

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY**

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

(1) That Section Foreman Otto Hymer, Hoopeston, Illinois, should have been paid on the same basis as would have been paid to a conductor, for services rendered while piloting locomotives around the wye at Hoopeston, Illinois, on June 29, 1948, and on subsequent days thereto;

(2) That Section Foreman Otto Hymer should now be compensated for the difference in pay received for calls at the section foreman's rate of pay and what he should have received if properly paid in accordance with the provisions of this Carrier's agreement with The Order of Railroad Conductors for each time he was called upon to pilot locomotives as referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Mr. Otto Hymer is Section Foreman at Hoopeston, Illinois.

There is located at Hoopeston on Foreman Hymer's section a wye which is frequently used by the Nickel Plate Railroad in turning its locomotives. When so used the Chicago & Eastern Illinois Railroad requires that a pilot conductor accompany these Nickel Plate engines around the wye.

Because of Foreman Hymer's familiarity with the Carrier's tracks and switches in and around this wye, the Carrier has, prior and subsequent to June 29, 1947, used Foreman Hymer in the capacity of a pilot conductor.

Under date of December 10, 1948, General Chairman D. Cellini wrote the Carrier's officer, Mr. R. Hill, in which he specifically outlined the dates, times and numbers of the engines piloted by Mr. Hymer between the period June 29, 1947 and November 27, 1948, and requesting that Mr. Hymer be compensated for such service in the manner provided in the Conductors' Agreement.

Subsequent to November 27 the Carrier has continued to use Mr. Hymer for this same kind of service. For services rendered by Section Foreman Hymer while turning these engines on the wye at Hoopeston, Mr. Hymer was paid 2 hours and 40 minutes at his Foreman's rate of pay, punitive rate. All such services rendered by Foreman Hymer were outside his regular bulletined hours.

It is further the Carrier's position that service performed by claimant was not that of a conductor-pilot within the scope of the Trainmen's Agreement, that there is no dispute between the Carrier and the Trainmen's Organization concerning this matter, and that this Division is without authority to interpret the agreement between the Carrier and the Brotherhood of Railroad Trainmen.

Accordingly, the Carrier submits that the instant claim should be denied or dismissed.

(Exhibits not reproduced).

OPINION OF BOARD: The same Carrier was recently before this Board in a case presenting the identical issue. See Award 4714. Possible points of distinction, however, necessitate a review of the record in both cases.

In the earlier case, the Board found the Carrier had admitted that the work performed was conductor-pilot work, and in the instant case this is a controverted question of fact.

An examination of the case file in Award 4714 discloses that the Carrier's admission came after it had contended, as here, that "it was necessary to call an employe who carried a switch key so that the respective switches might be unlocked." The work was performed on the same tracks at the identical locations in both cases; and in point of time, the signal maintainer performed the work on May 8, 1947, and the work now in dispute commenced on June 29, 1947, and continued until the dispute was settled. The record in the instant case does not suffer by a factual comparison with the reported case. Neither file is as complete as it might have been, but the record having been found sufficient by the Board in one case, there is no basis for holding it insufficient in another, unless we are to permit the Carrier to now change its position, and say that an admission on the record in the reported case is not binding on a like statement of facts again before us.

If we were inclined to so hold, we would be confronted yet with the Organization's affirmative statement that the "Foreman was called by the operator at the tower and instructed to report for duty in order to pilot N.K.P. trains around that portion of the wye" in question. This brings only a qualified and argumentative denial from the Carrier, when something more positive seems to be in order. We must recognize that the Foreman did not volunteer nor go out on the job of his own volition. He was called. By whom? By the Carrier through an employe presumably acting within his delegated authority. What work was he called to perform? To pilot trains around the wye. If this be not true, it seems to us the Board should have been so advised in a statement of facts from one in a position to know the contrary facts, if any. On the present state of the record, we must credit the Organization's statement.

We believe it is decisive of the fact question that the Carrier now seeks to change its position after the impact of its admission in the earlier case was brought home to it, which it cannot do. See Award 3950. Also, there is affirmative proof of the call to perform the work alleged to have been performed, which is not satisfactorily controverted, and this must be weighed in Claimant's favor. These two factors have gone a long way in overcoming other deficiencies in the record and in influencing a sustaining award in this case.

The only other point of distinction between the two cases is that concerning rules. We find this is a distinction without a difference, since the Board sustained a like claim under the Maintenance of Way Agreement in Award 3489.

All other contentions of the Carrier stand overruled by Award 4714. For other supporting Awards, see 4450, 4190, 2703.

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 Employee involved in this dispute are respectively Carrier and Employee 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 Carrier violated the Agreement as contended by the Petitioner.

AWARD

Claim (1 and 2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of November, 1950.