

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 Employes  
{ 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 made 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.

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 track work. On September 10 and 11, 1970, an initial conference was held by the parties on the reorganization subject. Thereafter, the Carrier prepared a proposed Memorandum of Agreement and a summary or memorandum of the points discussed ("Points Covered") at the conference and mailed both, along with a Carrier letter written by Director of Labor Relations Fremon on September 24, to the three General Chairmen of the BME. Mr. Fremon's letter reads in part:

"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 Rates of Pay schedules; however, analysis of these Awards reveals that those sustentions were based not solely upon the inclusion or Rates of Pay schedules, but upon the Rates 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.