Award No. 16085
Docket No. CL-16511

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Claude S. Woody, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

NATIONAL CARLOADING CORPORATION

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6051) that:

(1) Carrier violated the Clerks' Agreement when it refused to allow vacations earned during the calendar year 1964 or pay therefor for employe E. F. Ulmer and one hundred ninety-five (195) other employes.

(2) Carrier shall now be required to allow vacation pay due E. F. Ulmer and the other one hundred ninety-five named claimants.

EMPLOYES' STATEMENT OF FACTS: The collective bargaining agreement between the parties covering these employes bears effective date of February 21, 1957, a copy of which is on file with the Board and by reference is made a part of submission. Rule 29 of the agreement was amended by the adoption of the Non-Operating Employes' National Vacation Agreement of December 17, 1941 as amended.

The claim was handled on the property in the usual manner through the highest designated officer of the Carrier to handle such matters and the dispute was not resolved.

Effective February 21, 1957, the National Carloading Corporation moved its operations from the Chicago and North Western Railway Company in Chicago to the Corwith, Illinois Warehouse No. 1 of the Atchison, Topeka and Santa Fe Railway Company, where the handling of the freight and related clerical work was performed by Carrier's employes under a tariff arrangement. Employes of the Chicago and North Western Railway who had prior to February 21, 1957, been engaged in performing this work for the C&NW were given the opportunity to follow the work to the Carrier under the terms of a Memorandum of Agreement dated February 5, 1957 (Employes'

loading Corporation and Santa Fe and held seniority on a 'combined National-Santa Fe seniority roster', it will suffice to state that your appeal claim is wholly without merit or support under the governing vacation and other agreement rules. It is accordingly declined for that reason, the reasons advanced by the General Manager in his decision of January 27, 1966 and the additional reasons hereinafter set forth.

Your claim and position is in direct conflict with and contrary to the position that was advanced concerning the so-called National Carloading Agreement effective February 21, 1957 and Section 6 of the Tri-Party Agreement of February 5, 1957, by:

(1) The Brotherhood of Railway Clerks in the complaint in Civil Action the Brotherhood filed in the United States District Court for the Northern Division of Illinois against the Pacific Intermountain Express Co., Inc., and its subsidiaries, National Carloading Corporation, Pacific and Atlantic Shippers and Panda Terminals, Inc., and

(2) You under oath in the United States District Court when called to testify in connection with the above complaint.

Moreover, in advancing the claim and position you have in the instant dispute you are attempting to impose on this Carrier obligations and penalties that (1) should have been assumed by the National Carloading Corporation under the terms of the aforementioned National Carloading Agreement effective February 21, 1957 and the Tri-Party Agreement of February 5, 1957, and (2) were not imposed on the Chicago and North Western Railway Company when the work of and the employes assigned to the handling of National Carloading Corporation's business were transferred from the Chicago and North Western Railway Company to the Santa Fe.

Yours truly,

/s/ O. M. Ramsey"

(Exhibits not reproduced.)

OPINION OF BOARD:

JURISDICTION

We must first consider Carrier's position that this Board has no jurisdiction to consider this case, for the reason that Claimants were employed as "freight forwarders" which function is allegedly not a carrier activity. Section 1, First, of the Railway Labor Act, states that the term "carrier" shall include any " * * * carrier by railroad, subject to the Interstate Commerce Act, * * * and which operates any equipment or facilities or performs any service * * * in connection with the transportation, delivery, elevation, transfer in transit, * * * storage, and handling of property transported by railroad * * *." The terms "freight forwarders" or "freight forwarding" may have a peculiar definition under the terms of the Interstate Commerce

Act, but we are not here concerned with such terms as defined therein. Instead, we must consider the activities, functions, or work performed, in determining whether or not this dispute arises out of subject matter over which we can assume jurisdiction. The record reflects no suggestion that these activities were not assumed by carrier to be performed as carrier activities. We must conclude that Carrier accepted the work because of its facilities and its ability to connect said function with the transportation and handling of property transported by railroad. (See Fourth Division Award No. 2023.)

