Award No. 1296
Docket No. MW-1274

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert B. Rudolph, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ERIE RAILROAD SYSTEM LINES

STATEMENT OF CLAIM: "Claim of Employes' Committee:

"First: that the Carrier violated agreement between the Chicago and Erie Railroad Company, Trustees of the property of Erie Railroad Company, Trustees of the property of the New Jersey and New York Railroad Company, Trustee of the property of New York, Susquehanna and Western Railroad Company, Trustee of Wilkes-Barre and Eastern Railroad Company, and the Brotherhood of Maintenance of Way Employes, effective May 1, 1939, by, effective June 1, 1939, without conference with the Employes' Committee, eliminating nineteen section foremen's positions listed in that agreement on the Susquehanna, Delaware & Tioga Divisions."

"Second: that the nineteen section foremen's positions thus eliminated shall be restored and that employes who were adversely affected by the elimination of the nineteen section foremen's positions, and readjustments of the remaining sections on the Divisions, shall be reimbursed for any monetary losses sustained thereby."

EMPLOYES' STATEMENT OF FACTS: "An agreement governing rates of pay and working conditions between the Erie Railroad System Lines comprised of Erie Railroad Company, Chicago and Erie Railroad Company, The New Jersey and New York Railroad Company, New York, Susquehanna and Western Railroad Company, and the Brotherhood of Maintenance of Way Employes became effective November 16, 1934. That agreement enumerated and showed the location of each section foreman's position and listed the rate of pay applicable to each position.

"A revision of the above referred to agreement was effected August 1, 1936. That revised agreement likewise enumerated and showed the location of each section foreman's position and listed the rates of pay applicable for each position.

"The agreement was further revised effective as of May 1, 1939. This last revision was made as an agreement between the Chicago and Erie Railroad Company and Trustees of the property of Erie Railroad Company, Trustees of the property of the New Jersey and New York Railroad Company, Trustee of the property of New York, Susquehanna and Western Railroad Company, Trustee of the property of Wilkes-Barre and Eastern Railroad Company, and the Brotherhood of Maintenance of Way Employes. This revised agreement likewise enumerated and showed the location of each section foreman's position and listed the rates of pay applicable to each position.

cordingly there was no change in rates of pay. In the event rates of pay overlapped as a result of changes in section foremen's territories, the higher rate of pay was maintained.

"7. The claim that is now before your Board as a result of ex parte submission by the Brotherhood has not been properly progressed through the usual channels as contemplated under the Railway Labor Act, amended.

"8. No section foreman or assistant section foreman as a result of these changes is required to work in excess of the number of hours that have been established under the rules for the section to which they are assigned.

"9. There are no rule in the Rules and Rates of Pay for Maintenance of Way Employes which establish any particular number of miles as a section territory.

"10. It is the function and responsibility of the management to increase or decrease force and increase or decrease the length of track sections as may be considered consistent with the requirements of the service.

"11. The action taken by the management in adjusting sections on June 1, 1939 is not a violation of any rule of the Rules and Rates of Pay for Maintenance of Way Employes, effective May 1, 1939."

OPINION OF BOARD: The Board is of the opinion that the facts present a dispute between a group of employes and a carrier growing out of an interpretation of the agreement between the parties concerning rates of pay and rules within the meaning of Section 3 (i) of the Railway Labor Act, amended. The presentation of this claim on behalf of the employes affected, by the proper office or officers of the Brotherhood is a proper procedure, in that such organization is the recognized representative of the employes involved, and one of two parties to the agreement existing between the carrier and the employes. Cf. Award 547. Rule 18 (b) of the agreement between the parties relates to a dispute between a single employe and the carrier, and obviously does not preclude the presentation of a claim by a "group of employes" as provided in the said Section 3 (i) of the Railway Labor Act.

The record discloses that under the "Rates of Pay" section of the agreement there were listed by section number the nineteen section foremen's positions which were abolished by the carrier subsequent to the execution of the agreement. It is the position of the claimants that these nineteen positions were negotiated into the agreement, became a part thereof, and that the terminating clause of the agreement was violated when these positions were abolished without negotiation. The terminating clause reads:

> "These rules and rates of pay shall continue in force from their effective date, May 1, 1939, until changed or modified in accordance with the provisions of the Railway Labor Act, amended."

