

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Arthur W. Devine, Referee

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES  
DELAWARE AND HUDSON RAILWAY COMPANY**

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

(1) The Carrier violated the Agreement when it assigned an employe outside the scope of its agreement with the Brotherhood of Maintenance of Way Employes to perform crossing watchman's work at a grade crossing in South Scranton, Pennsylvania. (System File 2-11/Case Nos. 4.69 MW and 14.69 MW.)

(2) Crossing Watchman George Waslenko be allowed pay at his straight time rate for a number of man hours equal to that expended by other forces in the performance of the work referred to within Part (1) of this claim.

**EMPLOYES' STATEMENT OF FACTS:** On or about May 13, 1968 and again on January 6, 1969, the Carrier assigned a Transportation Department employe, who holds no seniority within the Maintenance of Way and Structures Department, to perform crossing watchman's work at the former "National" crossing in South Scranton, Pennsylvania. In each instance, the need for a watchman at this particular grade crossing was created by frequent use of the crossing by trucks and other construction equipment belonging to a general contractor working in the vicinity.

The claimant, a furloughed crossing watchman, was available, willing and entitled to be called and used for this work in accordance with the provisions of Rules 4 and 14 which read:

**"RULE 4.**

Employes displaced or out of service because of force reduction will be given an opportunity to return to service or to former positions in accordance with their seniority when forces are increased or vacancies occur."

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crossing at MP A-195.40 and the subsequent fouling of tracks by this equipment while working adjacent to the tracks in the immediate vicinity of the private crossing.

Because of the nature of the contractor's work, railroad traffic, and the alignment of the track at the particular location which, because of track curvature, precluded timely visual observance of approaching trains and necessitated voice communication with approaching rail traffic, it was deemed that operations at that point should be protected by a Transportation Department employe who was thoroughly familiar with train operations in the area and who would be in constant communication by radio and telephone not only with trains operating in the territory, but also with the operator at Hudson, Pa., who controls train operations in the area under the supervision of the south dispatcher in our main dispatching office at Albany, N. Y.

Following assignment of the train service employe to this protection service on or about May 18, 1968, the BMWWE promptly instituted claim alleging agreement violation account carrier failed to assign this work to a crossing watchman. Such claim was denied at all levels of appeal on the property.

**OPINION OF BOARD:** Beginning on or about May 13, 1968, and continuing for an unspecified period of time, the Carrier utilized the services of an extra Conductor to provide protection at a private crossing used by trucks and other construction equipment of a general contractor working in the vicinity of the crossing. Because a train service employe was utilized to provide protection a claim was instituted requesting payment at straight time rate to a furloughed crossing watchman for the number of man hours expended by others in the performance of such work.

The Scope Rule of the Agreement is of the general type and has been held to be such in a number of prior awards of this Board. Awards 7387, 7790, 8755, 9001, 9342, 9551, 9552, 9970, 13135, 13666, and 13710. Under such general type scope rules we have consistently held that the burden rests upon Petitioner to show an exclusive right to the work involved based on history, custom, and practice. Here the Petitioner has presented no evidence whatever to support any contention that the work is exclusively reserved to M of W employes. In the submission to this Board the Organization proceeds on the theory that the work is embraced within the Scope Rule and that accordingly Carrier has violated Rules 4 and 14 pertaining to recall of furloughed employes and seniority rights of crossing watchmen. However, the Scope Rule is the primary rule involved in the dispute and as stated in Award 17944 (McGovern) we need not direct our attention to the other rules cited by the Organization since they do not become operative until a violation of the Scope Rule is found. Awards 6269 (McMahon), 12238 (O'Gallagher), 13972 (House), 14227 (Schmertz), 14746 (Rambo) and 18104 (Devine) hold to similar effect.

Since Petitioner has failed to present evidence that the work is covered by the Scope of the Agreement we must deny the claim.

**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 Agreement 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 23rd day of October 1970.