FACTS

Claimants became employes of Carrier pursuant to a tripartite agreement between Carrier, the Organization, and the National Carloading Corporation, dated February 5, 1957, effective February 21, 1957, whereby Carrier agreed to perform certain work for National until an agreed tariff be terminated by National. Paragraph 6 of said agreement reads as follows, to wit:

> "The National Carloading Corporation agrees that in the event the work * * * is returned to National, the latter will take over the employes then employed by Santa Fe in the combined National-Santa Fe seniority district without loss of their seniority."

Under said agreement, certain employes were to be carried on a combined seniority roster.

Carrier and the Organization entered into a separate bilateral agreement, dated January 17, 1961, whereby the 1941 National Vacation Agreement, as amended, was adopted to apply to Claimants.

On or about August 1, 1965, National terminated its tariff arrangement with the Carrier, at which time Claimants had not yet taken their accrued vacations.

An injunction action was litigated in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 65C1199, wherein the Organization, under court order, caused National and/or its affiliates to "take over" the employes acquired by Carrier under the tripartite agreement without loss of seniority.

ISSUE

The question to be determined is whether Carrier is obligated to pay Claimants for vacations accruing prior to the date said Claimants were returned to National.

CARRIER'S ARGUMENT

Carrier contends that the tripartite agreement and, in particular, numerical paragraph 6 thereof, hereinbefore recited, together with the pleadings and testimony taken in the aforementioned court action, relieved Carrier of any obligation accrued or accruing in regard to Claimants. It further contends that the vacations in question, regardless of having been "earned" by Claimants, were "payable" only when taken, and not having been taken prior to August 1, 1965, payment therefor would only be properly made by National.

HOLDING

The National Vacation Agreement, Article 8, as amended, reads as follows, with emphasis added, to wit:

> "**The vacation provided for in this Agreement shall be considered to have been earned when the employe has qualified under Article I hereof. If an employe's employment status is terminated for any reason whatsoever,** including but not limited to retirement, resignation, discharge, non-compliance with a union shop agreement or failure to return after furlough **he shall at the time of such termination be granted full vacation pay earned up to the time he leaves the service, including pay for vacation earned in preceding year or years and not yet granted,** and the vacation for the succeeding year if the employe has qualified therefor under Article 1, * * *."

This Board has interpreted the foregoing provision in Award No. 15913 (Referee McGovern) to the effect that "earned" means "payable." It is exceedingly difficult to find any other connotation for the word "earned" as it is used in the aforementioned agreement.

We find no ambiguity in the Agreements above referred to. Numerical paragraph 6 of the tripartite agreement does not absolve Carrier from performance of obligations which matured prior to the take-over by National. Nor do we find such to be the Order of the Court in the case above referred to. If we place a contrary interpretation on this provision, it will constitute not only a redraft of that agreement, but a complete disregard for the bilateral agreement subsequently consummated by the parties. We are of the opinion that the two agreements are complimentary insofar as they pertain to the issues before us. To "take over the employes * * * without loss of their seniority" does not mean that said employes would be deprived of their accrued vacations by the occurrence of the condition subsequent. Nor do we find any express intention to charge National with the expense of these vacations. The preservation of seniority rights does not express such intent.

"Seniority" is, according to Webster, "a privileged status attained by length of continuous service." It is a standard for determining the order in which individuals will obtain benefits as they become available in the future. To agree to the preservation of seniority rights is not, however, to agree to answer for the debts of another or to pay pre-existing indebtedness.

If such was the understanding and intent of Carrier at the time the tripartite agreement was executed, then same should have been manifestly expressed in said agreement.

For the reasons above stated, the claim will be sustained as presented.

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 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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of February 1968.

CARRIER MEMBERS' DISSENT TO AWARDS 16085 AND 16086, DOCKETS CL-16511, CL-16676 (Referee Claude S. Woody)

The claimants were not "employes", nor was the AT&SF Railway Co. a "Carrier" as contemplated by the Railway Labor Act while performing the work of a freight forwarder.