It is the contention of the carrier that these positions were listed in the agreement by section number, together with the rate of pay for each numbered section, for the purpose of information only. With this contention we are unable to agree. That these particular positions were intended to come within the scope of the agreement is evidenced definitely by the fact that it was deemed necessary to incorporate them in the agreement by name and number. They are as much a part of the "Rates of Pay" section of the agreement as is the amount of pay attached to these positions and specified therein. Cf. Award 1230. When an agreement lists the positions together with the rates of pay attached to these positions, and then provides that these rates of pay shall continue until changed by certain procedure, we are of the opinion that it is as much of a violation of the agreement to abolish the position when the work remains and assign the work to someone else without following the specified procedure as it would be to change the rate of pay in an unauthorized manner.

It is no doubt true that had the work of these nineteen section foremen disappeared, then, according to prior awards of this Board, the positions could be abolished. But the work connected with these positions remained, there was simply a consolidation of positions and the work of the foremen whose positions were abolished, was assigned to other foremen. The carrier was simply attempting to combine or double up the work of the section foremen listed in the agreement. Under the terminating clause of this agreement and the prior awards of this Board, such action by the carrier constitutes a violation of the agreement. Cf. Awards 231, 388, 434, 496, and 556.

The carrier further contends that certain rules in the agreement which relate to reducing forces or abolishing positions indicate that there was no intention to establish by the agreement any particular number of section foremen's jobs. However, these rules relate simply to seniority and similar rights, and the reduction in forces or the abolition of positions therein contemplated must all be accomplished within the terms of the agreement. These provisions do not contemplate a violation of the agreement, or authorize the carrier to abolish positions in any other manner than provided in the agreement.

Another contention of the carrier relates to other positions listed in the agreement, and it is argued that the listing of these positions show that it was not the intention to fix any number of positions. Many of these positions it is contended are not filled. What prompted the placing of these positions in the agreement does not appear, but, in any event, the fact that they appear in the agreement cannot control the foremen's positions which were regularly established positions, listed by number with the amount of pay fixed and with the work of the position still remaining.

The agreements between this carrier and its employes were not made by the Brotherhood until 1934. Prior to that time the agreements were with a company union. Obviously, the acts of the carrier under the agreements with the company union are not very helpful in construing this present agreement. The violation of the agreement by the carrier since 1934 in the manner here contended cannot be held to constitute a modification. Cf. Awards 137, 422, 456, 735, and 1235.

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 existing agreement was violated when the nineteen listed section foremen's positions were abolished in a manner contrary to that provided in the terminating clause of the agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of December, 1940.

Dissent to Award No. 1296—Docket No. MW-1274

The award in this case is a grievous error arising from the substitution of assumed precedent of prior awards covering other circumstances and other agreements instead of determination of the true intent and meaning of the immediate contract between the parties to this dispute applied to the subject of the claim. It will be unnecessary to show the details of deviation of circumstances in each and all of the former awards cited in the Opinion of Board, because the fundamental impropriety lies in the reliance upon such a base to the neglect of the duty which imposes upon this Board to found its decisions upon interpretation and application of the agreement between the parties to a particular dispute.

The record in respect to the meaning of the contract bearing upon requirement to maintain any fixed number of sections is clear: One party, the employes, say that as of June 1, 1939, when the certain 19 sections here in dispute were eliminated, it was their understanding that such action was improper; the other party, the Carrier, says that it was its understanding that it was proper to take such action,—the work in not one iota being taken from employes covered by the contract. The obvious obligation of the Board was to determine the proper intent and meaning of the contract in the light of the contradictory understandings thus presented.

To what extent does the Opinion of Board deal with that primary and fundamental phase of a proper decision? After reviewing the respective contentions of the parties and asserting the support of the terminating clause of the agreement, which by its very wording as well as by the definite restriction of Section 6 of the Amended Railway Labor Act to "changes **in agreements** affecting," rather than "changes in" rates of pay, rules and working conditions as covered by the preceding effective Act, could not possibly constitute a bar to the revision of section limits and numbers as here arranged, and then further asserting certain prior awards of the Division as support of the declaration that there here was violation, the Opinion first approaches in its next to last paragraph that which is the primary obligation of the Division in reaching a decision, i. e., the interpretation of the contract.

