Award No. 7399
Docket No. MW-7124

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

FLORIDA EAST COAST RAILWAY COMPANY

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

(1) The highway crossing protection work performed at King Street, Cocoa, Florida, by other than Carrier employes was and is in violation of the Agreement;

(2) The Carrier be required to assign the work referred to in part (1) of this claim to employes subject to and in conformance with the rules of the Agreement between the parties hereto;

(3) Furloughed Crossing Watchmen W. G. Croghan and W. B. Byrd each be allowed pay at the applicable Crossing Watchmen's rate of pay for an equal proportionate share of the total man-hours consumed by other than Carrier employes in performing the work referred to in part (1) of this claim.

NOTE: Part (3) of the statement of claim contemplates the allowance of the straight-time rate of pay, except that time and one-half rates shall be allowed for that portion of the work herein involved which was performed on:

1. Any of the holidays designated in the Agreement;

2. All hours in excess of eight (8) hours per day for five days of each week by any one individual;

3. The sixth and seventh day of each week.

EMPLOYES' STATEMENT OF FACTS: The Florida East Coast Railway operates trains which pass through the city of Cocoa, Florida, and whose tracks cross King Street at grade level. This caused a great deal of concern on the part of officials and residents of the City of Cocoa with respect to the safety of the vehicular and pedestrian traffic over this King Street crossing.

Consequently, the city of Cocoa made repeated demands that the Carrier install certain safety devices at this King Street crossing or in lieu thereof,

"Since the seniority of Crossing Watchmen is confined to the city or town in which employed, and there is no rule in the agreement between the Railway and the Brotherhood of Maintenance of Way Employes that provides for furloughed Crossing Watchmen working at a location other than the place first employed, no furloughed Crossing Watchman has any agreement right to work at any other location. However, in cases where Crossing Watchmen are furloughed as the result of the installation of automatic crossing protection devices, we will, as we have in the past, give preferred consideration to applications from them for employment for such work at other locations when it is subject to performance by employes of the Railway."

Thus the Employes were in the inconsistent position in their conference of October 2, 1953, with the Superintendent, of progressing the present claim on the grounds that the claimants cut off as crossing watchmen at West Palm Beach had an agreement right to work not under the jurisdiction of the Railway at Cocoa, while at the same time recognizing that crossing watchmen in that status have no such agreement right and asking that "these furloughed employes have a chance to work at other locations." The Employes are in precisely the same situation today. They are attempting to collect by award compensation for the claimants for work not under the jurisdiction of the Railway and to which the claimants would not have any right by virtue of seniority or otherwise if it were under jurisdiction of the Railway.

3. While it is immaterial to the case, since, as has been developed above, the claim is without merit in its entirety, it should be stated for the sake of the record that if the claims had happened to otherwise have merit, the "Note" under the Employes' Statement of Claim, insofar as it relates to time and one-half rate for certain days, would, nevertheless, be invalid. The principle has been so thoroughly established on the Third Division that the penalty for work not performed is the pro rata rate, that reference to specific awards is unnecessary, or as that Division stated in Award 5607:

"In accordance with numerous holdings of this Board, the applicable penalty is the pro rata rate and not the punitive."

The claim in its entirety 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.

OPINION OF BOARD: This is a claim by two Crossing Watchmen to highway crossing protection work at Cocoa, Florida which was being performed by men with no seniority under the Agreement who were placed on the City payroll under an arrangement by virtue of which the Carrier reimbursed Cocoa for their wages.

No Crossing Watchman position had ever existed before in Cocoa and no Crossing Watchman furloughed under the Agreement resided there.

Both Claimants had been furloughed at West Palm Beach by reason of the installation of automatic crossing protection devices. Claimant Croghan resigned his seniority rights at West Palm Beach and was hired by the Carrier as a Crossing Watchman at Miami where he established seniority on the date he was hired there. Claimant Byrd remained at West Palm Beach where he resides with the status of a furloughed Crossing Watchman.

In view of our ultimate conclusion on the claim we pass the disputed question whether the men employed at Cocoa were employes of the Carrier or police officers of the City. We assume, without deciding, for the purposes of this decision that they were employes, with no seniority under the Agreement, newly hired by the Carrier. This poses the essential question presented by the claim: whether in these circumstances Claimants have any rights under the Agreement to the work at Cocoa.

First. It is true that crossing protection work is embraced within the Agreement by Rules 2 and 4 which create sub-departments and seniority ranks both specifying Crossing Watchmen and by Rule 45 which specifies a rate of pay for Crossing Watchmen. It is also true that the bulletining rules require permanent new positions except Cooks and Laborers to be bulletined (Rule 28(a) and (f)) and also require that "all employes" holding seniority in the rank bulletined and lower ranks be given an opportunity to bid (Rule 30(a)).

On the other hand Rule 3 which defines the "Scope of Seniority Rights" provides:

> "(d) Seniority of Crossing Watchmen will be confined to the city or town in which employed."

And the Force Reduction Rule provides:

> "32(a) When reducing forces seniority shall govern. . . . Crossing Watchmen may exercise their seniority rights only at the city or town at which employed."

If there be any inconsistency between Rules 3(d) and 32(a) on the one hand and Rules 28, 30 and 45 on the other, the former should control upon the well settled canon of construction that the specific controls the general provision. To say that Crossing Watchmen have seniority rights under the Agreement is not to say that their scope is coextensive with those of all other employes.

There is, however, no real inconsistency because the basic seniority rights of Crossing Watchmen under the Agreement is not systemwide like all the other employes (except cooks and laborers), but "confined to the city or town in which employed". Since no Crossing Watchman position had ever existed before in Cocoa and no furloughed Crossing Watchman resided there, it follows that no Crossing Watchman either furloughed or in active service elsewhere would have had any bidding rights under the Agreement if the new positions at Cocoa had been advertised.

Second. This conclusion is fortified by practice under the Agreement. It is established by the record that the Carrier always has issued bulletins only when new Crossing Watchman positions or vacancies are established or created at cities or towns where Crossing Watchmen are already employed and the bulletins are posted only at such points.

It is true, as in the case of Claimant Croghan, that the Carrier has employed furloughed Crossing Watchmen at a location other than the place first employed when they have been furloughed as the result of the installation of automatic crossing protection devices. But this has been done only upon the explicit assertion by the Carrier that, while the furloughed Crossing Watchman would be given "preferred consideration", he had no contract right to work at the new location; and it does not appear that any such Crossing Watchman ever carried his seniority with him to the new location.

In view of the foregoing considerations we are unable to conclude that Claimants had any right to the work at Cocoa either under the Agreement or under the practice.

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: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 27th day of July, 1956.