

Award No. 12928

Docket No. MW-12466

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
NEW ORLEANS PUBLIC BELT RAILROAD**

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

(1) The Carrier violated the effective Agreement when it failed to bulletin and fill the vacancy in the position of Bridge Foreman caused by the death of Bridge Foreman Solares on January 3, 1960 and thereafter assigned all Bridge Foreman's duties and responsibilities to Bridge Supervisors, including a newly established position of Bridge Supervisor.

(2) The Carrier further violated the Agreement when, by bulletin No. 412, dated March 25, 1960, it "temporarily abolished" the position of Bridge Foreman and continued to assign the duties and responsibilities thereof to Bridge Supervisors.

(3) Mr. E. T. Bradley be allowed the difference between the Bridge Foreman's monthly rate of \$433.65 and the bridgeman's monthly rate of \$418.57 beginning with February 1, 1960 (60 days retroactive to date of claim presentation) and to continue until the Bridge Foreman's position has been properly bulletined and assigned in conformance with Agreement rules.

EMPLOYES' STATEMENT OF FACTS: Mr. S. J. Solares, the incumbent of the only bridge foreman's position on this property, died on January 3, 1960, and thereby created a vacancy in the position of bridge foreman.

However, the Carrier failed to bulletin said vacancy in conformance with Agreement rules and, under date of March 25, 1960, Maintenance of Way Department Bulletin No. 412 was issued, advising that:

"Effective March 25, 1960, position of Bridge Foreman is temporarily abolished."

in the Welding Sub-Department and in the Bridge Sub-Department; but, shall in no way affect supervisory officers above the rank of foremen, such as Track Supervisor, Bridge Supervisor, Assistant to Bridge Supervisor, nor any Civil Engineer, Assistant Engineer, or other person employed in engineering work."

It is to be noted that the "Scope Rule" excepts such Employees as Bridge Supervisor and Assistant to Bridge Supervisor, from the rules of the Agreement, but the inclusion of these supervisory employees in the "Scope Rule", is direct evidence that the parties intended that Carrier had the right to employ Bridge Supervisors and Assistant to Bridge Supervisors. By the very nature of their title, it is obvious that these officers were intended to supervise the work of the employees in the Bridge Sub-Department. These excepted supervisory officers directed the work of employees in the Bridge Sub-Department during the periods when a Paint Foreman or a Bridge Foreman were employed, and, of course, were the only supervisory officers during periods when no foreman was employed.

There is no rule in Agreement with the Organization requiring Carrier to keep position of "Bridge Foreman" or any other position filled. Employees, by the processing of this claim, are attempting to have your Third Division write a new rule into our Agreement requiring Carrier to continuously maintain an assignment as Bridge Foreman, instead of negotiating a rule in accordance with the Railway Labor Act.

The "Paint Foreman" position (title later changed to Bridge Foreman), which originated when we first negotiated an Agreement with Organization was originally only filled until September 30, 1941, a period of about five months, and was then blanked for approximately 4½ years without protest from Organization.

As was shown in Carrier's Statement of Facts, during the period of May 1, 1941, through January 3, 1960, out of a total elapsed time of 18 years, 8 months and 2 days, a Paint Foreman or Bridge Foreman was only employed for a period of 9 years, 7 months and 6 days, slightly over 50% of the time.

There being no rule in the Agreement providing for continuous employment of this Bridge Foreman, the past practice of the parties to the Agreement clearly indicates that it was not the intent of the Agreement that this position be filled at all times.

Carrier has shown that no rule of the Agreement has been violated and respectfully requests your Honorable Board to decline this claim.

OPINION OF BOARD: The regular incumbent of the position of Bridge Foreman died. The duties and responsibilities inherent in that position were transferred to another newly created position of Assistant to the Bridge Supervisor, which is outside the Scope of the Agreement. The Petitioner questions the right of the Carrier to blank and abolish the Foreman's position. A review of the record indicates that the subject position was not in existence at the time the basic Agreement was negotiated, but has been in existence and filled approximately fifty percent of the time since the adoption of the Agreement. To further supplement the factual situation, it is noted that the incumbent died January 3, 1960, that effective February 8, 1960, the position of Assistant to Bridge Supervisor was created and filled, and, finally, that effective March 25, 1960, the position of Bridge Foreman was temporary.

ily abolished. As a result of the foregoing, the Petitioner alleges two violations of the Agreement by the Carrier, one being its failure to bulletin the vacancy in the Bridge Foreman's position in conformance with Rule 13, the other being the Carrier's unilateral transfer of the Bridge Foreman's work from a position within the Scope of the Agreement to a position excepted from the Scope of the Agreement.

The principal issue to be resolved in this case is whether the Carrier is required to continue to fill the position of Bridge Foreman, or whether it has the right to blank such position. A comprehensive review of this record leads us to the conclusion that there is nothing in this Agreement which precludes the Carrier from abolishing this position, and it is axiomatic that, except insofar as it has limited itself by the Agreement, all managerial prerogatives and rights remain with the Carrier. Additionally, the Petitioner is charged with the burden of presenting to this Board a preponderant body of evidence to convince us that the work involved was historically and exclusively performed by the Bridge Foreman. The record indicates otherwise. We will, therefore, dismiss the claim for lack of proof.

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 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

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1964.