

Award No. 4719

Docket No. MW-4740

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**THE DELAWARE AND HUDSON RAILROAD
CORPORATION**

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

(1) That subsequent to July 27, 1948, the Carrier violated the provisions of the Agreement dated November 15, 1943 when it permitted and continues to permit Trainmen, Switch Tenders and Tower Men to protect Grade Crossings at various locations on the Delaware and Hudson System;

(2) That the senior unemployed Watchmen on the various seniority districts be allowed one (1) day's pay at the straight time rate in accordance with the order of their seniority for each day that an employe having no seniority as a Crossing Watchman has performed or is permitted to perform the duties of a Crossing Watchman;

(3) That vacancies of Crossing Watchmen above referred to be advertised and awarded in accordance with the provisions of the effective agreement.

EMPLOYES' STATEMENT OF FACTS: On August 31, 1947 the Carrier placed into operation automatic flashing lights for the protection of its grade crossing at Cherry Street, Scranton, Pennsylvania. As a result of this installation of lights the crossing watchmen who formerly protected this crossing were removed, and their jobs abolished.

Since that time whenever switching movements are made over this crossing one of the trainmen from the yard switching crew stays at the crossing and presses the push button on the cut-out box of these flashing lights when the need to do so arises.

The Employes have contended that this trainman is performing crossing watchman's work.

Also, in this same manner and by similar methods trainmen and switch-tenders protect various other crossings where crossing watchmen have been removed. Particularly at locations as follows:

Fort Ticonderoga	—	14 crossings
Saratoga Springs	—	Congress Avenue
Albany	—	4th Avenue
		Columbia Street
		Erie Street

Temporary vacancies of thirty (30) days or less duration need not be bulletined. The filling of any vacancies or new positions pending bulletin will be governed by Rule 2."

When the automatic flasher-light signals and automatic gates were installed at Cherry St., South Scranton, Pa., the seniority or rights of employees were not infringed upon by any employee, or class of employees. Likewise, there was no vacancy existing that should be bulletined as per Rule 27(A).

In reviewing our records, it is found that the practice of having tower-men operate crossing gates has been in effect for at least thirty (30) years. The automatic flasher-light and gate system, controlled by train crews, and others, was installed in 1935. It has always been the duty of train crews to assist in the protection of crossings while their train is in a switching move over same.

At all points, where flasher signals and short-arm gates have been installed, adequate protection is provided by their use, and as they operate automatically, it is not necessary to have someone stationed at that point. Train service has been considerably reduced over the years so that, at some points, as few as two or three trains now pass, where formerly twelve or more were operated in a twenty-four hour period.

Awards 1078 of the Third Division and 11421 of the First Division recognize that it is proper to use employees not subject to the scope of agreement covering Maintenance of Way Employees to provide protection at crossings, which amounts to a small portion of their tour of duty.

Crossings have been protected by train crews, making switching moves, tower-men, and others in conjunction with their daily tour of duty for a good many years prior to July 1, 1939, when first agreement was signed between this Carrier and the Brotherhood of Maintenance of Way Employees. During negotiations for this agreement, no objection was made to this service being performed by employees of other departments. Likewise, when the next and present agreement, which became effective November 15, 1943, was contracted, there was no objection offered. The first claim was dated October 28, 1947, over eight (8) years after the agreement covering Maintenance of Way Employees became effective.

It is the Carrier's position that it was the practice for many years before the agreement covering Maintenance of Way employees became effective, for certain employees other than crossing watchmen to perform work in connection with crossing protection and such practice was continued without protest, following the effective date of agreement. To grant the request of the Employees in this case would have the effect of changing agreement rules which have been applied in accordance with their intent for approximately nine (9) years.

Claim is not supported by agreement rules and established practices thereunder and the Carrier respectfully requests that it be denied.

(Exhibits not reproduced).

OPINION OF BOARD: On account of inadequate record and conflicting statements of the parties, the Board finds it impossible to reconcile the facts and render a decision. Therefore the case should be remanded.

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 case will be remanded.

AWARD

Case remanded.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. J. Tummons
Acting Secretary

Dated at Chicago, Illinois, this 17th day of February, 1950.