

Award No. 12793

Docket No. SG-12170

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE PENNSYLVANIA RAILROAD COMPANY

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

The Carrier has violated and is continuing to violate the Scope and the intent of the current Agreement when it arbitrarily requires an employe of the T&S Department on the Chicago Seniority District No. 19 to relieve a Maintenance of Way employe, first trick Bridge Tender at Bridge No. 454.70, South Chicago, Illinois, on Saturday and Sunday, the rest days of the position of the first trick Bridge Tender. [System Docket No. 110 — Northwestern Region Case No. 26]

EMPLOYEES' STATEMENT OF FACTS: This dispute involves a draw-bridge which the Carrier operates at Mile Post 454.70, South Chicago, Illinois. Prior to August 1, 1931, the bridge was operated by employes covered by the Maintenance of Way Agreement. Effective August 1, 1931, the second and third trick Maintenance of Way Bridge Operators were removed, and the work of operating the bridge was assigned to Telegraph and Signal Department employes on second and third trick with headquarters at that location.

Sometime during 1931 the Brotherhood and the Carrier agreed that when the position of Bridge Operator held by the incumbent Maintenance of Way employe was vacated by that employe, said position would thereafter be a position advertised in accordance with the provisions of the agreement covering Telegraph and Signal Department employes. When the incumbent Maintenance of Way employe retired in 1957, the Brotherhood and the Carrier were unable to produce that agreement, so the Carrier assigned a Maintenance of Way Bridge Tender to the first trick to operate the bridge.

At the time the current dispute arose, the bridge was being operated during the first trick by a Bridge Tender covered by the Maintenance of Way Agreement and during the second and third tricks by employes covered by the Signalmen's (T&S) Agreement.

was allocated to employees covered by the MofW Agreement from Monday through Friday after 1957.

These facts disclose a period of past practice which, if needed, is convincing proof that the Signalmen's Organization has accepted this work without protest for almost thirty years. Thus, even if the Scope Rule were considered to be ambiguous with respect to the assignment of the work in question, the practice of using Maintainers to perform bridge tending work since 1931 on the second and third tricks and since 1949 on Saturday and Sunday on the first trick, is persuasive evidence that the Organization acquiesced in this practice and cannot, for that reason, now be heard to complain. See Awards 6011, 7170, 7339, 8001 and 8123, which support the use of past practice in resolving disputes concerning the interpretation of scope rules.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act in Section 3, First, Subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out "of grievances or out of the interpretations or application of Agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties thereto. To grant the protest of the Employees in this case would require the Board to disregard the Agreement between the parties and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has proven that the assignment of bridge tending duties to the Maintainer on first trick on Saturday and Sunday as part of his regularly assigned duties was perfectly proper and not in violation of any rule of the applicable Agreement; that scope rules such as that applicable here do not prohibit the assignment of work not specifically mentioned in the rule to employees covered by the rule; that this work has been performed by Maintainers at this location for almost thirty years, without protest, and on the first trick on Saturday and Sunday, the days in question, for ten years without complaint. Therefore, no proper basis for the protest presented at this time now exists, and your Honorable Board is respectfully requested to deny the complaint.

(Exhibits not reproduced.)

OPINION OF BOARD: The parties have issued a joint statement of agreed upon facts. Prior to August 1, 1931, three regularly assigned Maintenance of Way bridge operators were employed, one in each trick, at South Chicago Bridge. On that date the second and third trick operators were replaced by T&S employees. With the adoption of the 40 hour week in 1949, the

first trick Maintenance of Way operator was relieved on his Saturday and Sunday rest days by an employe covered by the T&S Agreement. On December 1, 1957, the occupant of the position on the first trick retired and for a short time was replaced by a T&S employe. The position was then advertised and assigned to an employe under the Maintenance of Way Agreement. The Saturday and Sunday rest days of this position continued to be occupied by a T&S employe.

The Brotherhood of Railroad Signalmen claims that Carrier violated and is continuing to violate the Agreement by using T&S employes to relieve a Maintenance of Way Department employe. It also maintains that Carrier had a responsibility under a 1931 Agreement of the parties to replace the incumbent Maintenance of Way employe upon his retirement with a T&S employe, and Organization states that such Agreement was complied with for a short time after the retirement of the Maintenance of Way employe when a T&S employe occupied the position. Further, it argues that the failure of the Carrier to comply with such 1931 Agreement contributed to Carrier's breach of the current Agreement by arbitrarily requiring a T&S employe to relieve a Maintenance of Way employe.

In reference to the 1931 Agreement, we find that the Brotherhood has been unable to present such Agreement or proof that it exists. The assignment of a T&S employe upon the retirement of the Maintenance of Way incumbent to trick one is not a recognition by Carrier that such an Agreement existed. Carrier's action in temporarily appointing a T&S employe is inadequate in the absence of proof of a 1931 Agreement or concession by Carrier of the existence of such Agreement. Without either proof by Organization or acknowledgment by Carrier, we cannot say such Agreement exists. The question of the existence of the 1931 Agreement would be more pertinent if this claim were broad enough to include the replacement of the Maintenance of Way employe for the regular assignment, rather than just for the rest days of Saturday and Sunday.

The Scope Rule of the Agreement neither prohibits nor gives exclusive right to the work of bridge tender to the T&S employes. Since 1931, the practice has been for both Maintenance of Way and T&S employes to perform this work on regular assignments. Moreover, T&S employes have been relieving the Maintenance of Way employes after the establishment of the 40 hour work week in 1949.

The Scope Rule was not violated; the assignment of T&S employes to relieve the Maintenance of Way first trick bridge tender is a continuation of a long-established practice. No proof exists of a 1931 Agreement to modify or prohibit this practice. We, therefore, hold that the claim is without merit.

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 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

The Agreement of the parties 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 24th day of July 1964.