There it proceeds to the most inconsistent and illogical disposal of factual evidence of the intent of the contract that can be imagined. That evidence was the list of positions in the agreement which alone by its designation by numbers, locations, and rates of pay for section foremen formed the sole basis for the claim and the support of this award. The Opinion disposes of this evidence in the words of its next to last paragraph as follows:

> ". . . What prompted the placing of these positions in the agreement does not appear, but, in any event, the fact that they appear in the agreement cannot control the foremen's positions which were regularly established positions, listed by number with the amount of pay fixed and with the work of the position still remaining."

The superficial character of that expression, the only one in the Opinion having direct bearing upon the evidence afforded by the contract itself, should be clearly revealed and is here so done by quotation of that portion of the "RATES OF PAY" section covering the divisions involved by this claim:

"RATES OF PAY—SECTION FOREMEN

		ASSIGNMENT		
		8 Hrs. per	9 Hrs. per	10 Hrs. per
Section Number	**Location**	**Day**	**Day**	**Day**
" * * * * * *	* * * * * * * * * * * * * * * * *	* * *	* * *	* * *
	Delaware Division			
1 to 22 incl.	Mill Rift to Lanesboro	$150.20	$178.38	$206.56
23	Susquehanna	155.20	184.33	213.47
24	Susquehanna	160.20	190.29	220.38
Extra Gang		160.20	180.48	209.75

"RATES OF PAY—SECTION FOREMEN

Section Number	Location	ASSIGNMENT 8 Hrs. per Day	9 Hrs. per Day	10 Hrs. per Day
	Susquehanna Division			
1 to 4 incl.	Hickory Grove to Binghamton	150.20	178.38	206.56
5	Binghamton	155.20	184.33	213.47
6	Johnson City	150.20	178.38	206.56
7	Endicott	155.20	184.33	213.47
8 to 14 incl.	Liberty St., Endicott to Waverly	150.20	178.38	206.56
15	Waverly	155.20	184.33	213.47
16 to 18 incl.	Chemung to Southport	150.20	178.38	206.56
20	Elmira	155.20	184.33	213.47
21 to 23 incl.	Elmira to Corning	150.20	178.38	206.56
24	Corning	155.20	184.33	213.47
25 and 26	Erwins and Addison	150.20	178.38	206.56
27	Addison	155.20	184.33	213.47
28 to 33 incl.	Cameron Mills to Hornell	150.20	178.38	206.56
34 to 36 incl.	Hornell	155.20	184.33	213.47
Extra Gang		160.20	180.48	209.75
	Tioga Division			
37 to 42 incl.	Pine City to Blossburg	145.20	172.42	199.64
* * * * * * *	* * * * * * * * * * * * * * * * * *	* * *	* * *	* * *"

From the same "RATES OF PAY" section of the Agreement and for the same divisions, the following assistant section foremen are shown:

"ASSISTANT SECTION FOREMEN

" * * * * * *	* * * * * * * * * * * * * * * * * *	* * *	* * *	* * *
	Delaware Division			
1, 5, 11, 19 & 20	Mill Rift to Deposit	$119.20	$141.58	$163.95
23	Susquehanna	123.20	146.34	169.48
24	Susquehanna	127.20	151.11	175.01
Extra Gang		127.20	143.48	166.75
	Susquehanna Division			
5	Binghamton (2)	123.20	146.34	169.48
6	Johnson City	119.20	141.58	163.95
7	Endicott	123.20	146.34	169.48
13	Smithboro	119.20	141.58	163.95
15, 20, 24 & 27	Waverly to Addison	123.20	146.34	169.48
34 to 36 incl.	Hornell (6)	123.20	146.34	169.48
Extra Gangs		127.20	143.48	166.75
* * * * * * *	* * * * * * * * * * * * * * * * * *	* * *	* * *	* * *"

(**Tioga Division**—none shown)

Similarly, from the same "RATES OF PAY" section for those divisions are shown the M. of W. Mechanics positions as follows:

