NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24632

THIRD DIVISION

Docket Number NW-21531

Robert J. Ables, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(St. Johnsbury & Lamoille County Railroad, Inc.
(M.P.S. Associates, Inc.
(Vermont Public Service Board
(Lamoille Valley Railroad Company
(Wabash Valley Railroad Corporation

ON REMAND FROM UNITED STATES DISTRICT COURT
FOR TEE DISTRICT OF VERMONT: CIVIL ACTION NO. 79-142

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

(1) Each of the below named employes shall be paid in full for all vacation time due them in the calendar years of 1972 and 1973 (specified below) which each of then earned in the calendar years of 1971 and/or 1972 (Carrier's File - Union M.W.E.)

NAME	LENGTH OF VACATION (DAYS) 1972	1973	TOTAL
L. J. Bray	15	15	15
K. C. Hill	15	15	30
H. C. Wood	15	15	30
R. F. Cleveland	15		15
L. V. Smith	5	15	20
R. G. Perkins	15	15	15
N. J. Bergeron	5	15	20
G. F. Gardner	15		15
W. H. Arel	10	15	25
R. E. Lamphere	10	10	10
W. R. Hooker	10		10
E. H. Hill		10	10
R. E. Jettie	10	10	10
D. F. Bigelow		10	10
W. G. Reeve	10	10	10
R. R. Phillips	10	10	10
A. A. Fournier	10		10
F. E. Garrow	10	10	10
H. F. Raymond	10	10	10
K. J. Patch	10		10
K. J. Mercier	10		10
A. M. Goodell	10	10	10
J. M. Bryce	10	10	10
R. R. Judd	10		10
A. J. Willey	10		10

OPINION OF BOARD:

I. NATURE OF THE CASE

This action by the National Railroad Adjustment Board, Third Division, is taken pursuant to an order of the United States District Court for the District of Vermont, remanding this dispute between the parties to this Board for rehearing. (Civil Action File No. 79-142 (1981).)

In its opinion and decision before remand, this Board decided that the St. Johnsbury and Lamoille County Railroad had violated its collective bargaining agreement with the Brotherhood of Maintenance of Way Employes concerning certain vacation claims which had matured under the predecessor Carrier.

In remanding this dispute to this Board, the Court noted that the "[o]perati of the railroad has changed hands so many times since the vacation pay was earned that the question of which organization [railroad] must compensate the employees has no ready answer". The Court reviewed the Board's decision "for compliance with the terns of the Railway Labor Act", but left open other stated bases for review in the event the case was returned to the Court for enforcement after rehearing. The Court was particularly concerned about due process and the Board's conclusion that a successor carrier is bound as a matter of law to compensate its employees for vacation benefits which accrued during the operation of the railroad at an earlier date by another carrier.

On notice requirements before decision by this Board, the Court found it to be "especially troubling" that the carrier against which the vacation credits were earned, i.e., the predecessor carrier, St. Johnsbury and Lamoille County Railroad, (also known as the Pinsley Interests, or, as named at the time of the rehearing before this Board, M.P.S. Associates, Inc.) had not been given notice by the Board to appear at the hearing before the Board, in May 1976, to consider the basic claims of the employees for vacation pay. The Court declared it was unwilling to enforce the Board's award until it was certain that each defendant (before the Court) against whom enforcement may properly run, has had a fair opportunity to present its case to the Board. The Court declined to enforce the Board's award because, in its opinion, the proceedings were not conducted in compliance with 45 U.S.C. §153 First (j) of the Railway Labor Act requiring the Board to give notice to all parties necessary to resolve the vacation pay dispute. The Court decided that the proper disposition of the case on motions before the Court was a remand to the Board for further proceedings on the basis that the Court was "unwilling to enforce an award which does not clearly name the parties against whom it is enforceable and which results from proceedings before the NRAB, of which not all interested parties were given notice".

In sum, the Court remanded the case to the Board to permit the Board to reexamine its earlier findings that successor carriers are bound, as a matter of law, to pay for accrued vacation during the operation of the railroad before the sale of the property and to give all the defendants (in the Court proceeding) an opportunity to be heard concerning the merits of the original claim for vacation pay, before the Court will make any judgment as to which party, if any, a new award of the Board may be enforced.

II. BOARD ACTION ON REMAND

On September 4, 1981, by letter to each of the parties in the present proceeding, the Board (acting without referee) gave notice of hearing "for the purpose of orally reviewing and arguing the evidence already presented" and that the Board "is not disposed to accept evidence not heretofore presented*.

