

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Paul W. Richards, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

(J. M. Kurn and John G. Lonsdale, Trustees)

STATEMENT OF CLAIM: "First—That the St. Louis-San Francisco Railway Company violated its agreement governing hours of service and working conditions, with the Brotherhood of Maintenance of Way Employees, said Agreement being effective September 1, 1937, when on March 2, 1940 they permitted the State Highway Department of the State of Oklahoma to place crossing watchmen on detour across the St. Louis-San Francisco Railway Company's main line on the East Line of Section 22, and on the South Line of Section 22, Township 17 North, Range 10 East, in the State of Oklahoma. The Rules violated in the Maintenance of Way Agreement are: Rule 1, Article I, Scope of the Agreement. Rule 3, Article II, Rule 10, Article III, and Rule 8, Article V.

"Second—That the senior Maintenance of Way employees who have made application for crossing watchmen's positions and are waiting for assignment, and who are not able to work their regular positions, be allowed pay for each day they lost during the period of time the Highway Department employees filled these positions.

"Third—That the senior extra employees in the Maintenance of Way Department be allowed pay for each day that they are held out of service, where the senior employees who have made application for crossing watchmen's positions and are not permitted to work these positions, but work their regular assigned positions instead depriving the senior extra employees of work."

JOINT STATEMENT OF FACTS: "United States Highway No. 66 parallels Frisco's main line track in the vicinity of Mile Post 447, approximately $\frac{3}{4}$ mile South of Kelleyville, in Creek County, Oklahoma. The Oklahoma State Highway Commission constructed a highway bridge to replace a previously existing structure across Little Pole Cat Creek on this highway.

"During the construction of the bridge, the State Highway Commission detoured highway traffic over an existing county road. This detour crossed Frisco tracks at two existing grade crossings, one located on south line of Section 22, and one located on east line of Section 22, Township 17 North, Range 10 East.

"Effective March 2, 1940, the two crossings were placed in service as detours and the Highway Commission placed their employees at these crossings to protect highway traffic. The highway bridge was completed and detour discontinued May 25, 1940. There were no flagmen employed at these

'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 employees is therefore denied.'

This Decision was dated July 6, 1923. Since that date new agreements have been entered into between the carrier and the employees 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.'

"We contend Rule 3, Article II, and Rule 8, Article V, have no application whatever to this case because even if the positions did come under the scope rule, which we deny, Rule 10, Article III, governs.

"We further contend there could be no basis for money payment as set up in employees statement of claim in this case as no employees are designated and further, with seniority rules not applicable to crossing flagmen employed by the Railway, it is utterly impossible to now say who would have been placed on the positions had the Railway placed its employees on the crossings at the expense of the State.

"We feel the claim should be denied in its entirety."

OPINION OF BOARD: In the opinion of the Board, the showing in this docket does not warrant a finding that the guarding of the highway crossings in question with crossing-watchmen, from March 2, 1940 to May 5, 1940, inclusive, was work that the Carrier was under obligation to perform, either as a part of or in connection with the operating of its railroad. Prior to March 2, 1940, the Carrier had neither assumed nor recognized as its duty the guarding of these crossings with watchmen, nor after that date was that duty imposed by any authority having that power. On the contrary, the sovereign authority itself, the State of Oklahoma, through one of its instrumentalities, made it known to the parties to this dispute that the State's instrumentality would itself provide continuous flagging service to protect traffic at these crossings during the period in question, and intended to ask the U. S. Bureau of Public Roads to include the cost of this flagging as a part of the project. The State, through its instrumentality, further advised the parties to this dispute:

"That the State Highway Commission is entirely within its rights to provide such protection to highway traffic as it deems necessary with its own employees, for the reason the States rights to use the section line are superior to those of the railroad company."

Thus it clearly appears that the State, through its agency, reserved to itself the guarding of this one of the State's highways. The very authority that might have attempted (whether successfully we in no manner intimate), to impose on the Carrier a duty to guard the crossings, i. e., the State of Oklahoma, in fact exercised its will in the opposite direction. It definitely excluded the Carrier from so doing. The necessary conclusion is that the guarding of these crossings with watchmen during the period in question was not work that the employees of Carrier could successfully claim they had the right to do under the schedules of agreement. Accordingly, the claim should be denied.

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:

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 facts appearing in this docket fail to sustain the claim that the rules cited by the Petitioners were violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 30th day of June, 1941.