Award No. 12046
Docket No. MW-11634

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

FLORIDA EAST COAST RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when, in lieu of calling and using its Roadway Department employes on Section No. 33 to remove lights and barricades from newly installed highway crossing at S. W. 16th Avenue in Miami, Florida on Saturday, September 13, 1958, it assigned the work to Special Agent Hall and Track Supervisor Skinner, who occupy positions excepted from the scope of this Agreement.

(2) Section Foreman A. B. Langham and the senior laborer on Section No. 33 each be allowed a minimum of two hours and forty minutes pay at his respective time and one-half rate because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Claimant Section Foreman and Laborer were regularly assigned as such on Section No. 33 with headquarters at Miami, Florida, with Saturdays and Sundays as designated rest days.

Prior to September 13, 1958, the Claimant Section Foreman and the employes under his supervision were assigned to and did construct a new highway crossing at South West 16th Avenue in Miami.

One of the duties directly necessary and incidental to the construction of the crossing was the erection of barricades and the placing and daily care of warning lights thereon to provide the necessary protection for vehicular traffic. Upon completion of the installation of the crossing, the Claimant Section Foreman was instructed by the Carrier to leave the barricades and warning lights in place until signal lights could be installed.

never been exclusively assigned to employes represented by the Brotherhood of Maintenance of Way Employes, nor has it been exclusively performed by them. On the contrary, they are erected by police officers or other employes of cities and towns, State Road Department employes, employes of counties, Special Officers of the Railway or others including employes represented by the Brotherhood of Maintenance of Way Employes, depending on the circumstances, and are removed on the same basis by whoever happens to be on hand when necessity for them ceases, and that has always been true. That it is true is attested to in the letter which Assistant General Chairman Goodson of the Brotherhood addressed to the Chief Operating Officer on November 21, 1958, in which he readily acknowledged that the work involved was not reserved exclusively to employes covered by the Agreement with the Brotherhood, his letter reading in pertinent part as follows:

> "In filing this claim I feel that this is a part of the duties of the employes covered by the agreement with the Brotherhood Maintenance of Way Employes and the Railway. Crossings are a part of the foremans responsibilities. It is one of the many duties that are not spelled out in plain language. **This is work that is performed by these employes from time to time."** (Emphasis supplied).

The work involved is not, therefore, such as by agreement, past practice, tradition and custom inures exclusively to employes covered by the Agreement with the Brotherhood of Maintenance of Way Employes.

For the reasons stated the claim is without merit and should be denied.

The Florida East Coast Railway Company reserves the right to answer any further or other matters advanced by the Brotherhood of Maintenance of Way Employes, in connection with all issues in this case, whether oral or written, if and when it is furnished with the petition filed ex parte by the Brotherhood in this case, which it has not seen. All of the matters cited and relied upon by the Railway have been discussed with the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: In September, 1958 Carrier assigned its Roadway Department employes of Section No. 33 to construct a highway crossing at S. W. 16th Avenue in Miami, Florida. Before leaving for their rest days, Saturday and Sunday, these employes blocked the crossing with barricades and warning lights for safety purposes.

On Saturday, September 13, 1958, Carrier requested Special Agent Luther Hall and Track Supervisor J. M. Skinner to remove the barricades and warning lights in order to make use of the crossing for vehicular traffic. On Monday, the Roadway employes resumed their work. Claim is made by Section Foreman A. B. Langham and the senior laborer of Section No. 33, Maintenance of Way Employes, that Carrier violated the Agreement in assigning the work performed on Saturday, September 13, 1958 to employes in positions exempted from the scope of the Agreement.

Central to this dispute is the question of whether or not the work performed is exclusively reserved to the Roadway employes.

Claimants argue that since such work was assigned to them in the past and since such work is traditionally and customarily performed by Roadway Department workers, it is reserved to them under the scope of the Agreement.

They also maintain that they were assigned to the entire project and, therefore, were entitled to be called in on Saturday to remove the barricades and warning lights, work which they consider as part of this assignment.

Carrier denies that this work is exclusively reserved to employes under the Scope Rule and further asserts that Claimants have not presented evidence to prove that the work was historically and traditionally performed by Maintenance of Way Employes.

The Scope Rule indicates job classifications but does not define the work to be performed by the employes. There is no express rule in the Agreement that reserves to the specified employes the exclusive right to perform the work under consideration. Claimants acknowledge this fact in these words: "We agree that such work is not spelled out as such in the Scope Rule . . ." In the absence of provisions in the Scope Rule reserving the work exclusively to employes, it is well established that Claimants have the burden of proving that the work belongs to them by custom, tradition, and past practice.

That Carrier assigned this type of work to the Road Employes is true, but it does not follow as argued by Claimants that the assignment of removing lights and barricades is a recognition by Carrier that these duties belong exclusively to this class of employes and that Carrier has no right to assign such work to others. Mere assignment does not vest the employes with exclusive rights to perform the work.

In view of the lack of convincing proof to support the position of Claimants that the work in question belongs to them exclusively by established practice, and in view of the failure to show a breach in the Agreement by Carrier in assigning the work to workers other than Maintenance of Way Employes, the claim is 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:

That 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 was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of January 1964.