

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

NEW YORK CENTRAL RAILROAD (NEW YORK DISTRICT)

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

(1) The Carrier violated the effective Agreement when, beginning with March 9, 1958, it required Crossing Watchman Fred Richter to discontinue performing crossing watchman's work at Elmsford, New York and thereafter transferred the crossing watchman's duties to telegraphers.

(2) The crossing watchman's work at Elmsford, New York now be restored to Crossing Watchmen holding seniority within the scope of the Agreement between the two parties to this dispute.

(3) Crossing Watchmen Fred Richter and A. Chiarlitti each be reimbursed for any and all monetary loss suffered account of the violation referred to in Part (1) of this claim, such reimbursement to extend from the initial date of the instant Agreement violation and to continue until the violation is discontinued.

EMPLOYES' STATEMENT OF FACTS: For years, a position of Crossing Watchman has been maintained to provide crossing protection work at Elmsford, New York on the Hudson Division of the New York District.

The afore-mentioned position was established and maintained in conformance with the provisions of the collective bargaining Agreement between the two parties to this dispute; both the position and the work inherent thereto being mutually recognized as being fully encompassed within the scope of the aforesaid Agreement.

The subject position was assigned working hours from 6:20 A.M. to 6:50 P.M., daily, except Saturdays and Sundays and the incumbent thereof, as of March 1, 1958, was Crossing Watchman Fred Richter.

Effective as of March 7, 1958, Crossing Watchman Fred Richter was instructed to discontinue performing crossing watchman's work at Elmsford,

CONCLUSION

The Carrier has shown that it is not a monopoly of employees under the Maintenance of Way agreement to provide crossing protection. Only when full time crossing watchmen are employed does the Maintenance of Way schedule cover such service. There was no violation of the Scope Rule as alleged. The claim, if not dismissed because of non-compliance with the time limit rule, should be denied for lack of merit.

All facts or arguments herein presented have been made known to the Employees.

(Exhibits not reproduced.)

OPINION OF BOARD: It is Carrier's position at the outset that the claim of the Petitioners is barred under the Time Limit Rule in that the claim submitted herein was acknowledged and denied by Transportation Superintendent G. E. McHugh on April 9, 1958, and Petitioner failed to notify Mr. McHugh in writing that his initial decision had been rejected within 60 days, as provided for by Article V, 1 (b) of the agreement.

To the contrary, Petitioner affirms that written notice was given but that McHugh failed to properly inform Petitioner as to the reason for his disallowance of the claim.

Article V, 1 (b) provides for a time limitation and is procedural in nature; neither party having raised any objection to the progression of this claim on the property and having made no reference to it until the submission of the dispute to this Board, they will be deemed to have waived their objections and consequently, we will proceed to a consideration of this dispute on the merits.

It is the contention of the Petitioner that for several years a position of Crossing Watchman has been maintained to provide crossing protection work at Elmsford, New York, on the Hudson Division of the New York District; that the position was established and maintained in conformance with the provisions of the agreement between the parties to this dispute; that the subject position was assigned working hours from 6:20 A.M. to 6:50 P.M. daily, except Saturdays and Sundays and the incumbent thereof, as of March 1, 1958, was the Claimant Fred Richter; that effective March 7, 1958, Claimant Richter was instructed to discontinue crossing watchman's work at Elmsford and the duties of his position were unilaterally transferred to Telegraphers, who hold no seniority rights within the scope of the agreement here controlling, that Claimant Richter in the exercise of his seniority displaced Crossing Watchman A. Chiarlitti, who also makes claim for reimbursement of monetary loss suffered by him due to Carrier's violation of the agreement.

Carrier does not deny that for some years a position of Crossing Watchman has been maintained at Elmsford; Carrier asserts that prior to June 6, 1957, Carrier employed an agent at this station to supervise its operation and also employed two crossing watchmen whose job it was to operate the manually controlled crossing gates; that when no watchmen were on duty at Elmsford it was the responsibility of a trainman to flag his own train or engine over the crossing; that on June 6, 1957, due to a decrease in the number of

trains passing over this Division and through Elmsford, one of the existing crossing watchman's job was abolished and the remaining watchman's duty hours set; that due to further curtailment of trains, as of March 10, 1958, the traffic over Elmsford crossing consisted of only four passenger and two freight train movements Monday through Friday, inclusive; to further effect a more economical operation in this Division, the crossing watchman's job was abolished at Elmsford on that date and the agent at said station required to operate the crossing gates while on duty.