By further notice to the parties on September 25, 1981, the Board (still acting without referee) set the date for the hearing on November 4, 1981 and emphasized again that the Board acts in an appellate capacity on authority of Section 3, First of the Railway Labor Act, as amended, and as an appellate board "the National Railroad Adjustment Board does not conduct evidentiary hearings. This Board's jurisdiction is limited to a review of the material and arguments as developed by the parties to the dispute during their on-property handling thereof." (Emphasis in the original.)

All designated parties appeared at the hearing through counsel. The proceedings were not transcribed.

A. Positions Of The Parties Before The Board After Remand

The essential position of each party follows:

1. St. Johnsbury And Lamoille County Railroad, Inc.

The St. Johnsbury and Lamoille County Railroad, Inc. concluded that the Pinsley Corporation (now M.P.S. Associates, Inc.), the owner and operator of the railroad at the time vacation pay accrued to the employees, should pay the claims on three grounds. First, equitable estoppel should be invoked, requiring M.P.S Associates, Inc. to pay the claim because it would be unfair to require the St. Johnsbury and Lamoille County Railroad, Inc. to pay the claims as it was not the wrongdoer and the Brotherhood of Maintenance of Way Employes had slept on its rights in proceedings before the Interstate Commerce Commission (permitting abandonmen and sale of the railroad to the State of Vermont), thus, misleading the State as the purchaser concerning outstanding obligations. Second, there was no substantial evidence that the claims by the employees were made in accordance with the Railway Labor Act, particularly with respect to the failure of the employees to make timely claims for vacation pay. Third, that the Board is not empowered to order a subsequent carrier to pay the debt of a prior carrier; there is no court decision under the Railway Labor Act granting enforcement against a successor company; it did not acquire the assets, accounts recoverable or payable of the predecessor railroad; that the St. Johnsbury, etc. did not buy out a prior company, only that it leased it from the State of Vermont, thereby adopting the old name, thus, the Board lacks power to order a subsequent carrier to pay damages; and that, even if the Board has such power, it should not exercise it because there has been no continuity of ownership.

2. Pinsley Interests (now M.P.S. Associates, Inc.)

Pinsley was never aware of the claim on the property when it owned the railroad. The new operator did not deny the claim when it was presented, it said only that it was not liable to pay such claims, but did not refer the claims to Pinsley; thus, Pinsley did not have an opportunity to argue time limits in filing the claims and that, in any event, labor contracts do not carry forward automatically.

3. Vermont Public Service Board

The only issue is whether the State (or the Vermont Public Service Board) is a carrier. The State maintains it is not. In none of the operating agreements did the State have any responsibility for operating the railroad. It was not signatory to any waiver agreement concerning vacations.

4. Lamoille Valley Railroad Company

The substantial issue is whether a successor operator is liable for the mature debts of the predecessor company and there is no federal case law on point. However, the Lamoille Valley Railroad did not exist at the time of the National Railroad Adjustment Board award on the vacation claims and although there can be constructive satisfaction of the collective bargaining agreements under the Galveston case (351 F2d 183 (1965). CA 5th Cir.), that decision does not provide for automatic continuation of that agreement. As an equitable consideration, at the time this party made a new agreement with the employees on vacation pay, there was no reference to past vacation claims; thus, the Lamoille Valley Railroad Company should not be held responsible for those claims. The Lamoilie Valley Railroad Company also complained that it did not have an opportunity to introduce new evidence under the Board's procedures on remand.

5. Wabash Valley Railroad Corporation

The Wabash Valley Railroad Corporation is not the legal successor to the predecessor company. The claim is barred because the Vermont Northern Railway, predecessor to the Wabash Valley Railroad Corporation, made a new agreement with the Union on vacations, not including any old vacation claims. In any event, the claims should be denied on grounds stated by the Board in its initial determination of the vacation pay claims, based on equitable estoppel and laches.

6. The Brotherhood of Maintenance of Way Employes

This is a one issue case. It is whether the sale of the property automatically terminates the collective bargaining agreement. The Brotherhood concludes that the Board has jurisdiction over the claims. It argues further that: the Court has asked this Board to interpret termination provisions in the contract but that the Court cannot modify, much less terminate, a Section 6 notice, which was not given, based on termination of prior operations; public policy requires continuous operation which has been supported by the Supreme Court; collective bargaining agreements under the Railway Labor Act may be amended only under Section 6 procedures; any analysis about the obligations of successor companies under the National Labor Relations Act is not germane to this dispute because that Act excludes railroads; the new agreement with the Northern Vermont Railroad modified the existing contract only to the extent it incorporated national agreements on vacations; and that any arguments concerning procedural defects should have been presented at the first hearing.