At all times relevant to this dispute, the claimants were engaged in accomplishing the freight handling work of National Carloading Corporation, a freight forwarder. Conclusive proof of this fact is found in the organization's verified complaint in the Injunction Action litigated in the U.S. District Court for the Northern District of Illinois, Eastern Division, Case No. 65C1199, as follows:

> "5. Prior to July, 1944, **employes of NCC engaged in the freight handling operations of the freight forwarding business of NCC** in Chicago, Illinois. On and after July 3, 1944, such freight handling operations were transferred by NCC to the Chicago and North Western Railway Company, hereafter called 'C&NW'. C&NW agreed that all NCC employes would 'follow their work', that they would retain their NCC seniority when working for C&NW, and that the terms and conditions of the collective bargaining agreement then in effect between NCC and BRC would apply to them and to all employes subsequently hired by C&NW for **the handling of such freight forwarding work** of NCC. Thereafter, NCC and C&NW agreed to and did establish a joint Chicago & North Western-National Carloading seniority roster **whereby employes engaged in freight handling of NCC freight forwarding business by C&NW** maintained seniority rights with both companies.
>
> 6. **On or about February 5, 1957, Defendant NCC transferred the freight handling operations of its freight forwarding business in Chicago, Illinois from C&NW to the Atchison, Topeka and Santa Fe Railway Company,** hereafter called 'Santa Fe'. Such freight handling has thereafter been accomplished at a facility owned by the

Santa Fe and located at 3750 West 47th Street, Chicago, Illinois, herein sometimes referred to as '47th Street Corwith'.

7. On or about February 5, 1957, Defendant NCC and Plaintiff entered into an agreement, to which the Santa Fe is also a party, which provides, **inter alia**, that:

> **(a) The employes of C&NW who then engaged in the handling of NCC's freight forwarding work would be transferred to Santa Fe without loss of seniority."**

This work was consistently treated as a unit belonging to NCC and its employes or successors, even to the extent of expressly stating that NCC employes would "follow their work." The fact AT&SF Rwy. Co. accepted this work from NCC via C&NW did not alter the fact that it was a freight forwarder's work, and not subject to the jurisdiction of this Board. AT&SF Rwy. Co. was simply standing in the shoes of NCC until NCC again took over its activities.

Merely because the AT&SF Rwy. Co. was a "carrier" for some purposes does not necessarily mean it is a "carrier" in all of its activities. This clearly was not a carrier function, but that of a freight forwarder of which this Board does not have jurisdiction.

The majority committed error in this case by assuming jurisdiction.

Awards 16085 and 16086 are in error on the merits. Award 15913 is distinguishable on the facts, and, furthermore, it does not hold that "earned" means "payable". Obviously, these words are not synonymous. Claimants had earned the right to a vacation, but that right had not matured, and did not mature when NCC took over. This was a continuing employment arrangement, as previously indicated, whereby the employes and the work moved as a unit from NCC to C&NW to AT&SF Rwy. Co. to NCC.

The majority's narrow interpretation of Numerical Paragraph 6 of the tripartite agreement limiting the employes' rights to seniority only, is clearly in conflict with Judge Perry's Order in Federal District Court Case 65C1199 mentioned above. Judge Perry enjoined NCC from withdrawing seniority rights from these employes, and, in addition, enjoined NCC from "withdrawing or diminishing any rights of employes on the combined Santa Fe-National district seniority roster heretofore had, * * *." Paragraph E, R. p. 98. All of claimants' rights without regard to their nature or source, including the unmatured right to a vacation, were clearly construed in the court case as following the claimants to NCC and were included in the Order.

The majority interpretation of the agreement is in error, and we dissent.

W. M. Roberts
R. A. DeRossett
C. H. Manoogian
J. R. Mathieu
C. L. Melberg

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARDS 16085 AND 16086, DOCKETS CL-16511 AND CL-16676

(Referee Claude S. Woody)

The dissent is but a reiteration of arguments made and rejected when the cases were under consideration. Those arguments were clearly and correctly answered in the Awards.

Furthermore, to argue that under the Railway Labor Act, Claimants were not "Employes" and the AT&SF Railway Company was not a "Carrier" while or because engaged in work of loading and unloading freight pursuant to the terms of the Railway Company Tariff, is, quite obviously, wholly inconsistent with reality.

D. E. Watkins
Labor Member
3-14-68

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