

Award No. 7960

Docket No. MW-7572

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE BALTIMORE AND OHIO RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it relieved Sectionmen of flagging duties in connection with the construction of new track facilities and thereafter assigned such duties to employees not covered by the scope of the effective Agreement;

(2) Sectionmen Arthur Wines and Clay J. Lucky be paid the difference between what they received and what they would have received in continuing to perform flagging duties, time claimed to include all time consumed in the performance of flagging work subsequent to August 22, 1951;

(3) Sectionman Sprague L. Carpenter be paid for all time lost subsequent to August 22, 1951, account of being furloughed as a result of the violation referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Prior and subsequent to July 16, 1951, a new Road Grade was being constructed within the confines of Section No. 98, Monongah Division. Section No. 98, with headquarters at Centralia, West Virginia, was in charge of Section Foreman B. F. Henline. Messrs. Arthur Wine, Clay L. Lucky and Sprague L. Carpenter were among the section laborers employed on Section No. 98. Laborers Arthur Wine and Clay L. Lucky were used by Section Foreman B. F. Henline to perform the duties of flagmen or trackmen-watchmen at the point where this construction was being done. Effective July 17, 1951, the Carrier discontinued the use of these two section laborers (Wine and Lucky) as flagmen, by substituting two Trainmen to serve in such capacity. When the trainmen were substituted, thereby causing Messrs. Wine and Lucky to work with the regular section gang, it became necessary that Section Foreman Henline reduce his section gang and accordingly, section laborer Sprague L. Carpenter, the junior laborer on Section No. 98, became a furloughed employee.

Protest was registered by the Organization on July 18, 1951, account these two Trainmen being permitted to perform this flagging service and claim for compensation was filed on October 21, 1951. During conference discussion of this case on December 13, 1951, claim of the Organization was declined by the Carrier.

rier's knowledge this case is the first and only case of its kind ever handled by this Organization on this property. There is no dispute between the parties here but that the employees used to perform the service, employees holding rights under the Trainmen's Agreement, were fully qualified as flagmen under the rules.

The Carrier asserts in summary that the particular service performed here by trainmen was service properly falling to employees within the scope of the Trainmen's Agreement, not the Maintenance of Way Agreement.

CARRIER'S SPECIAL STATEMENT AS TO PART (3) OF THE CLAIM:

Part (3) of the statement of claim in this case lists claim coming from Sectionman Sprague L. Carpenter. The claim read that "Sectionman Sprague L. Carpenter be paid for all time lost subsequent to August 22, 1951,***." The Carrier is at a loss to understand the nature of this claim. The Carrier's records indicate that Sprague L. Carpenter resigned from the service of this Carrier effective August 8, 1951. The claim commences August 22, 1951. It would appear, therefore, that as of the date for which Claimant Carpenter is claiming he was no longer an employee of this Carrier.

The Carrier submits that the claim made here at parts (1), (2) and (3) is completely without merit. The Carrier respectfully requests this Division to find this claim at all its parts as being without merit and to deny it in full.

(Exhibits not reproduced)

OPINION OF BOARD: Initially we must deal here with the third party issue raised by Carrier.

Carrier cites numerous Awards and opinions which it believes support its position. Organization likewise quotes many Awards and other documents which it believes support its position.

We are inclined to follow the Awards cited by Organization, Awards 7387, 7047, 7048 and 7409 among others, and declare this Board "now has jurisdiction over the only necessary parties to this proceeding and over the subject matter. ***Therefore we proceed to consideration of the merits."

Three claimants are here involved: Arthur Wines, Clay L. Lucky and Sprague L. Carpenter. However, Messrs. Wine and Lucky are directly concerned with the merits of claim.

The Organization asserts that both men were employed as Section laborers. They were assigned to perform the duties of flagmen over a particular section of track because an outside contractor was constructing a new road grade adjacent to the one to which claimants were assigned, and trackmen were used to protect Carrier's trains from falling rocks, earth or other debris which might delay or interfere with the safe passage of trains.

On July 17, 1951 Carrier replaced Wines and Lucky with two trainmen to perform this flagging service and Wines and Lucky were returned to their regular section gang. When this was done, Organization asserts, Carpenter, the junior laborer in the gang, became a furloughed employee.

For reasons unknown, Carrier restricts its description of duties claimants performed prior to July 17, 1951 to the words: "to keep the then existing track free of earth and other material that might fall from the new grade." It never mentions that Wines and Lucky performed flagging service, although it does not deny that they did perform such service.

Carrier asserts when construction work progressed to a point where the contractor had to employ dynamite and blasting powder to remove earth and rock, "instructions were issued***that all trains operating in this area would

proceed under full control. Train and engine crews were instructed not to proceed past the area until they had received a signal. It was necessary for the flagman to obtain lineups of approaching trains. The Carrier stationed an operator at this point to secure information as to the movement of trains. The Carrier deemed it necessary to use employees coming within the scope of the trainmen's working agreement to perform flagging at this point."

The Organization offers this rejoinder to Carrier's argument:

"In essence, the Carrier asserts that the Claimant employees were fully qualified and competent to protect these trains against track obstructions when the trains were moving under normal movements instead of under full control and when there was no operator available to provide current information as to approaching trains but, when trains were operated under full control and information as to approaching trains was readily and immediately available, these same claimants were no longer qualified or competent to perform the very same but much easier and less nerve-wracking service. In other words, when the work is difficult and requires exceptional alertness, the claimants were fully qualified and competent; but when the work and tension was immeasurably relieved, they were no longer competent and qualified track flagmen."