Petitioner contends to the contrary, that work of the position remained and under the terms of the agreement that work belonged to the crossing watchman.

Carrier contends that inherent in the right of a Carrier to manage its railroad is its right to abolish a position when it is no longer required. This is true. However, the management can by contract agree to diminish or relinquish a right that it otherwise has. It is the Petitioner's position that under the terms of the agreement between the parties the work at Elmsford crossing belongs exclusively to the crossing watchman. Let us then consider the rules of the agreement applicable to the situation presented here.

"RULE 1 — SCOPE

"These rules govern the hours of service and working conditions of the following classes of employes in the Maintenance of Way Department:

* * * * *

"TRANSPORTATION DEPARTMENT

"Highway and Non-Interlocked Crossing Watchmen

Drawbridge Operators and Tenders

Lampmen (except those covered by other agreements)

* * * * *

"NOTE: Nothing in this rule requires the use of employes of the above listed occupations on properties where such occupations are not in existence."

"RULE 30 — CROSSING WATCHMEN

"(a) Seniority of crossing watchmen will be restricted to the following seniority districts:

"BUFFALO AND EAST

* * * * *

"Hudson Division

* * * * *

"(b) Seniority as crossing watchman will begin on date employee is assigned to such position by bulletin notice.

"(c) No seniority as crossing watchman will be established by employees covering temporary or extra assignments not covered by bulletin notice.

* * * * *

"(g) Furloughed employees from other Departments may only have preference over non-employees in filling vacancies in positions of crossing watchmen. Their seniority rights as crossing watchmen shall commence from the date of such service as crossing watchmen. However, if they return to service in their former classes, when called, they shall lose seniority rights as crossing watchmen."
(Emphasis ours.)

Rule 30 restricts seniority of Crossing Watchmen to certain seniority districts—seniority of Claimant Watchmen was there restricted to Hudson Division on Lines Buffalo and East. All crossing watchmen's work on this Division is likewise restricted to employees holding seniority as Crossing Watchmen on this Division—regardless of what the practice may have been elsewhere on this railroad. The specific provisions of this agreement allocate the discontinued work to the Crossing Watchmen. In assigning the work that remained to a Telegrapher, outside of this agreement, there has been a violation of the agreement. See Award 9553—Bernstein.

Carrier has submitted awards in which it appears that work has been discontinued due to the installation of automatic control devices—different issues and facts are presented in those awards and they are not controlling here. This matter is being determined in accordance with the provisions of this agreement.

Claim (2) will be denied, as it has been uniformly held that this Board has no authority to restore a position once it is discontinued or abolished.

As to Claim (3), the Record is silent as to just when Claimant Fred Richter displaced Claimant A. Chiarlitti and what monetary loss he suffered, if any; likewise, there is no way of determining what monetary loss Claimant A. Chiarlitti sustained. Claim (3), consequently, will be remanded to the property to ascertain just what financial loss these Claimants have suffered as a result of the violation of this Agreement.

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 Agreement has been violated.

AWARD

Claim 1 — sustained.

Claim 2 — denied.

Claim 3 — *sustained and remanded to the property in accordance with this Opinion.*

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1963.

**CARRIER MEMBERS' DISSENT TO AWARD 11752
DOCKET MW-11201**

Award No. 11752 correctly recognizes that the work of protecting train movements over crossings does not belong exclusively to crossing watchmen under the Maintenance of Way Agreement. Award No. 11752, however, is in error in applying the Scope Rule and Rule 30 to work which the Award recognizes is not exclusively reserved to Maintenance of Way Employees, and in disregarding the practice stated by the Carrier of changing from time to time the method of performing this work at the point in question, as well as other points on the railroad, dependent upon traffic requirements.

Further, Award 9553 is not applicable to the instant case, as it contained different rules that are not controlling here. In Award 9553 the Carrier entered into "the 1954 Memorandum of Agreement," in which the Carrier agreed to advise the General Chairman, consult with him and endeavor to reach an understanding when the Carrier desired to take work from under the Agreement and have it performed by others. We fail to find any such Agreement in the instant case. However, Awards 5575, 7809 are applicable to the instant case in which we denied similar claims on the basis that "the Scope Rule of the Maintenance of Way Agreement, as it stands, has not been violated in this instance, since it does not provide for the exclusion of others in the performance of the service in question. Nor do we find any other provision of the parties' Agreement which has been contravened."

For these and other reasons, we dissent.

R. E. Black

R. A. DeRossett

W. F. Euker

G. L. Naylor

W. M. Roberts