Award No. 9553
Docket No. MW-8371

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY

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

1. The Carrier violated the effective Agreement on October 5, 1954, and November 6, 1954, when it abolished nine (9) crossing watchmen positions on the New Haven Division and assigned the work of such positions to employes who hold no seniority rights under the effective Agreement;

2. Crossing protection work at Torrington, Connecticut, (2); Manchester, Connecticut, (1); Bristol, Connecticut, (2); Lee, Massachusetts, (1); New Haven, Connecticut, (2); and Wallingford, Connecticut, (1); be returned and assigned to the employes holding seniority rights under the effective Agreement;

3. Crossing Watchmen Michael Crudo, Louis Sacks, Isadore Adler, Albert Zagorsky, Stanley Pisars, and any other assigned Crossing Watchmen at these points affected by the abolishment of the aforesaid crossing watchmen positions be paid at their respective straight-time rates for all time that the work of furnishing crossing protection at these points has been performed by employes who hold no seniority rights under the effective Agreement, from October 5 and November 6, 1954, until the violation has been corrected.

EMPLOYES' STATEMENT OF FACTS: Maintenance of Way Crossing Watchmen were, prior to October 5, 1954 and November 6, 1954, assigned to the work of furnishing crossing protection at Torrington, Connecticut; Manchester, Connecticut; Bristol, Connecticut; Lee, Massachusetts; New Haven, Connecticut and Wallingford, Connecticut.

On October 5, 1954 the positions of second trick crossing watchmen were abolished at No. Elm Street and at Litchfield Street, Torrington, Con-

"In the circumstances of this dispute the Division concludes that flagging his own train over a public crossing is an incident of a trainman's normal duties, and that it was not improper under Rule 35 for the Carrier, upon discontinuing the manually operated gates at the crossing in question, to require trainmen to flag their own trains over the crossing."

In Award 2154 of this division flagging at a highway was divided between telegraphers and crossing tenders on different days of the week. The award held that carrier was under contract for such work with both crafts and that in view of practice there was no violation in the challenged division of work between the two. See also Award 1078.

The most recent expression of this division is in Award 5575. The case in its history, practices and rules is parallel with the present. It involves the discontinuance of crossing watchmen's assignments at three highways and thereafter protection by train crews. Upon the record the claim was denied.

The Agreement in this dispute does not reguire that any specific crossings be protected by watchmen. No rule provides as to the amount of work or other test that will govern such assignments. In the past without question such work has been performed by three crafts, and the distribution between them has been changed from time to time.

In these circumstances Carrier submits the claim is without merit and should be denied.

All of the facts and arguments used in this case have been affirmatively presented to Employes' representatives.

OPINION OF BOARD: The facts are not in dispute. The Carrier accurately summarized them as follows:

"On October 5, 1954, the Carrier abolished the second trick crossing watchmen's positions at the following locations: North Elm Street and Litchfield Street in Torrington, Connecticut; Main Street in Manchester, Connecticut; Central Street in Bristol, Connecticut; Center Street in Lee, Massachusetts; Hall Avenue in Wallingford, Connecticut; the second and third trick positions were abolished this date at Grand Avenue in New Haven, Connecticut. On November 6, 1954, the Carrier likewise abolished the first trick crossing watchman's position at Central Street in Bristol, Connecticut.

"In each of the above instances, except the crossing at Hall Avenue in Wallingford, Connecticut, the train crews were instructed to protect movements of their trains over crossings; in that exceptional case, the work was assigned to a Telegrapher."

Contentions of the Parties

The Organization claims that the assignment of the work performed by the designated crossing watchmen to employes admittedly outside the Agreement violates it and a supplementary Memorandum of Agreement made in 1954.

The Scope Rule specifically covers "Highway Crossing Watchmen and Gatemen" and establishes separate seniority rosters for them. Rule 53

provides in part: "Crossing Watchman's Work: Watching at crossings and protecting traffic and:

"General Understanding

This classification of work rule is predicated upon conditions and practices as in effect on this property. It does not add anything to the work which these forces have heretofore performed on this property or take away from them work which they have heretofore performed."