The Organization offers in evidence a letter from its local chairman which states sectionmen were performing this flagging service for six months or longer; and another letter from a section foreman which alleges that "blasting was underway at time my track flagmen were in charge of flagging at said point. And also there is an operator stationed at some point to give and take information to and from dispatchers, and said flagmen do not give or take said information to and from dispatcher***."

Organization makes the further point that "when a train was stopped in the instant case, the trainmen of the train were required to immediately provide flag protection at the rear of the train because their own train was an obstruction to safe movement of the following train. But, when the hazard is a bridge structure, flag protection is invariably provided by B & B forces. When the hazard is a trackman's motor car, push car, work equipment, a slide, wash-out, broken rail, material on the track, track repairs or construction, the duty of providing flag protection is invariably provided by track forces as prescribed by Carrier rules."

Carrier asserts (after it assigned trainmen to perform flagging duties) "on a number of occasions the railroad was covered with debris from the dynamiting of the new roadbed," and organization observes that "the Carrier states in its initial submission that it was for that precise reason that the claimant employees were assigned to the work here in dispute in the first place."

There can be no doubt, from the record here established, that Carrier's concern was "to keep the then existing track free of earth and other material that might fall from the new grade." Carrier does not deny that this was the responsibility and work of track forces. It had so assigned them. Neither does it deny that claimants were performing flagging service in connection therewith for six months or longer.

Nor is there a denial by Carrier of Organization's statement that the "claimant employees had been examined on and satisfactorily passed an examination on flagging rules; they are considered qualified and competent to protect trains against unsafe track structural conditions and track obstructions, such as broken rails, slides, washouts, track repairs, rail renewals, motor cars and other work equipment on the tracks and etc. And where—as here—the performance of such duties were made infinitely more easier by the immediate availability of train line-ups, there can be no question as to the claimants' qualifications and ability to perform the work in dispute."

In the concluding section of argument offered in Carrier's behalf it is asserted that the instant claim should be denied * * * because

"(1) Train service flagmen did not perform the same work as had previously been done by Section Laborers—keep the line free from debris which task remained for them to perform, but were used solely to signal, flag and progress train movements through the danger area as directed by the Dispatcher via an Operator stationed at the location involved; ***"

Taken at its face value, this would infer no flagging service had been performed by trackmen prior to July 17, 1951.

Organization observed, in its submissions, that:

"The first duty and requirement of these Sectionmen was to protect trains against a track obstruction; their second duty was to remove such obstruction. If they performed no flagging duties, what protection would a train have against a track obstruction if it obstructed the track in front of an approaching train before it could be removed? Common railroad sense would demand that these section men first make sure an approaching train is stopped and to thereafter remove the obstruction."

We therefore conclude that Organization has proven that the flagging service performed by Claimants Wines and Lucky was in integral and necessary part of trackmen's assignment to keep "the then existing tracks free of earth or other material that might fall from the new grade."

A sustaining Award is, therefore, in order with respect to parts (1) and (2) of the claim.

Respecting part (3) it is Organization's contention that when Wines and Lucky were relieved of their flagging duties and returned to track work, "it was necessary for the foreman of that section to furlough Trackman Sprague L. Carpenter."

Carrier states its records "indicate that Sprague L. Carpenter resigned from the service of this Carrier effective August 8, 1951. The claim commences August 22, 1951. It would appear, therefore, that as of the date for which Claimant Carpenter is claiming he was no longer an employe of this Carrier."

Accordingly, part (3) of this claim as it affects Sprague L. Carpenter will be remanded to the parties to jointly determine his status as of August 22, 1951. If they find he was on furlough as of that date, his claim here presented will be sustained. If they find he did resign as of August 8, 1951 his claim will 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 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 has been violated.

AWARD

Claims (1) and (2) sustained.

Claim (3) remanded to parties as per opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 13th day of June, 1957.

DISSENT TO AWARD NO. 7960, DOCKET NO. MW 7572

In respect of the majority's election to follow Awards 7387, 7047, 7048 and 7409, cited by the Organization in the instant case, insofar as the third part issue is concerned, the undersigned make the special concurrence of the Carrier Members to Award 7387 and their dissents to the other awards, supra, on that issue, a part of this dissent.

The majority in Award 7960 infers from the information furnished by the Carrier that "no flagging service had been performed by trackmen prior to July 17, 1951." Petitioner presented no evidence showing that any flagging service had been performed or required prior thereto. As the majority herein recognizes, the Carrier showed that, coincident with assigning a trainman to perform the flagging service, train and engine crews were instructed not to proceed through the area until they had received a signal.

In any event, it is elementary that signaling and flagging in protecting train movements is not work reserved exclusively to sectionmen to the exclusion of trainmen.

Having followed Award 7387, cited by Petitioner in respect of the third party issue, the majority herein erred in its failure to follow that same Award and deny the claim in the instant case on the basis that herein, like in Award 7387, no agreement reserves the work involved to claimants to the exclusion of others.

For the above reasons, we dissent.

/s/ W. H. Castle

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ J. F. Mullen