

Award No. 11368

Docket No. MW-10830

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**KANSAS, OKLAHOMA & GULF RAILWAY CO.
MIDLAND VALLEY RAILROAD COMPANY**

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

(1) The Carrier violated the agreements between the Kansas, Oklahoma and Gulf Railway and the Midland Valley Railroad, and the Brotherhood of Maintenance of Way Employees, effective May 16, 1937, by eliminating seven section foremen's positions listed in these agreements and supplements thereto without negotiations with or approval of the employees' committee;

(2) The seven section foremen's positions thus eliminated shall be restored and that employees who were adversely affected by the elimination of the seven section foremen's positions, and the readjustments of the remaining sections, shall be reimbursed for any monetary losses sustained thereby.

EMPLOYEES' STATEMENT OF FACTS: Under date of September 9, 1957, the Kansas, Oklahoma & Gulf Railway Company issued the following notice:

"KANSAS, OKLAHOMA & GULF RAILWAY COMPANY

CIRCULAR NO. 92

Muskogee, Oklahoma, September 9, 1957

ALL CONCERNED:

Effective with the completion of the assignments of Friday, September 13, 1957, the following sections are abolished:

Section No.	Headquarters
1	Miami
2	Fairland
4	Locust Grove
5	Wagoner

ing or prosecution by the Department of Justice. The jurisdiction of the National Railroad Adjustment Board is limited by Section 3 of the Act to disputes growing out of grievances, the interpretation or application of agreements between carriers and their employees. Since no charge is made that the trainmen's agreement with the carrier was violated or that the protest involves a grievance requiring application or interpretation of any provision of an agreement, there is no basis for a proceeding before this Board."

CONCLUSION

The employees have not lifted the burden of proving that the Carriers violated the contract. They have not pointed out where the action of the Carriers amounts to a breach. That burden was carried by the employees in Award 5483 but there, unlike here, the contract contained a rule of prohibition against the action taken by the Carrier. The Board has treated similar cases where it found that the contract did not contain a provision supporting the claim and although such a provision was strongly desired by the employees and its implied presence was argued by the employees, the Board held in this language that there was no violation of the Agreement (Award 2491).

"It may be as we have indicated that the contract did not contemplate a situation arising such as we have here and for that reason provisions governing such a situation were not included. But we cannot supply that which the parties have not put in the agreement. We can only interpret the contract as it is and treat that as reserved to the carrier which is not granted to the employees by the agreement."

The claim should be denied for the reasons stated herein.

It must be obvious that the net result of the organization's contentions, if sustained, would be to give it the power of veto over the Carrier's right to readjust its operational facilities and labor demands in response to the "ebb and flow" of the traffic load, and to freeze all positions and wage rates as of a given time. The Carriers have not surrendered to that extent in this docket.

Since this is an ex parte case, this submission has been prepared without seeing the employees' statement of facts or their contention as filed with the Board, and the carrier reserves the right to make a further statement when it is informed of the contention of the petitioner, and requests an opportunity to answer in writing any allegation not answered by this submission.

All data submitted herewith in support of the Carriers' position has been presented to the employees or their duly authorized representative and is hereby made a part of the matter in dispute.

OPINION OF BOARD: In Rule 8 (a) of each of the Agreements here involved, under the caption of "RATES OF PAY" there is set forth:

"(a) Schedule of Rates

* * * * *

Sections, as follows:"

under which appears a list of sections, each identified by the name of a town, and the Foremen's Rate" and the Laborers' Rate" for each section. The rates vary.

Both of the Agreements have an identical Rule 9 which reads:

"DATE EFFECTIVE, DURATION, ETC.

"This agreement is effective May 16, 1937, and supersedes, as to employees covered hereby, all agreements heretofore in effect, and shall continue in effect until changed in accordance with the provisions of the Railway Labor Act."

Employees contend that the listed positions of section foreman were negotiated into the Agreement; and, so long as the work of a listed section remained, Carriers could not unilaterally abolish the section foreman's position listed in the Agreement. Further, Employees contend that Rule 9, of each Agreement, obligates Carriers to negotiate with Employees, as a contractual indispensable condition precedent, Carrier's contemplation of abolishing any section foreman's position, listed in the Agreements.

Carriers contend that Rule 8, in each Agreement, only binds Carriers as to rates of pay of occupants of the positions. They aver that Rules 8 and 9 do not encumber their management prerogative to determine number of employees and positions necessary to their operation.

The material facts can be succinctly stated:

1. On September 9, 1957, Kansas, Oklahoma & Gulf Railway Company, herein called KOG, issued a notice abolishing four section foremen's positions, effective September 13, 1957, and assigned the work of the four sections to two of the remaining sections listed in Rule 8. Thereafter, on November 1, 1957, KOG posted a notice abolishing a fifth section foreman's position, effective November 4, 1957, and assigned the work of the abolished section to and between two remaining sections listed in Rule 8. These actions were undertaken by KOG absent negotiation with Employees.

