the current Agreement of September 1, 1937.

"We contend there was no violation of the Agreement between the carrier and the employes in this case and request claim be denied. There was no necessity whatever for having both crossing flagmen and switchtenders on this crossing which would have been the result of complying with employes' request. Neither the Maintenance of Way Employes or the B. of R. T. have contended combination switchtenders-crossing flagmen could not satisfactorily handle both the switches and the crossing protection."

OPINION OF BOARD: It appears that for many years crossing watchmen have been within the scope rule of the wage agreement between the carrier and the Brotherhood of Maintenance of Way Employes, while switch tenders are within the scope rule of an agreement between the carrier and the Brotherhood of Railroad Trainmen. Still, for twenty years, or longer, the carrier assigned only switch tenders, occupied in part at the point involved with duties pertaining to switch tending, to discharge the duties of crossing watchmen as well. The carrier refers to employes working so, as "combination switch tenders-crossing flagmen." There is no such designation in any rule called to our attention. The brotherhood concedes that prior to the time when the carrier assigned crossing watchmen to the crossing in question, as hereinafter set forth, no protest or complaint was made against the procedure followed by the carrier in assigning switch tenders to the employment.

In December 1937, however, duties calling for the services of switch tenders, as such, at the crossing ceased, and only crossing watchman duties continued there. The carrier thereupon assigned crossing watchmen to the task. They carried on until May 8, 1939, when the carrier, having inaugurated new track construction at and near the place of the crossing, found it necessary to employ switch tenders in relation to that activity. Faced with the requirement of having switch tenders at the point in any event, the carrier removed the regularly assigned crossing watchmen there, and combining their duties with those of switch tenders, assigned the whole work to the latter. That arrangement continued until August 1, 1939, when necessity for their presence at the crossing in question having ceased, the carrier relieved the switch tenders and reassigned crossing watchmen to the work.

We are disposed to the view that regardless of what in the first instance may have prompted the carrier to combine the duties of crossing watchmen and switch tenders at the point in question, and to assign switch tenders to the discharge of the combined duties, and however long the practice continued, the carrier's resort to the scope rule in 1937, in the circumstances

appearing, constituted such recognition of the application and control of that rule, that thereafter, proceeding unilaterally, its attempt to depart therefrom, as here, was violative thereof.

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 carrier violated the agreement.

AWARD

The claim as modified by the employees' letter to the Board dated January 9, 1940 is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 16th day of July, 1940.