

Award No. 12850
Docket No. SG-12533

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Ables, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Erie Railroad Company:

In behalf of Signal Maintainer Donald Earl, New York Division, for five (5) hours' pay at the time and one-half rate of pay because the Carrier failed and refused to call him for work on his assigned signal section on Saturday, February 20, 1960. [Carrier's File: No. 220.12, Sig. Item 90.]

EMPLOYES' STATEMENT OF FACTS: The work force assigned to the signal maintenance territory with headquarters at Rutherford, New Jersey, consist of three positions; one Leading Signal Maintainer, one Signal Maintainer, and one Signal Helper.

At the time of this dispute Mr. John Hanley was regularly assigned to the Leading Signal Maintainer position and Mr. Donald Earl, the claimant in the instant claim, was regularly assigned to the Signal Maintainer position.

The regular assigned work week of the above positions was Monday through Friday, with rest days of Saturday and Sunday.

The Rutherford, New Jersey signal maintenance assignment included the maintenance of electric automatic gates on 13 street crossings in Passaic, New Jersey.

On Saturday, February 20, 1960, the crossing gates at Washington Street, Passaic, New Jersey, were damaged and the Carrier called Leading Signal Maintainer John Hanley and three signal gang employees from Paterson, New Jersey to make the necessary repairs to the crossing gates.

The Carrier did not call Signal Maintainer Earl for the overtime work which occurred on his regular assigned territory on February 20, 1960, even though he was available and qualified to perform the work.

Carrier has furnished in evidence two affidavits of signal department employes with many years of experience that prove that this matter in the instant case was handled in accordance with the established past practice and custom on the property. As further proof thereof, Carrier has then submitted in evidence five comparable cases to the instant case where no such claim was filed by Petitioner. Carrier submits that all this proves beyond a shadow of a doubt that there is no merit to this dispute. This work is construction work—not maintenance work—and as such the construction gang employes have the right to be called.

Based upon the facts and authorities cited, Carrier submits that this claim is totally without merit and should be denied. Awards 6007, 6222, 6369, 6788, 7970 and 8208.

OPINION OF BOARD: On Saturday, February 20, 1960, the Supervisor, Communications and Signals notified Leading Signal Maintainer Hanley to investigate a report that the crossing gates at the Washington street crossing, Passaic, New Jersey had been damaged. Hanley reported back that the crossing gate arm was broken and that the construction gang should bring a new gate as soon as possible. The Carrier called three employes from the Paterson, New Jersey construction gang, with instructions to use the large truck which was assigned to them to carry heavy material. These employes picked up, delivered and installed the new gate, working at overtime rates since this was their regular rest day.

At the time of the dispute, Claimant Carl was a Signal Maintainer on the Rutherford, New Jersey signal maintenance section. Hanley was the Leading Signal Maintainer on this section. This assignment involved maintenance of electric automatic gates (such as involved here) on 13 street crossings in Passaic. Each of the construction gang employes who installed the new gate had seniority in this territory, of which the Rutherford signal maintenance section was a part, and each was senior to Earl.

The claim was filed because the Carrier did not call Signal Maintainer Earl for the overtime work on his assigned signal section.

The Employes base their claim on the Carrier having called and used employes not assigned to the Rutherford signal maintenance territory instead of the Claimant who was a regular assignee in this territory. They rely heavily on the Unassigned Work Day Rule, which in the Signalmen's Agreement is Rule 14 (h):

"Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by an available furloughed unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

Essentially, the Employes' position is that the work in question was not part of any assignment and that, in accordance with the Unassigned Work Day Rule, Earl should have been called since: "It has been the practice and the understanding that employes assigned to a signal section will be called when work is required on their territory on a day which is not part of any assignment." Citing a number of prior awards, they contend that the provisions of Rule 14 (h) are clear and unambiguous and do not require evidence of past practice to give it meaning.

Carrier argues, ambivalently, that it satisfied Rule 14 (h) by calling Hanley, "the" regular employe on the assignment; and on the other hand, argues that the rule does not apply because no work was "required" by the Carrier to be performed by Earl. In this latter respect, the Carrier shows through past practice that construction gang employes have been called to perform this kind of work.

As we see it, Rule 14 (h) clearly applies. But it does not follow that Claimant Earl was the regular employe for the type work required under the circumstances. The key to resolving the dispute, therefore, is to determine who is, or who are, the regular employes for the type of work performed. Actually, two separate determinations must be made because the Carrier issued two calls for work.

There seems to be no question about the first call. Following past practice and in strict conformance with Rule 14 (h), the Carrier called the Leading Signalman to investigate the damage and report back on what was required in the way of repairs. The regular employe on this case was, of course, Hanley, on whose section the damage was reported.

On the second call, the construction gang employes out of Paterson, were told to put up a new gate since they had the replacement gate at their location and the truck by which to get it to the street crossing. Neither the gate nor the truck were available at the Rutherford headquarters where Earl was assigned.

Since the construction gang employes had seniority in the territory which included Earl's signal section, (Rule 35) there must have been some type of signal work which even Claimant would concede belonged to the construction gang employes. Therefore, not all signal work in the Rutherford signal section belonged to employes assigned to that section.

In cases of this sort, where only one craft and only one seniority district is involved, the only intelligent way to identify the regular employe is to examine who has done this work before. Applying this test the answer is clear. Carrier has shown that in a number of instances construction gang employes were called to do this work—all without challenge by the Brotherhood on this property. The regular employes for the type of work performed, therefore, were the construction gang employes.

Little fault can be found with the Employes principal contention that an unambiguous rule can not be changed through practice (although the argument is probably overstated. Even real property rights, which are among the most zealously guarded by statutory and common law, may be compromised through adverse possession.) The trouble is not the rule but its application to this case. It is true that the regular employe has certain priorities to overtime work, but before those superior rights can attach, it must be shown that the employe for whom the claim is made is the regular employe for the work which is in issue. This, the Employes have failed to do.

Since Carrier made so much of a point about the seniority of the respective employes, it may help to clear the air on Unassigned Day Rule disputes to add that we do not think seniority is in issue here at all. If Earl were the regular employe for the kind of work done it would make no difference how much senior the other employes were—the work would belong to Earl. (In this connection we might add parenthetically that if Earl were entitled to be called so was the signal helper who was the third employe in his gang. Mysteriously, no claim was made for him in this case.)

One last point bears comment. The Carrier stresses, and repeats for emphasis, that it satisfied the Unassigned Work Day Rule by calling Hanley "the" senior regularly assigned employee. In support of this conclusion Carrier states:

"By using the definite article 'the' before the words 'regular employee' the framers of the rule have let it be known that the rule covers only a single employee. It could not be otherwise."

We think it is otherwise. In fact, we think the argument is nonsense. If Earl and a 100 other employees were found to be regular employees for the kind of work performed, then each one would have been entitled to be called before the construction gang employees.

Superfluous or specious arguments not only muddy the water but they detract from arguments that may be substantial.

Our denial of the claim here is based solely on the fact that the Employees have not shown that the Claimant was the regular employee for the work performed.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 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 9th day of September 1964.