Award No. 18935
Docket No. MW-14310

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Clement P. Cull, 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 it assigned crossing protection work at Dawley's Crossing to employes who do not hold seniority as crossing watchmen.

(2) Each crossing watchman who was regularly assigned to the Crossing Watchmen's Spare Board on the Providence District during the period of the aforesaid violation be allowed pay at the crossing watchmen's straight time rate for an equal proportionate share of the total number of man hours consumed by other classes of employes in performing the work referred to in Part (1) of this claim for the period extending from sixty (60) days prior to date of claim presentation and continuing until violation is discontinued. (Date of claim presentation was May 11, 1962).

EMPLOYES' STATEMENT OF FACTS: The Carrier's' highest appellate officer briefly described the factual situation involved in this dispute as follows:

"The location involved is a private crossing, known as Dawley's Crossing, and is situated approximately 600 yards south of the south switch of Milk House, Norwich.

The Spector Dump Truck Rental of Willimantic is being permitted the use of this private crossing in order to truck sand and gravel to the Dawley Lumber Company wharf. A flagman, represented by the Brotherhood of Railroad Trainmen, is assigned, at the contractor's expense, to protect at this point."

The Carrier omitted mentioning that the "flagman" was a Carrier employe, selected by the Carrier, paid by the Carrier, that he was solely and exclusively responsible to the Carrier for the proper performance of crossing watchman's work and that the Contractor merely reimbursed the Carrier for the cost of providing said crossing protection.

Mr. Christensen conceded in conference with the undersigned that Crossing Watchmen, represented by his Organization, have never been assigned at Dawley's Crossing, nor have they ever been exclusivly assigned to protect similar crossings. However, the General Chairman expressed the opinion that Crossing Watchmen should be utilized in preference to employes represented by the Brotherhood of Railroad Trainmen under circumstances such as existent in this dispute.

The claim was denied by the undersigned on August 3, 1962; copy of this document is attached as Carrier's Exhibit "D."

In the decision referred to above (Carrier's' Exhibit "D") the undersigned confirmed, in writing, the contention advanced by General Chairman Christensen in support of his claim on the property. Quoting from that decision:

> "As I understand your position in this matter, while you agree that crossingmen have never been exclusively assigned to protect crossings of the type in question, you would prefer that such work be delegated to employes covered by your agreement."

No exception has been taken by the General Chairman as to the confirmation of his contention with respect to the instant dispute and it is, therefore, an accurate recitation of the position of the Organization regarding the claim now before your Board.

Copy of Agreement effective September 1, 1949, as amended, between the parties is on file with your Board and is, by reference, made a part of this submission.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are not in dispute. The parties are in agreement that beginning on March 5, 1962 and continuing on an intermittent basis until August 31, 1962, Flagmen were assigned by Carrier to protect the private crossing known as Dawley's Crossing near Norwich, Conn. A truck rental company had been granted permission to use the crossing for the purpose of trucking sand and gravel to a local lumber company during the aforesaid period.

Petitioner claims that Crossing Watchmen represented by it should have been assigned rather than Flagmen represented by the Brotherhood of Railroad Trainmen. Petitioner relies on its Scope Rule, Rule 2 and the Memorandum of Agreement of February 24, 1954.

It is unnecessary to cite awards by this Board which hold that a Petitioner has the burden of proving each and every part of its claim including proof that the work in question has been reserved exclusively for the Employes involved. Based on the record in this case the Petitioner has not sustained its burden.

The record reveals that Flagmen were assigned the work in this instance pursuant to Rule 25 (d) of the Trainmens' agreement with Carrier which provides the method of payment to Flagmen when they are engaged in "flagging for contractors or construction work." It has been asserted by Carrier, without refutation by the Organization, that herein Employes were never assigned exclusively to protect crossings of this type. This Board, however, is not relying solely on the assertion. It is relying on the fact that the Organization has failed to produce evidence that such work was reserved exclusively for Petitioner's members. In this connection in Award 14227 when

this Carrier used S. S. Operators (Telegraphers) to monitor automatic crossing gates when no Crossing Watchman was on duty this Board found as follows with regard to exclusivity:

> "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."

There is nothing in this record which would justify a contrary finding.

The foregoing disposes of the arguments based on the Scope Rule. Rule 2 and Rule 53. This leaves for consideration the Memorandum of Agreement of February 24, 1954. The Memorandum of Agreement does not confer exclusivity upon Petitioner. Petitioner would, it appears, have this Board assume exclusivity existed and then proceed to find a violation of the agreement based on the Memorandum. Such argument must be rejected as the question of exclusivity is the issue to be resolved herein and we have found above that Petitioner has not proved its case in this regard.

Obedient to the teaching of the Supreme Court in Transportation-Communication Employees Union v. Union Pacific Railroad Company (385 U.S. 12/5/1966) this Board has resolved the entire dispute. Due notice of the hearing held on December 17, 1971 was served on United Transportation Union into which Brotherhood of Railroad Trainmen has merged, to be present or represented or to submit its position in the controversy. It opted to do none of these. Despite its failure to participate the Board has discharged its statutory duty as defined by the Court and issues this decision as being dispositive of the issues raised by Petitioner.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of January 1972.

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