The 1954 Memorandum of Agreement is so important to this case that it will be set out in full (except for signatures). It provides:

"(a) When it may be desired by the Railroad Company that work covered by the Agreement of September 1, 1949 be performed by parties other than those coming under the scope of the Agreement, the Chief Engineer will advise the General Chairman, after which the Chief Engineer, or his designated representative, will confer with the General Chairman, or his designated representative, and endeavor to reach an understanding. If an agreement is not reached and the Carrier proceeds with the performance of work by other than employes covered by the Agreement, the employes may handle as a dispute under the procedural rules of the Agreement and the Railway Labor Act.

"When work covered by paragraph (a) is to be performed by parties other than those coming under the scope of the Agreement, such action will not result in the furloughing of regular assigned employes.

"(b) It is recognized that situations resulting from washouts, slides, hurricanes, snow-storms, fires or floods and the like may require immediate attention in order to keep the railroad in operation; in such instances it is agreed the Railroad Company may utilize the services of parties other than those coming under the scope of the above-mentioned agreement, provided that regular assigned employes are not furloughed thereby nor will they be deprived of work for which they are available and qualified.

"(c) All rules and provisions of the Agreement between the parties effective September 1, 1949, not referred to in paragraphs (a) and (b) above remain unchanged."

The Organization contends that the Scope Rule and Rule 53 confirm to crossing watchmen the work they were performing at the time of the adoption of the Agreement and that the work involved in this dispute was theirs at that time.

Further, the Organization contends that the 1954 Memorandum of Agreement bans assignment of such watchmen work to employes outside the Agreement without observance of the procedures specified in Section (a).

The Carrier contends that:

(1) Guarding of crossings is not the exclusive work of crossing watchmen on this property and on railroads in general;

(2) The reassignments made here conform to accepted practice on this and other carriers;

(3) The discontinuance of jobs necessary for the efficient and economical operation of the Carrier is a management prerogative;

(4) The Memorandum of Agreement does not limit the prerogative because:

(a) it must be read in conjunction with the main Agreement;

(b) it applies to contracting out only;

(c) a condition of its applicability is that prohibited changes result in furloughs, and it is not shown that furloughs were caused here.

In addition, the Carrier puts forward two procedural objections to a sustaining award.

(1) the claim is more extensive than the dispute on the property; and

(2) a monetary award to unnamed claimants is improper; some are named, but others are not.

Discussion

(a) The issue of exclusiveness; practice on this property and other carriers.

The Carrier is quite correct that on other carriers crossing protection is handled in various ways, e. g., by trainmen flagging, crossing guards, and telegraphers protecting as an incident to their other duties nearby. Further, Carrier has demonstrated, and the Organization does not deny, that employes outside the scope of the Agreement perform crossing guard work, e. g. on the third trick at locations involved in this dispute.

The effective answer to this is that specific provisions of this Agreement allocate the discontinued work to crossing watchmen.

The Scope Rule and the first quoted portion of Rule 53 generally allocate crossing protection work to crossing watchmen. The "General Understanding" part of Rule 53 unequivocally adopts the "conditions and practices in effect on this property".

It is asserted and not denied that "all of the work involved in this dispute was work which was performed by Crossing Watchmen as of and prior to the effective date of the Agreement here in question".

In other words, the Agreement covered the work done by crossing watchmen where and when they had done it prior to the execution of the Agreement. Practice at other points or times (e. g. the third trick) on this property or other carriers cannot add to or detract from the express award by the Scope

Rule and General Understanding of the work in question to Crossing Watchmen represented by the Organization.

(b) Management prerogative and the Memorandum of Agreement.

The Carrier contends that ". . . inherent in the Carrier's right to manage its railroad is its right to abolish a position when it is no longer required."

It is not a novel proposition of contract or labor relations law that both management and labor organizations can bargain and agree to diminish or relinquish a right they might otherwise have. We believe that the Carrier agreed to restrictions upon its power over job elimination when it entered into the 1954 Memorandum of Agreement. By that contract the Carrier agreed to advise the General Chairman, consult with him and endeavor to reach an understanding when the Carrier desired to take work from under the Agreement and have it performed by others. A more explicit self-limitation for the Carrier would be difficult to devise.

