

Award No. 13079
Docket No. SG-12848

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Erie-Lackawanna Railroad Company:

On behalf of Leading Signal Maintainer W. D. Wilson and Signal Maintainer M. R. Rickie for compensation for eleven (11) hours each, at one and one-half times their regular rate of pay, account not being notified or called to perform operational check of automatic highway crossing devices on May 4 and 5, 1960, at Fourth Street, Hillburn, New York, which is on their regularly assigned signal maintenance territory.

EMPLOYES' STATEMENT OF FACTS: On the dates involved in this claim, the Claimants were the incumbents of signal maintenance positions on that part of the Erie-Lackawanna Railroad Company that was formerly the Erie Railroad Company, and they were governed by the Agreement between the Erie Railroad Company and trustee of the property of the New Jersey and New York Railroad Company, and Signal Department employees represented by this Brotherhood, reprint effective March 1, 1953. By reference thereto, that Agreement is made a part of the record in this dispute.

For some time, the city officials of Hillburn, New York, and the Carrier have had a quarrel over the operation of highway crossing protection devices at Hillburn, due to delay to traffic over the crossing. The City has contended mechanical failures or error in design caused the delays. The Carrier has conducted many tests and operational checks in order to find the trouble. The Claimants involved in this dispute have performed numerous checks, with and without supervision present, with a large part of those checks having been performed during regular working hours.

The instant claim is based on the fact that on May 4 and 5, 1960, the Carrier assigned signal gang employes to check the Hillburn crossing protection devices during overtime hours, and because the disputed work was performed on the Claimants' regularly assigned signal maintenance territory.

the practice to continue for seven more years under the agreement before this claim was filed, the Organization did not consider the continuation of the practice as a violation of the Scope Rule."

Without detraction from or prejudice to the foregoing, concerning Petitioner's claim for time and one-half for each of the claimants, this Board is well aware of the fact that it has enunciated in over two hundred different awards that the right to perform work is not the equivalent of work performed insofar as the overtime rules of an agreement are concerned. And, that the one making a claim for time and one-half for allegedly having been deprived of work has not done that which makes the higher rate applicable. With this principle so often pronounced by this Board, Carrier does not deem it necessary to say anything further in this respect except to reiterate that the claim is without merit in any event.

IV. CONCLUSION.

As Carrier has heretofore shown, the single issue to be decided in this dispute is whether this work is that of signalmen or maintainers. There is and can be no dispute about the fact that Signalmen Cristello and Phelan are senior to the claimants in the respective class to which assigned.

With no rule of agreement spelling out whether the work of making a twenty-four hour check is signalmen's work or maintainer's work, Carrier has then, consistent with the dictates of this Board, shown that past practice and custom on the property supports the fact that the involved work has been recognized as rightfully performed by signalmen. And, with these being the facts, the principle laid down by this Board that the intention of the parties is expressed by their past conduct provides full support for a denial decision in this dispute.

Without detraction from or prejudice to this position, Carrier reiterates that this Board has consistently held that there is no legitimate basis for Petitioner's claim of time and one-half for work not performed.

Based upon the facts and authorities cited, Carrier submits that this claim is totally without merit and should be denied.

OPINION OF BOARD: Organization claims that W. D. Wilson and M. R. Rickie were each deprived of 11 hours of overtime work and pay because Carrier assigned work belonging to their positions to Cristello and Phelan, two signal gang employes to whose positions the work did not belong; that this assignment by the Carrier violated Rule 14 (h) because Wilson and Rickie were the "regular employes" for this work under that rule and Cristello and Phelan were not.

The work involved a "24 hour operational check" involving a check of train and engine movements and analysis of same to develop the possibility of changes in circuiting. Carrier argues that this work was not normally performed by Wilson, Rickie or others in the signal maintenance gang, but was normally performed by Cristello, Phelan and others in the signal gang. Evidence by the Organization purporting to prove that such work was normally performed by the signal maintenance gang is in General Chairman's letter of October 5, 1960, to Mr. S. J. Parsons, Chief Engineer, which includes a list showing dates during the pendency of the case on which checks "other than regular inspection and tests of apparatus" were made by regular men of the maintenance gang during regular hours. No work listed or referred to

elsewhere in the evidence was a "24 hour operational check", performed by employes in the maintenance gang, and no evidence was introduced that the maintenance gang ever performed such 24 hour operational checks which the evidence clearly distinguished from other checks.

The question is not whether or not the maintenance gang employes were able to perform such checks, or even whether or not they normally performed checks involving some of the same kind of work; the question is: in what position, if any, is the 24 hour check the normal work, and which employes are, therefore, the "regular employes" for purposes of Rule 14 (h)? The record indicates that, to the extent such infrequent assignments can be called normal, they are done by the signal gang; we cannot from this record, therefore, find that Cristello and Phelan were not the "regular employes" intended in Rule 14 (h).

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

That the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of November 1964.