"RATES OF PAY—M. OF W. MECHANICS

	Per Hour	ASSIGNMENT 8 Hrs per Day	9 Hrs. per Day	10 Hrs. per Day
" * * * * * * *	* * * * * * * * * * * * * * * * * *	* * *	* * *	* * *
	Delaware, Susquehanna and Tioga Divisions			
Carpenter Foremen				
Susquehanna (2)	—	$175.20	$208.11	$240.99
Binghamton	—	175.20	208.11	240.99

"RATES OF PAY—M. OF W. MECHANICS

		ASSIGNMENT		
	Per Hour	8 Hrs. per Day	9 Hrs. per Day	10 Hrs. per Day
Elmira	—	175.20	208.11	240.99
Elmira	—	175.20	208.11	240.99
Hornell	—	175.20	208.11	240.99
Plumber Foremen:				
Susquehanna * * * *	—	225.00	225.00	225.00
Hornell * * * *	—	225.00	225.00	225.00
Painter Foremen	—	175.20	208.11	240.99
Electrical Welding Equipment Foremen * * * *	—	200.00	200.00	200.00

Etc."

NOTE: This list continues with 24 named occupational positions of mechanics shown in similar manner except that no locations are shown.

The very nature of this **"RATES OF PAY"** section thus indicates that it was not intended to limit the number of positions either as to increases in the number of employes required or decreases as the necessities of the work required.

Let us consider the Assistant Section Foremen's list to see if there was such intention. On the Delaware Division there is shown but one such position on each of 7 certain sections,—and these identified only by number. On the Susquehanna Division there was one such position on each of 7 individual sections identified by number; on another group of 3 sections at Hornell 6 such positions are identified, and on one section at Binghamton 2 such positions are identified.

Similarly, under the M. of W. Mechanics one carpenter foreman would be identified at each of 4 named localities and 2 at one other station (Susquehanna). Various other foremen's positions at monthly rates and mechanics' positions, both at monthly and hourly rates, are included in that **"RATES OF PAY"** section. The absurdity of saying that the naming of the positions, covering as they did variably one to any number of employes per position, were thus irrevocably fixed by the number of such employes either working, on the payroll, with retained seniority rights, or other unspecified or even implied requirement as of the minute the Agreement became effective, must be apparent.

It is equally illogical to say that because at one certain named location a numeral was used to indicate the number of positions, such as the two carpenter foremen at Susquehanna or the six assistant section foremen at Hornell, it was thus intended to restrict the carrier from either reducing or increasing the number that could be thus assigned. In fact, such a ridiculous contention was not urged by the petitioners, and in all the discussions before the Division the fair inference could be gathered that no such unreasonable interpretation of this **"RATES OF PAY"** section of the agreement was in mind of either of the parties,—the claim and contention of the employes singling out the section foremen only as being guaranteed the inflexibility alleged to be a contract requirement of the **"RATES OF PAY"** list.

So evident is it to be unreasonable to select from this **"RATES OF PAY"** list the section foremen's positions on the three divisions included in this claim as being a selective group to which the inflexibilities alleged by this claim were intended by the Agreement as to make it unnecessary to emphasize argument thereupon.

Consider, though, the contradictory intent given by the Opinion to the inclusion of section foremen's positions and the positions other than section

foremen, each with equally indefinite identification as to limit of territory and guarantee of inflexibility, as it appears in these words:

> ". . . but, in any event, the fact that they appear in the agreement cannot control the foremen's positions which were regularly established positions, listed by number with the amount of pay fixed and with the work of the position still remaining."

The heaping of condemnatory expression would not add to the revealing inconsistency of such analysis and conclusion. It speaks for itself.

As a final gesture, the Opinion gives expression of evident condonation of discredit of a contract duly signed and executed by parties preceding the period of the agreement here involved. Whatever impropriety lurks in such expression in lieu of evidence or even contention on that question in the record, it may reasonably be accepted as a further showing of the diversion from the only duty which the dispute imposed upon this Board by the law which created it, i. e., the interpretation of the contract between the parties. It but emphasizes the grievous error that has been committed by this award and the grossly impractical situation that it presents to the injured party—the Carrier.

S/ R. F. RAY
S/ R. H. ALLISON
S/ C. P. DUGAN
S/ A. H. JONES
S/ C. C. COOK