Award No. 5725
Docket No. 5583
2-SCL-CM '69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John H. Dorsey when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYES' DEPARTMENT, AFL - CIO (CARMEN)

SEABOARD COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the controlling agreement, the senior furloughed Carman Helper R. L. Owens, Lakeland, Florida, was denied his contractual rights to service from July 5th to August 10, 1966, when the Atlantic Coast Line Railroad called a junior Carman Helper to perform the relief work during this period.

2. That accordingly, the Atlantic Coast Line Railroad be ordered to pay Carman Helper R. L. Owens $0.496 per hour, the difference between pay earned as a Stores' Department employee ($2.483 per hour) and pay received by Junior Carman Helper J. Sweet ($2.979 per hour), who filled the relief vacancy.

EMPLOYEES' STATEMENT OF FACTS: The Claimant, R. L. Owens, Carman Helper, hereinafter referred to as the Claimant, holds seniority date of 4-23-1952 on the Freight Carman Helper's roster of the Atlantic Coast Line Railroad, hereinafter referred to as the Carrier, at Lakeland, Florida. J. Sweet holds seniority date of 4-23-1952 on the same roster, their positions on roster being denoted by a 1 and 2 opposite their seniority dates. The 1 being opposite the Claimant's seniority date and he being listed before J. Sweet denotes the Claimant being the senior of the two. (See Exhibit "A.")

The Carrier called and promoted to a mechanic's position the junior furloughed Carman Helper J. Sweet to perform relief work from July 5th to August 10th, 1966.

This claim has been progressed successively on appeal, as prescribed under the controlling agreement, up to and including the highest designated officer with whom such disputes are handled and the Carrier has consistently declined to make adjustments.

The agreement effective November 11, 1940, as amended, is controlling.

Carrier reserves the right, when it is furnished with ex parte submission filed by the petitioner in this case, to make such further answer and defense as it may deem necessary and proper in relation to all allegations and claims as may have been advanced by the petitioner in its submission and which have not been answered herein. (Exhibits not reproduced.)

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

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

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

Parties to said dispute waived right of appearance at hearing thereon.

During the period involved in this dispute—July 5-August 10, 1966—vacancies at Carrier's Shops in Lakeland came into being due to Carmen taking vacations. Furloughed Carman Helper J. Sweet was used in vacation relief during the period. Claimant, a furloughed Carman Helper senior to Sweet on Carmen Helpers Seniority Roster—Lakeland, filed claim that he, because of his seniority, should have been assigned to the work.

Both Claimant and Sweet were furloughed at Lakeland Shops on November 29, 1963. Thereafter, Claimant was employed in Carrier's Store Department at Lakeland as Laborer. He was so employed during the period here involved. The collective bargaining agent for Laborers in that Department is Clerks. Claimant, under Clerks' Agreement, established seniority in the Department effective December 16, 1963.

Rule 16-A of the Shop Crafts Agreement, which includes Carmen, reads in material part:

> "2. **Furloughed employes desiring to be considered available to perform such relief work will notify the proper officer of the Carrier in writing,** with copy to the local chairman, **that they will be available and desire to be used for such work.** A furloughed employe may withdraw his written notice of willingness to perform such work at any time before being called for such service by giving written notice to that effect to the proper Carrier officer, with copy to the local chairman. If such employe should again desire to be considered available for such service notice to that effect—as outlined hereinabove—must again be given in writing. **Furloughed employes who would not at all times be available for such service will not be considered available for relief work under the provisions of this rule.** Furloughed employes so used will not be subject to rules of the applicable collective agreements which require advance notice before reduction of force.
>
> 3. Furloughed employes **who have indicated their desire to participate in such relief work will be called in seniority order for this service."** (Emphasis supplied.)

On June 16, 1966, prior to the work periods here involved, Claimant notified Carrier in writing:

> "Dear Sir: I, R. L. Owens, request relief work as 406 or Carman Helper in Lakeland or Winston Yards. /s/ R. L. Owens."

This satisfied the prerequisite for consideration of assignment of Claimant to Carmen relief work as prescribed in Rule 16-A(2).

The issue is whether Claimant, being employed on a regular assignment in the Stores Department, was available to work the relief assignment filled by Sweet.

Immaterial in the resolution of the issue is Claimant's holding seniority under more than one agreement. His rights under a particular agreement are not divested or adversely affected, in the absence of a contract bar, because of vested rights under another agreement. In the railroad industry it is commonplace for an employe to acquire and enjoy rights under more than one collective bargaining agreement on the same property.

Carrier's defense is premised on the sentence in Rule 16-A(2) which reads:

> "Furloughed employes who would not at all times be available for such service will not be considered available for relief work under the provisions of this rule."

From that it argues that inasmuch as Claimant had a regular assignment in the Stores Department he was not at all times available for relief work on Carmen assignments. This on Carrier's part is a self-serving presumption. Claimant's June 16, 1966, request for Carman Relief Work, **supra**, must on its face, in the light of Rule 16-A(2), be construed as a declaration by him that he would be available for such work. What might be the consequence of his deserting his Store Department position to accept Carmen relief assignments is not material.

Claimant had a vested contractual right to Carmen relief work to the extent of his contractual seniority rights under Carmen's Agreement. He having expressed that he would be available to fill such assignments passed the burden of proving that he "would not at all times be available for such services" to Carrier. We hold that Carrier had the contractual obligation to offer Carmen relief assignments to Claimant, merited by his seniority standing and in response to his June 16, 1966, application for such assignments, until such time as it was factually demonstrated that he "would not at all times be available for such service." Whether he would desert his Store Department position to accept the Carmen relief assignments, regardless of consequences, is, in the posture of this case, conjecture. Carrier could not presume what Claimant would do upon the contractually required offer of a Carmen relief assignment. The election was contractually vested solely in Claimant. We will sustain the Claim.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 27th day of June, 1969.

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