

PARTIES TO DISPUTE: Baltimore & Ohio Railroad Company
and
Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM: 1. Carrier violated the Agreement when it assigned Train Service Employees as Crossing Watchmen to control traffic over a temporary detour crossing at Miami St., Rossford, Ohio, on or about July 22, 1968.
2. Carrier shall now compensate Maintenance of Way Employees E. E. Chenetski, Albert VonPoppel, C. W. Yates and C. J. Basset at their respective rates of pay, beginning July 22, 1968 and continuing until the work has ceased or an employee is assigned in accordance with the Maintenance of Way Agreement.

STATEMENT OF FACTS: Due to the construction of a new vehicular bridge to carry traffic over the Carrier's tracks at Miami Street a temporary two lane grade crossing over the tracks was constructed for the purpose of rerouting vehicular traffic. This grade crossing passed over three yard tracks and Train Service Employees were assigned to control said traffic when switching movements approached the crossing and/or passed over it. The movement of trains at this point required protection on a 24 hours per day basis with a single trainman so assigned to each of three shifts. Manually operated flashers were installed at this temporary crossing and were activated by the above referred to trainman, in addition to his other duties at the location.

POSITION OF PARTIES:
CARRIER: The trainmen assigned were Utility Men-Flagmen which position

POSITION OF PARTIES:

CARRIER:(cont'd) included the following:

1. Activating the crossing flashers when an engine approached the crossing, and
2. Flagging the train to a stop if the highway crossing could not be cleared, and
3. Assisting in switching operations by passing signals, cutting the train at the crossing when necessary and making draw bar and air hose uncouplings and couplings.

Carrier averred that the employees assigned had indeed flagged trains, passed signals, and uncoupled and coupled cars and air hoses in the performance of their duties; that this was work belonging to train service employees as distinguished from the work of Crossing Watchmen; and that neither the Scope Rule nor any other rule of the Agreement reserves exclusive right to the work in question to Maintenance of Way Crossing Watchmen.

POSITION OF EMPLOYEES: Claimants alleged that the work performed was work belonging to Crossing Watchmen. The primary responsibility of the men assigned was to control vehicular traffic over the crossing. The Organization stated that such switching as may have been done by the Train Service Employees was done for the convenience of the train crew only, in order to expedite the work of the train crew, but that the such employees were given no specific instructions to assist train crews who, as part of their assignment, had the duty of performing such work. In summary, the Carrier violated the Agreement when it assigned other than Maintenance of Way employees to perform Crossing Watchmen duties "which are reserved for employees under the Scope of this Brotherhood Agreement."

OPINION OF BOARD:

There is an obvious conflict between the parties as to nature of the assignments involved herein insofar as the basic or primary duties performed were concerned together with the question of exclusivity under the Scope Rule of the Agreement.

This Board has carefully reviewed the partisan submissions and exhibits and makes the following observations:

1. The record shows that the assigned employees did, in fact, line switches, give signals to train crews, and uncouple and couple cars and air hoses as well as activate flashers to warn approaching vehicles.
2. The Organization did not refute the fact that the foregoing duties are those of the Utility Man-Flagman except to state that such work was performed merely as a convenience to the train crews involved.
3. The referred to Scope Rule of the Agreement is similar, if not identical, to the Scope Rules contained in numerous other Agreements between the Organization and other Carriers. It is of the general type which lists Crossing Watchmen as a class of employees covered by the Agreement but does not prescribe the work reserved to such employees.

This Public Law Board is an adjunct of the National Railroad Adjustment Board and therefore, of necessity, must be guided by the principles and procedures of that organization. It is axiomatic, and the NRAB has so held on numerous occasions, that in the face of a Scope Rule such as the one contained in the instant Agreement the burden of proof rests with Petitioner to show that

custom and past practice on a particular property have established exclusivity insofar as the right to disputed work is concerned. Mere assertions and/or allegations are not sufficient to successfully support a claim.

Both Petitioner and Carrier cited various prior Awards in support of their respective positions. Petitioner relied heavily upon Award No. 26, of Special Board of Adjustment No. 293, wherein it was stated:

"The evidence convinces us that the train service employee here involved was used primarily to protect the temporary road crossing from vehicular traffic belonging to the contractor." Emphasis added.

The Carrier, in the instant case, utilized the services of a Utility Man-Flagman whose duties, referred to previously herein, appear to describe precisely the nature of the work performed at the location in question. The record before us leaves much to be desired in attempting to resolve the question as to what the primary responsibilities were of the employees involved.

Nevertheless, Petitioner has bottomed his submission on the alleged violation of the Scope Rule of the Agreement. As previously stated, the Scope Rule in question is of the general type, the thrust of which is that when Crossing Watchmen, per se, are used they will be governed by the Rules of the Agreement pertaining to employees in the Maintenance of Way and Structures Department. The Agreement is silent, however, as to the kind of work reserved to such an employee. Therefore,

Petitioner is obligated to show by probative evidence that the work in dispute is reserved to employees under their Agreement based upon custom and past practice of the Carrier involved. The record in this case does not show that Petitioner has met such burden of proof.

Numerous recent Awards of the NRAB have treated with just this type of situation, a few of which are referenced below in part as follows:

Award 12022 stated:

"Petitioner relies on the Scope Rule to support its claim. The Scope Rule in the instant case does not describe the work reserved to the class of employees covered by it. Train movements over public highway crossings have been protected by several methods, viz., by train crews, manually by crossing tenders and telegraphers, and by automatic signals or gates. In other words the work in question does not exclusively belong to the said watchmen and they have not performed it to the exclusion of all other employees."

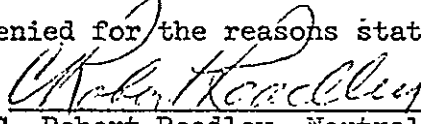
Award 14729 stated:

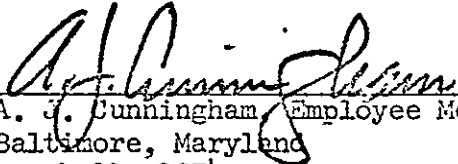
"The proof fails to show that the work involved was the exclusive work of employees covered by the Maintenance of Way Agreement nor does the Agreement contain any provision that affirms that all such work belongs exclusively to employees covered by Carrier's Agreement with the Organization."

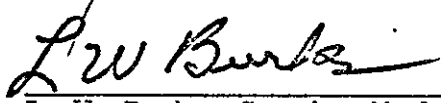
Award 18243 stated:

"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. 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."

The claim is denied for the reasons stated herein.


C. Robert Roadley, Neutral Member

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A. J. Cunningham, Employee Member
Baltimore, Maryland
March 11, 1974


L. W. Burks, Carrier Member