We agree with the Carrier that the 1954 Memorandum is to be read and harmonized with the underlying 1949 Agreement. When so read it couples with the Scope Rule and "General Understanding" to place the work of Crossing Watchmen, as it existed when the 1949 Agreement was executed, beyond reassignment without prior consultation.

Carrier also argues that the 1954 Memorandum of Agreement is inapplicable to transfers of work to employes because it is a limitation on contracting out only. No proof of this assertion appears in the record outside the Memorandum. If the allegation is to be sustained the proof must be found in the language of the Memorandum itself.

There can be little doubt that the Agreement is applicable to contracting out; but its terms do not limit to that subject. It is sufficiently comprehensive on its face to be applicable to all transfers of work covered by the Agreement to other human agencies. Its terms do not cover the substitution for an employe of a device owned by the Carrier.

Moreover, section (b) seems analogous to provisions permitting the use of employes not under the Scope Rule in the case of emergency and in the absence of employes who come under the Scope Rule of a given agreement. This is a factor which negates the Carrier contention that the 1954 Memorandum was meant to be limited to contracting out.

The language itself is not completely clear. Extrinsic proof would have been acceptable on the issue, but none appears in record. We therefore cannot accept the limitation urged by the Carrier.

In addition, the Carrier asserts that before the duty to advise, confer and attempt to agree about the transfer of duties to employes outside the Agreement arises there must be a contention that employes have been furloughed. The second paragraph of Section (a) provides:

> "When work covered by paragraph (a) is to be performed by parties other than those coming under the scope of the Agreement, such action will not result in the furloughing of regular assigned employes."

The furlough language is not stated in the form of a condition. Rather, it is an affirmative declaration that employes will not be furloughed as a result of transferring work. We read this paragraph as an additional right of the employes over and above the Carrier's promise to advise, confer and endeavor to agree.

We conclude that the Carrier's abolition of the designated Crossing Watchmen's positions and the transfer of that work to other employes without prior advice and consultation was a violation of the Agreements.

Alleged Expansion of the Claim

Carrier objects that the claim is not properly before us because it is more extensive than when presented to the Carrier. As Carrier describes it,

> ". . . the part of the claim relating to compensation which was discussed on the property was for pay for all time lost, whereas on appeal, compensation is asked for all time that the work of affording crossing protection at these locations has been performed by others."

Actually, the claim as presented is less broad than as originally presented. The first formulation would cover transfers of the work in dispute both to people and devices, requesting as it does "pay for all time lost". The claim on appeal to us is more limited, requesting compensation only "for all time that the work (in dispute) has been performed by others".

We conclude that this objection is without substance.

The Unnamed Claimants Issue

Lastly, Carrier contends that the claim is defective because some of the claimants are not named. We presume that the opjection is not intended to contest the validity of the claim of five claimants whose names do appear.

The claim does name the nine places at which the crossing watchmen work in dispute was eliminated. The claim also designates the dates on and after which the transfer work took place.

We believe that the claimants who fit the places and dates are so readily identifiable as to meet the requirements established by the August 21, 1954 Agreement as interpreted by this Board. Awards 9333 (Weston), 9248 (Schedler) and 9205 (Stone).

Restoration of Work

Claim 2 requests that the specified crossing protection work "be returned and assigned" to employes under the Agreement. It is well established that the Board lacks power to order specific work assignments. It can only award compensation for breaches of agreements. Claim 2 must be denied, with the understanding, however, that continuation of the work transfers to employes outside the Agreement without observance of Section (a) of the 1954 Memorandum of Agreement is in violation of the Agreements.

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 contract was violated.

AWARD

Claim 1 sustained. Claim 2 denied. Claim 3 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 16th day of September, 1960.

DISSENT TO AWARD NO. 9553, DOCKET NO. MW-8371

Award 9553 correctly recognizes that the work of protecting train movements over crossings does not belong exclusively to crossing watchmen under the Maintenance of Way Agreement, and that, on the contrary, it is performed in various ways on this and other carriers. Award 9553, however, is in error in applying the 1954 Memorandum of Agreement to work which is not exclusively reserved to Maintenance of Way employes, and in disregarding the practice stated by the Carrier of changing from time to time the method of performing this work, dependent upon traffic requirements.

For these and other reasons we dissent.

/s/ W. H. Castle

/s/ R. A. Carroll

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ J. F. Mullen