2. Midland Valley Railroad Company, herein called Midland, abolished two section foreman's positions listed in Rule 8, effective October 1, 1957. It assigned the work of the two sections to a remaining section listed in Rule 8. These actions were undertaken by Midland absent negotiation with Employees.

In essence, the Claim and issues in the instant case are like those in Award No. 1296 (1940). In that case, as here, the sections are listed in the Agreement with rate of the foreman's position on each section; and the termination clause is identical to that in Rule 9 of the Agreements now under scrutiny. The Board found in Award No. 1296:

"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."

Award No. 1296 is controlling precedent. With it as authority we find that Carriers violated the Agreements, here being interpreted, when they abolished section foremen's positions without following the procedures specified in Rule 9 of each Agreement.

The Claim in Award No. 1296 contains, in its paragraph "second," a prayer for an award of damages which is in substance the same as that in paragraph (2) of the instant claim. It prayed not only that the occupants of the abolished section foremen's position be restored to their positions and made whole; but, also, "that employes who were adversely affected by the elimination of the . . . foremen's positions" be made whole. Although in Award No. 1296 the claim was sustained in its entirety, it is to be noted that the Award issued almost fourteen years before the execution of the National Agreement

of August 21, 1954. Applying Article V, Section 1 (a) of the said National Agreement we find that the prayer "that employes (other than the foremen) who were adversely affected by the elimination of the seven foremen's positions" be reimbursed, is too vague, indefinite and uncertain. As to them, we dismiss the claim. Cf., Award No. 11156. In all other respects we will sustain the Claim.

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 Carriers violated the Agreements.

AWARD

Claim sustained in part and denied in part as prescribed in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11368, DOCKET MW-10830

Using Award 1296 as authority, the Majority erroneously finds that listing a position in the Wage Scale amounts to negotiating it into the Agreement. Although persistently advanced by the organization this Division has repeatedly repudiated this argument. It is so utterly devoid of logic and reason the opinions denying these claims have withheld extensive comment thereon.

The employes took the same position in the following cases and for support in each instance specifically cited and relied on Award 1296 for authority, but their claim was denied in each instance:

Award 6610	Referee Bakke	Denied
Award 6944	Referee Messmore	Denied

Award 7073	Referee Carter	Denied
Award 7359	Referee Larkin	Denied
Award 8768	Referee McMahon	Denied

Among other awards contrary to Award 11368, see:

Award 4992	Referee Carter	Denied
Award 6318	Referee Munro	Denied
Award 5719	Referee Guthrie	Denied
Award 5803	Referee Carter	Denied
Award 6945	Referee Messmore	Denied
Award 8015	Referee Cluster	Denied
Award 8061	Referee McCoy	Denied
Award 8768	Referee McMahon	Denied
Award 8215	Referee Guthrie	Denied
Award 8662	Referee Guthrie	Denied
Award 9608	Referee Guthrie	Denied
Award 9777	Referee La Driere	Denied
Award 10950	Referee Ray	Denied
Award 11120	Referee Dolnick	Denied
Award 11294	Referee Moore	Denied

For these reasons, we dissent.

W. M. Roberts
G. L. Naylor
R. E. Black
R. A. DeRossett
W. F. Euker

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Interpretation No. 1 to Award No. 11368

Docket No. MW-10830

Name of Organization:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Name of Carrier:

**KANSAS, OKLAHOMA & GULF RAILWAY CO.
MIDLAND VALLEY RAILROAD COMPANY**

Upon application of the representatives of the Employees involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

1. The make whole provision of the Award is limited to the holders of the seven section foremen's positions at the time of the violation of the Agreement and extends to no other employees;

2. The said section foremen shall each be made whole for loss of wages suffered because of the violation. The loss is the difference between what each of them would have earned absent the violation, less what each actually earned. The Award does not provide for any other monetary damages. Should, as to any of said section foremen, the amount actually earned exceed what would have been earned, the Award provides for no monetary award in such instances;

3. This Division has held that it has no power to compel a Carrier to restore a position. The Award in this case does not depart from those holdings;

4. The National Agreement in Mediation Case No. A-5987, dated October 7, 1959, effective December 1, 1959, is not a part of the record in this case. We are constrained, therefore, from considering what effect, if any, it has relative to what will constitute compliance with our Order of April 26, 1963, issued pursuant to the Award.

Referee John H. Dorsey, who sat with the Division, as a member, when Award No. 11368 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 25th day of June 1964.