

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36085
Docket No. MW-34493
02-3-98-3-131**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri-
(Kansas-Texas Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to allow all of its employees who worked on 'per diem' gangs on or after December 1, 1994 the per diem they were entitled to and as provided in the September 23, 1996 Letter of Agreement (System File 8900 PER DIEM/1056942 MKT).**
- (2) As a consequence of the violation referred to in Part (1) above, each employe assigned to or working on gangs listed on Seniority Rosters 7111, 7222, 7600 and 8900 on or after December 1, 1994, who were not allowed a per diem allowance in accordance with the September 26, 1996 Letter of Agreement, shall be allowed the per diem allowance as prescribed in said Agreement."**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The facts in this matter appear to be generally uncontested. On September 23, 1996, the Carrier entered into an Agreement with General Chairman Ybarra and General Chairman Lewis to resolve the issue of the application of the decision in CIC Decision No. 26 to employees on the former MKT/OKT. This Agreement provided that CIC Decision No. 26 would be applied to "Per Diem Gangs" retroactive to December 1, 1994. Pursuant to that Agreement, the Carrier made certain payments to employees on those Per Diem Gangs.

In the instant matter, Chairman Ybarra alleges that an additional group of employees, Consolidated System Gangs, had been covered by the September 23, 1996 Agreement, and were thus also entitled to the additional payments described in CIC Decision No. 26. The Carrier denied the claim, indicating that CIC Decision No. 26 only applied to certain, specific employees, but not Consolidated System Gangs. Instead, the Carrier indicated that the Claimants in this case were governed by Award 298. Conversely, the Organization claimed that the September 23, 1996 Agreement applied to both Award 298 Gangs (including Consolidated System Gangs) as well as to Per Diem Gangs.

Thus, the issue in the instant case is whether Consolidated System Gangs are entitled to any amounts discussed in CIC Decision No. 26 or are limited to those amounts indicated in Award 298. We note that the burden of proof in this matter is on the Organization to show that Consolidated System Gangs are entitled to the payments listed in CIC Decision No. 26.

The Organization takes the position that the Carrier is required to pay all gangs which receive per diem payment, including Consolidated System Gangs, the backpay as required by the September 23, 1996 Agreement. The Organization bases its claim on the "plain language" of the Letter of Agreement of September 23, 1996. According to the Organization, all types of Per Diem Gangs should be treated equally under the September 23, 1996 Agreement and, therefore, all such gangs should receive backpay retroactive to December 1, 1994. Thus, according to the Organization, any and all Per Diem Gangs, including Consolidated System Gangs, should receive backpay as required by CIC Decision No. 26.

Conversely, the Carrier takes the position that the plain language of the Agreement of September 23, 1996 is specifically limited to Per Diem Gangs governed by the On-Line Service Agreement discussed within CIC Decision No. 26. Further, the Carrier contends that all employees governed by Award 298, including Consolidated System Gangs, are

specifically not covered by the September 23, 1996 Agreement. The Carrier takes the position that there is a distinction between such gangs, and therefore the Consolidated System Gangs, and all other gangs identified in Award 298 are not entitled to any backpay pursuant to the Agreement of September 23, 1996. The Carrier requests that the claim be denied.

We extensively reviewed all the evidence in this matter. Specifically, we reviewed the following documents:

1. Agreement of DP-404 (Memorandum of Agreement) which established the provisions of Award of Arbitration Board No. 298.
2. Agreement between Union Pacific and BMW effective on October 1, 1988, establishing the Consolidated System Gangs to work over both the former Missouri Kansas Texas and the Oklahoma Kansas Texas Railroad Properties.
3. Memorandum of Agreement effective January 1, 1992, which provided a per diem allowance for employees working on the new consolidated seniority districts and the MKT System seniority territory when assigned in outfit cars or to on-line service.
4. Contract Interpretation Committee Decision No. 26 dated January 5, 1995.
5. Contract Interpretation Committee Decision No. 26 (Part II) dated January 4, 1996.
6. Agreement of September 23, 1996 confirming the application of CIC Decision No. 26 to employees working on Per Diem Gangs on the former MKT/OKT.
7. Memorandum of February 21, 1997 from Dominic Ring, Assistant Director of Labor Relations to Jack Dobrinska, Manager, Field Engineering Administration.
8. June 4, 1997 letter from General Chairman Ybarra, responding to 2/21/97 Memorandum from Ring to Dobrinska.

This was a complicated matter with numerous documents dealing with the issue at hand. We find that after an extensive review of all evidence, we must agree with the Carrier. The burden of proof in this matter falls on the Organization to show that Consolidated System Gangs are entitled to receive backpay under the Agreement of September 23, 1996. While there is some limited evidence to substantiate the Organization's claim, we have not been able to determine with any degree of certainty that in the instant case the Organization has been able to meet that burden of proof.

From a review of the language of all the relevant documents, we believe that the parties chose to differentiate between Per Diem Gangs covered by the On-Line Service Agreement and those gangs covered by Award 298. The Board finds that the parties intended that these different gangs would be governed by different standards. Based on this evidence, we believe that Award 298, and not the On-Line Service Agreement, covers Consolidated System Gangs.

As noted above, the burden of proof to show that the Consolidated System Gangs should receive backpay under the September 23, 1996 Agreement falls upon the Organization. Based upon the evidence, we believe that the Organization has been unable to meet that burden. Thus, we find that the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of July 2002.