

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Southern Pacific Transportation Company (Western Lines)

PARTIES TO DISPUTE: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Mr. L. E. McKenny instead of Foreman W. H. Ream to perform flagging work at the 28th Street crossing located in Springfield, Oregon on March 28, 1986 (Carrier's File MofW 152-1047).

(2) As a consequence of the aforesaid violation, Foreman W. H. Ream shall be allowed eight (8) hours of pay at his time and one-half rate."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On June 13, 1986, the instant claim was filed. The claim protested the use of an Engineering Department employee without Maintenance of Way seniority to do flagging work on Good Friday, March 28, 1986, on a grade crossing project. The project was performed by an outside contractor. The claim also asserts that the Claimant had been performing the flagging work for this project since March 24.

The Organization contends that the Carrier's actions violated Rule 1 (The Scope Rule) and Rule 18(k) which states:

"Work on Unassigned Days. - (k) Where work is required by the Carrier to be performed on a day which is not a part of the assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

The Carrier's initial defense was that flagging work is not exclusively reserved to employees represented by the Organization. Later the Carrier also asserted that during the work prior to the holiday in question the Claimant did not work with the contractor, but instead it maintained that he had provided flagging protection for the members of Extra Gang No. 52 in connection with their work, which, coincidentally, was also on March 28, 1986. To this there was no rebuttal.

It is noted that no work was performed on the day in question by the extra gang to which the Claimant was assigned. It is also noted that no contention is raised in the record that the use of the contractor was improper. Thus, it is clear that the flagging work in question was not part of the Claimant's assignment or regular duties. His regular duties were in connection with his extra gang and did not involve working with the contractor. Accordingly, Rule 18(k) is not a basis to sustain the claim since the Claimant was not the "regular" employee. There was no "regular" employee assigned to flagging work in connection with the contractor.

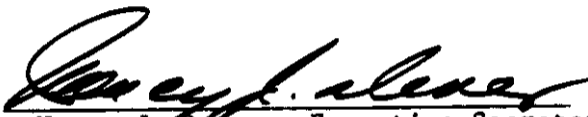
The second basis of the claim was the Scope Rule. Regarding Rule No. 1, it is the opinion of the Board that it is ambiguous with respect to any exclusive jurisdiction concerning flagging work. As such, the Organization would have to show that foremen customarily performed the work by practice. This has not been done. On the contrary, the Carrier asserts, without rebuttal, a practice whereby many crafts including management have provided flagging services.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November 1991.