

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

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

(1) The Carrier violated the agreement by assigning switch tenders, not coming within the scope of the agreement, to perform the duties of highway crossing watchmen, causing crossing watchmen to be displaced.

(2) Crossing Watchman Joseph A. Balsamo be allowed to return to his position at South Claiborne, Illinois Central Railroad, Mainline at New Orleans, Louisiana and be reimbursed for all wage loss suffered by him because of the violation of agreement.

(3) Any other crossing watchmen displaced at other crossings as a result of the Carriers' improper action be returned to their original positions and paid for all wage loss suffered by them.

(4) The Carrier fill the positions of crossing watchmen at South Claiborne and Mainline with crossing watchmen.

JOINT STATEMENT OF FACTS: Prior to November 29, 1947, at the Carrier's crossing on South Claiborne Street and the Main Line, there were six positions of crossing watchmen. Two watchmen were employed on each of three shifts, one watchman for the east lane traffic on Claiborne Street and one watchman for the west lane traffic.

About 100 feet south of the east traffic lane there is a crossover from the southbound traffic to the northbound traffic. This crossover has two hand-operated switches.

J. H. Nillen and J. S. Burke were formerly switchmen regularly employed in the Carrier's service. Mr. Nillen entered service as switchman on May 28, 1920, and Mr. Burke started as switchman on December 6, 1910. On November 26, 1920, J. H. Nillen was incapacitated to the extent of loss of right leg, and J. S. Burke was incapacitated on May 31, 1935, to the degree of loss of left leg.

These employees being incapacitated for their regular occupation were subsequently continued in the service as crossing flagmen.

At a later date when the Carrier found it necessary to use these hand-operated switches in the crossover above referred to, Crossing Flagmen Nillen and Burke were assigned to the performance of this work and were paid at

Second Division Award 974 (I. L. Sharfman, Referee) :

"In these circumstances the established practice must be deemed to reflect the intent and understanding of the parties. There is no basis for finding a violation of the existing agreement; if relief is considered necessary, it must be secured through the process of negotiation."

Second Division Award 1122 (Sidney St. F. Thaxter, Referee) :

"* * * This Board cannot make or amend a rule. It is bound by the agreement which the parties have made * * *"

Third Division Award 42 (Paul Samuel, Referee) :

"To recognize this dispute from a jurisdictional standpoint would, in my humble judgment, open the door to future disputes which, under the cloak of a grievance, are in truth and fact working condition problems which are not governed by rules or contracts, and thus permit the Adjustment Board to supersede the functions and duties of the Mediation Board."

Third Division Award 1102 (I. L. Sharfman, Referee) :

"Since the parties themselves failed of agreement to change the rule as theretofore understood and applied, it is not the function of this Board, in passing upon a claim first submitted ten years later, to effect virtually the same change in the rule through a process of interpretation."

Third Division Award 1290 (Herbert B. Rudolph, Referee) :

"It has further been the constant holding of this Board that it cannot make a new agreement for the parties so as to include positions not covered in the agreement the parties themselves have made."

Third Division Award 1687 (Sidney St. F. Thaxter, Referee) :

"It is apparent, therefore, that what this board is asked to do is to frame a rule which may apply to situations which may arise in the future not only with respect to this employe but with respect to all others similarly situated. It has been repeatedly held that this Board has no authority to make rules. Its function is to interpret them and apply them to the facts of particular cases."

Third Division Award 2132 (Sidney St. F. Thaxter, Referee) :

"* * * It seems to us, however, that it is not advisable, even to reach a result which might appear equitable, to attempt to read into a rule something which is not there. The weight of authority, as well as sound reason, supports this principle."

Third Division Award 2612 (Curtis G. Shake, Referee) :

"The problem with which we are here dealing is peculiarly a matter of contract between the organization and the carrier. We do not find the terms of the contract indefinite, uncertain or ambiguous; on the contrary, these are clear and positive. It follows that any change of policy must be brought about by negotiation. It is not within our jurisdiction to make contracts for the parties."

Claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This case comes before this Board on an agreed statement of facts. Insofar as material to a disposition of this controversy, the facts appear to be as follows: Prior to 1932, Carrier at its South Claiborne Avenue Crossing employed six crossing watchmen in around-the-clock service, three to protect the east lane and three to protect the west lane. It also

employed two switchtenders on the east side to handle two hand-operated switches approximately 100 feet south of the eastbound thoroughfare traffic lane. On August 16, 1932, two switchtenders on the east side of South Claiborne Avenue were required to flag the crossing and the crossing watchmen on two shifts were removed. In March 1943 the third shift crossing watchman was removed and replaced by a switchtender. In November 1947, mechanism was installed in the watchman's shanty on the east side of South Claiborne Avenue, controlling the gates on both sides of the Avenue, and mechanically operating the two crossover switches. J. H. Nillen and J. S. Burke, former switchtenders who were each incapacitated as the result of the amputation of a leg on November 26, 1920 and on May 31, 1935, respectively, were continued in service as crossing watchmen and eventually assigned to this crossing. When it became necessary to reinstate the use of the crossover switches, they were assigned to that operation in addition to flagging the crossing, paid at the switchtender's rate and carried on that roster. When the reduction in force took place, as a result of the mechanical improvements completed November 1947, Claimant Balsamo, an able-bodied employee, holding seniority on the Highway and Street Crossing Watchmen & Gatemen's roster, sought to displace either Nillen or Burke, but his request was denied. Employees file claim as indicated. Carrier bases its defense to the action taken upon Rule 24 of the Agreement (quoted below). Employees assert that Rule 24 has no bearing on this matter, their claim being that the Scope Rule of the Agreement is being violated by permitting switchmen to perform services as highway crossing watchmen.

"Rule 24. The general rule of promotion and seniority will not apply to positions of track, bridge, tunnel and highway crossing watchmen and watchmen, gatemen or signalmen at non-interlocked railway crossings, but such positions may be filled by incapacitated employees from any department, and preference in filling and retaining these positions will be determined by the degree to which incapacitated for other work. Seniority in the service of the railroad and ability to perform the work to govern; maintenance of way employees will be given preference."

Rule 24 of the Agreement serves a very laudable purpose. Its humanitarian aspect cannot be doubted and consequently it should be viewed in the light of its obvious purpose, to wit: to provide work for incapacitated employees who are unable to perform the duties of their regular positions. In the instant case, despite their obvious physical handicaps and their obvious inability to perform certain types of manual labor, Messrs. Nillen and Burke are assigned to tending switches, are carried on the Switchtender's roster and are paid at the rate of that classification. There is no doubt that watchmen, gatemen, and signalmen are positions attaching to the Maintenance of Way and Structures Department and employees in that classification hold seniority under the Maintenance of Way Agreement. Rule 24, however, permits the filling of such positions by incapacitated employees from any department without regard to seniority. It is, of course, clear that the guiding factor in determining appointment is the degree to which incapacitated for other work. Seniority in the service of the railroad and ability to perform the work are also to be given consideration. Obviously, Nillen and Burke are not incapacitated for other work as the facts appear in this Docket, for they are performing the work of switchtenders. Clearly, then the question involved in this docket is not the interpretation and application of Rule 24 but rather whether or not the Scope of the Maintenance of Way Agreement is being violated by assigning switchtenders to the duties of crossing flagmen.

From the statement of facts above appearing, there is an indication that before 1932 the Carrier apparently recognized the separability of the duties of switchtenders and crossing flagmen for it did maintain two switchtenders at the crossing in addition to the crossing flagmen. On the other hand, for a period of seventeen years off and on, the Organization acquiesced in the assignment of the work to switchtenders. The Agreement under the Scope and Seniority rule clearly includes positions of watchmen, and gatemen and signalmen at non-interlocked railway crossings. There is a seniority roster maintained for employees in such service. Of course, such seniority rights as

they may have among themselves are subordinated to the rights of incapacitated employees under Rule 24. Rule 24 in itself is a clear indication that the work of track, bridge, tunnel and highway crossing watchmen, etc., comes within the Scope of the Agreement, for if it were not covered, there would be no need to agree upon an exception to the general rule of promotion and seniority in appointment to the positions performing such work. It appears, therefore, that the Agreement clearly contemplates the inclusion of the work as performed under the circumstances appearing in this Docket, in its Scope. That being so, the long acquiescence of the Employees in the assignment of work to employees outside of the Agreement cannot defeat a claim that the Agreement is being violated. Under numerous Awards of this Division such a long period of acquiescence, however has been held to be a bar to a claim for compensation beyond the date of protest to the Carrier by the Organization.

It follows from the above that Claim (1) should be sustained. As to Claims (2), (3) and (4) it is within the Carrier's discretion as to the method it employs to correct the Agreement violation. We do not have the authority to direct the establishment or restoration of positions in cases such as this. Any wage loss suffered by the employees mentioned in items (2) and (3) of the claim should be paid from the date of protest to the Carrier to the date that the Agreement violation is corrected.

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 Carrier violated the Agreement.

AWARD

Claim sustained to extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois this 24th day of February, 1950.