

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21490  
Docket Number MW-21206

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**  
(**Chicago and North Western Transportation**  
(**Company**)

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

(1) The Carrier violated the Agreement when it abolished all positions on Gangs 1, 2, 3, 4, 5 and the Twin City **Terminal Gang** (**System File 81-19-92**).

(2) Assistant **Foremen-Truck** Drivers D. O. Johnson and J. R. Decker; Machine Operator R. T. **Husby** and Laborers R. A. **Dierks**, R. Schwebach, I. **Loof**, D. Anderson, J. Ziebarth, S. **Wellman**, G. Helget, R. Segler, M. Ellis, **M. Tobin**, R. **Denninger** and M. Hanson each be **allowed** pay at their respective rates of pay for all **time** lost during the period they were furloughed.

(3) Foremen **J. R. Woefel**, Ed Johnson, T. S. **Babou**; Assistant **Foreman-Truck** Drivers **T. P. Freid**, T. Borden; **Truck** Driver J. Walker; Machine Operators W. Barnes, J. **Oglesby** and R. **Shaurette** each be allowed the difference between their lower pay-rated earnings on the positions to which they displaced and what they would have earned if their respective positions had not been abolished.

OPINION OF BOARD: This dispute arises under the parties' **Memorandum of Agreement** dated October 29, 1970, under which five separate seniority districts were consolidated into one. The **Agreement** established a consist of specific machine operator and **maintenance** crew positions, in lieu of the then **existing** positions in the five seniority districts, and set forth schedules providing the rates of pay of the newly established positions. In December 1973 and January 1974, the Carrier abolished a number of the positions which had been established by the **Memorandum** of Agreement.

The Organization asserts that these **abolishments** violated the parties' **Memorandum** of Agreement, in that the specification of the positions in the Agreement constituted a guarantee by the Carrier to **maintain** and keep those particular positions in existence during the seasons delineated in the Agreement. The Carrier denies that it wade a guarantee to **maintain** positions and **submits** that the Agreement in

no way restricted its right to eliminate any or all of the positions specified in the **Agreement**.

Pertinent background facts now follow.

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Prior to October 1970, the Carrier desired to combine five seniority districts into one district for the purpose of promoting greater efficiency in the performance of trackwork. On September 10 and 11, 1970, an initial conference was held by the reorganization subject.e Thereafter, the Carrier prepared a proposed Memorandum of Agreement and a summary or memorandum of the points discussed ("Points Covered") at the conference and smiled both, along with a Carrier letter written by Director of Labor Relations Fremon on September 24, to the three General Chairmen of the **BMWE**. Mr. Fremon's letter reads in part:

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"You will note that substantially more points were covered during the conference and in the summary than are included in the agreement. The reason for this, of course, is that numerous of the points covered do not require any new or additional agreement in that such points are already covered by or in accordance with existing agreements."

Item 19 of "Points Covered" states:

"19. Nothing contained herein or in the agreement to be prepared constitutes a guarantee of the continued maintenance of any position or positions."

On October 7, 1970, General Chairman Wold and the Director of Labor Relations entered into a letter Agreement regarding Item 14 of "Points Covered" and the third sentence of Section 9 of the proposed Agreement. Additional agreements between the parties concerning pay rates for Twin Cities Terminal maintenance gang foremen and various Truck Driver positions were confirmed on October 12, in a letter sent by the Director of Labor Relations to General Chairman Lee, with copies to the other General Chairmen and Vice President Wilson.

The essential issues raised by the foregoing, and the whole record, is (1) whether the language of the October 29, 1970 Memorandum of Agreement guarantees to maintain the positions established by the Memorandum, and (2) whether the parties' actions with respect to the "Points Covered" memorandum has any significance in the determination of the first issue.

