Award No. 14227
Docket No. MW-15613

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert Schmertz, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when, on April 19, 1964, it abolished the position of third trick Crossing Watchman at White Street, Danbury, Connecticut and thereafter assigned the work of said position to Telegraphers-Operators. (Carrier's Docket 9782.)

(2) Crossing Watchmen H. D. Nickerson or S. Fesh, whichever was first out on the Crossing Watchman's Spare Board at Danbury, Connecticut and subject to call on each day subsequent to April 19, 1964, be allowed eight (8) hours' pay at the Crossing Watchman's straight time rate for each such day that the work of the abolished position is performed by a Telegrapher-Operator.

(3) The position of third trick Crossing Watchman at White Street be re-established in accordance with the provisions of our effective Agreement.

EMPLOYES' STATEMENT OF FACTS: The factual situation here involved was partially described within the following quoted correspondence:

"New Haven, Connecticut 06506
January 29, 1964

Mr. Thomas Christensen, General Chairman
Brotherhood of Maintenance of Way Employes
79 Farmington Avenue, Room 210
Hartford, Connecticut

going east to New Haven, and two going west to Maybrook. There are no passenger train movements at all, and during this period there would normally be no Highway Rail Car movements.

Thus it is, that the only occasion for the crossingman to overrule the automatic gate operation would be when switching movement is made onto the siding between Balmforth and Maple Avenues, or on infrequent occurrences when a through-freight train may set out or pick up in the area.

Because of this minimal amount of work, which did not justify the continued employment of a crossing watchman during these hours, the Carrier abolished this position and moved the third trick S. S. Operator from the passenger station to the crossing control cabin — a distance of about 200 feet — and such monitoring of the automatic gates as may be necessary is performed by the S. S. Operator.

Attached as Carrier's Exhibit A is copy of General Chairman Christensen's appeal dated July 30, 1964.

Attached as Carrier's Exhibit B is copy of decision by the undersigned to General Chairman Christensen dated August 14, 1964.

Agreement between the parties is on file with this Division and is, by reference, made a part hereof.

(Exhibits not reproduced.)

OPINION OF BOARD: On April 6, 1964 the Carrier gave notice of intent to abolish the third trick Crossing Watchman and Relief Crossing Watchman positions at White Street, Danbury, Connecticut. Abolition was effective April 19 and 18, respectively.

As a result the two employes who worked these positions either bid into or displaced into other positions. The abolition of these jobs resulted in periods of time when there was no Crossing Watchman on duty. During these periods, the S. S. Operator performs the work of monitoring the automatic gates which according to the Carrier is the only work the abolished Crossing Watchman previously performed.

The Organization contends that the Scope Rule and Rule 53 in conjunction with the 1954 Memorandum of Agreement preclude the Carrier from abolishing these jobs, in that the Scope Rule and Rule 53 establish that this work is covered by the agreement and that the Memorandum of 1954 precludes non-covered employes from performing this work if it results in the furloughing of regular employes.

The Organization has cited Award 9553 (Bernstein) between these same parties as controlling on this matter. After a careful reading of that case we are of the opinion that it does not dispose of this case.

While the facts of that case are quite similar to this one, there are certain distinctions which must be noted. In 9553 the Board found that the Scope Rule and Rule 53 "generally allocate crossing protection work to crossing watchmen" with Rule 53 making it clear that this is in accordance with the "conditions and practices on this property."

However, there is no finding in 9553 that this work is exclusively reserved to Crossing Watchmen. This is clear from the following language:

> "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."

We take this to mean that whatever rights, protections and obligations exist under the agreement are applicable to all Crossing Watchmen positions as they existed as of the date of the agreement. We do not take this to mean that these jobs cannot be abolished.

Award 9553 appears to sustain this view. In that award the Board in effect said that a job may be abolished, but it must be done in accordance with the 1954 Memorandum, i.e., consultation and an endeavor to reach an agreement covering performance of work by non-covered employes.

The violation found by the Board in 9553 was a failure to consult prior to abolition of the job and the transfer of functions as required by the 1954 Agreement. That this was the situation in 9553 is clear from the following:

> "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."

In the matter before us the Carrier has fulfilled the consultation requirements of the 1954 Memorandum which it violated in 9553. Having done so, there can be no violation of the Memo.

The Carrier has urged a finding by this Board that the Memorandum be considered inapplicable because it was intended to apply only to subcontracting. The same position was urged in 9553 and the Board said:

> "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."

The Carrier apparently having failed to submit any evidence in 9553 now seeks to offer "extrinsic proof" that it was intended to apply only to sub-contracting. It is our view that to allow Carrier to relitigate this issue now when it failed to produce evidence in 9553 would be improper. The Carrier had his day in court on this issue. Regardless of what our views may be concerning the proper interpretation of the Memorandum, the mischief to be caused by relitigation of a settled interpretation, unless palpably and shockingly incorrectly, is such as to preclude this Board from entertaining the prospect.

In 9553 the award sustaining the payment of compensation grew out of the violation of the obligation to consult. In the matter before us, we have found no such violation.

Therefore, under the terms of the Memorandum, the Organization has the right to process the dispute under the terms of the agreement, and the

Railway Labor Act. Since there is no violation of the Memorandum insofar as the consultation requirements, the Board must now consider whether there is a violation of either the agreement or the furlough provisions of the Memorandum.

It is our view that neither the Scope Rule alone nor in conjunction with Rule 53 explicitly creates any exclusive reservation of this work to the Organization. We furthermore adopt the view, held many times by this Board, that absent an explicit reservation of work in the agreement, only a system-wide practice of exclusive work assignment can serve to merge that practice into the agreement and thereby establish a right of exclusivity.

That system-wide exclusivity does not exist is borne out by Award 10545 (Daly) in which this Board said:

> "Thus, we must conclude that the Organization did not have an exclusive right to the 'Crossing Watchman's work' at the Danforth Street Crossing, and that the Agreement was not violated by the Carrier."

The transfer of the remaining duties of the abolished job, therefore, did not there cause a violation of this agreement because this work was not exclusively reserved to employes covered by the agreement.

The remaining issue before the Board is whether or not the Carrier's action caused a violation of the furlough provision of the Memorandum. A review of the record fails to disclose that any furlough resulted to these Claimants. Indeed, their claim is based upon an assertion that the work belonged under this agreement and that if it were so performed they would perform it. Since we have rejected that conclusion and fail to find any resulting furlough, we must conclude that there has been no violation of the agreement or the Memorandum.

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 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 11th day of March 1966.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.