In its **argument** on these issues, the Organization contends that the listing of the positions and schedules of rates of pay in Section 2 of the Agreement represents prima facie proof that those positions were intended to be **maintained**. The Organization has cited several authorities in support of this position; but, upon analysis, such authorities **are found** inapplicable to this dispute. For example, Awards Nos. **1296 and 11368**, sustained similar claims in facts **involving** Sates of **Pay** schedules; however, analysis of these Awards reveals that those sustentions were based not **solely** upon the inclusion or Sates of Pay schedules, but upon the Sates of **Pay** schedules coupled with additional provisos that such rates of pay were to continue in effect until changed **or** modified in accordance with the provisions of the Railway Labor Act. In the confronting Agreement, no such provision was included and the text of the Agreement, standing alone, falls far short of expressing an intent to keep the disputed positions in existence unless **changed** by the parties' **Agreement**. In this regard the following portions of the Agreement are particularly pertinent:

"2. In lieu of the positions covered by Section 1 hereof the following positions will be established:  
/Various positions are then enumerated, including the positions in dispute in this case./

3. The positions referred to in section 2 hereof, when and as established, will be bulletined to track department employees of the TC Division... (**Underline** added.)

The quoted text from Section 2 merely says that certain positions will be established, and the fact that the text goes on to describe and enumerate the involved positions in no way connotes that the positions are to be kept **in** existence on a guaranty basis. Moreover, since the underlined portion of the text from Section **3**, "when and as established," strongly suggests that **some power** is reserved to the Carrier concerning when and whether the enumerated positions will be established, the **Agreement** contains at least one express passage which clearly cuts against the notion that the Agreement contains a guarantee **of** positions. In short, neither the listing of the positions with a schedule of pay rates, **nor** the text found within the four **corners of the Agreement**, affords a basis for finding that the Agreement guaranteed to **maintain** the disputed positions.

It remains to determine whether this conclusion is altered by the parties actions respecting the "Points Covered" **memorandum**. The Carrier contends that item **19** of this memorandum was included by reference in the Memorandum **of Agreement**, while the Organization

contends that the absence of item **19** from the Agreement supports its contention that the Carrier did indeed promise to guarantee the disputed positions. In considering this aspect of the case, the departure point is the unquestioned fact that the Carrier forwarded the **"Points"** memorandum to the Organization in a context which gave clear notice that the Carrier considered itself not bound by a guaranty. Item **19** in the memorandum states that neither the **memorandum** nor the agreement to be prepared "constitutes a guarantee." Thereafter, **a** letter of October 7, **1970**, confirmed an understanding between the Director of **Labor** Relations and General Chairman Wold to the effect that the third sentence of Section **9** of the Agreement (suspension of protected status for failure to accept work in a Division or **Twin** Cities Terminal Maintenance gang) and the third sentence of Item **14** "Points Covered" (virtually identical to the comparable sentence in the Agreement) are not applicable to MI **employees**. A letter of October **12**, 1970, from the Director of Labor Relations to General Chairman Lee confirmed an understanding regarding rates of pay for Truck Drivers.

The Carrier maintains that no objection was ever made to Item **19** of "Points Covered." While it is possible that objections were made by the Organization at the September **10-11, 1970** conference, no written evidence **of** any such objection appears in the record. Given that specific reference was made to at least one other item in "Points Covered," and that "Points Covered" was received by the Organization in the same package as the proposed Agreement, there is no basis for a finding that the absence of Item **19** from the October **29, 1970** Agreement evidences that the Carrier agreed to guarantee the maintenance of the disputed positions. It is not necessary to find whether **Item 19** was actually **made** a part of the Agreement, as the Carrier **seems** to contend, as it has been previously found that the Agreement does not contain a guaranty.

In view of the foregoing, and on the **whole** record, it is concluded that the record affords no basis for finding **that** the Carrier was restricted **from** abolishing the disputed positions and the claim will therefore be denied.

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 **Employees involved in** this dispute are respectively Carrier and **Employees** 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

**The Agreement was not violated.**

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Pauls  
Executive Secretary

**Dated at** Chicago, Illinois, this 15th day of April 1977.