B. Due Process

The State of Vermont, as the purchaser* of the St. Johnsbury and Lamoille County Railroad (and its name) is a carrier within the meaning of the Railway Labor Act. 45 USC 151. A state-owned railroad engaged in interstate commerce is subject to the Railway Labor Act. Taylor v. Fee (CA 7), 233 F2d 251, rev'g 132 F. Supp. 356. aff'd 353 US 553, 1 L Ed 2d 1034, 77 S Ct 1037; United Transportation Union v. Long Island Railroad Co. et al., (No. 80-1925, Decided March 24, 19821 455 US 678 (19821.

It was this railroad against whom employees filed their claim. The Board gave notice of hearing in satisfaction of 45 USC $153(j) which requires due notice of hearings to employees and to "the carrier or carriers involved in any disputes submitted to them" (the Board).

There was not, at the time, any defense against the claim based on timeliness. Any such defense therefore is waived, particularly as to a minor dispute before the National Railroad Adjustment Board. 45 USC 151 et seq.

* The "Agreement Of Purchase And Sale" on September 7, 1973 between The Vermont Transportation Authority "an instrumentality of The Sovereign State of Vermont" and the St. Johnsbury and Lamoille County Railroad, describes the Vermont Transportation Authority as the purchaser of "the aforesaid property".

On the face of the claim, there was no apparent question as to the carrier responsible for paying the claim, if valid. There was no obligation of which this Board is aware to undertake discovery to determine corporate or intercorporate relationships, or lease, or acquisitions, or mergers, or other such arrangements, to determine which corporate entity was speaking for the carrier which was running the railroad. It was, and it continues to be, this Board's opinion that in the adjustment of minor disputes, which is the mission of this Board under the Railway Labor Act, it is sufficient, unless there are apparent contrary indications, to name the employer of the employees who have filed the claim under an existing collective bargaining agreement and that it is not the obligation of an Adjustment Board to sift through corporate relationships, or sell and purchase agreements, to determine which carrier (of possibly several, as it later developed in this dispute) shall pay the claim. We expect the designated carrier to pay the claim, if determined to be valid. It is the duty of the named carrier to give the Board notice of other potentially responsible parties to anticipate interpleader or indemnity considerations - none of which was done here. We do not consider therefore that there was any infirmity in the Board's notice requirements about hearing the claim.

On May 19, 1977 this Board sustained the claims of named employees for vacation pay for specified time and it ordered the St. Johnsbury and Lamoille County Railroad (as owned by the State of Vermont) to pay those claims. Thus, the claimants, the amounts due, and the carrier which was to pay those claims were clear.

Any contest about which of the corporate entities is to pay the claim is to be decided by the federal courts, whatever may be the cross-claims between corporate interests.

C. Successor Railroad Required To Pay Claim

The Board holds to its view that the St. Johnsbury and Lamoille County Railroad, at the time of the Board's award, is required to pay the vacation claims under the collective bargaining agreement existing at the time.

The District Court has raised the question whether the collective bargaining agreement between the St. Johnsbury and Lamoille Railroad, before the sale, and the Brotherhood of Maintenance of Way Employes terminated, automatically, upon the sale of the railroad to the State of Vermont. The Court refers to cases under the National Labor Relations Act which indicate that there is such automatic termination. Also, the court notes that there is no decisional law under the Railway Labor Act on point.

The Railway Labor Act, pre-dating the National Labor Relations Act and remaining fundamentally different with respect to the making, duration and termination of collective bargaining agreements, case law under the National Labor Relations Act cannot be controlling for the same or similar point under the Railway Labor Act.

The absence of a firm decision under the Railway Labor Act on the matter of the obligation of a successor owner of a railroad assuming collective bargaining obligations of its predecessor indicates more that neither labor nor management has seriously questioned the survivability of the collective bargaining agreement in such successor company than that such absence limits its survivability.

Over a period of more than 50 years under the Railway Labor Act, arbitration decisions, some decisional law, and public policy have established that the collective bargaining agreement of the parties does not terminate automatically upon the sale of the property and that the successor carrier is liable for obligations incurred by .its predecessor.

The Railway Labor Act prescribes detailed procedures that must be followed, before a collective bargaining agreement may be terminated or modified. For example, §2 Seventh of the Act, 45 USC §152, states that a carrier cannot change the rate of pay, rules, or working conditions of its employees, except as prescribed in such collective bargaining agreement or in Section 6 of the Railway Labor Act.

Courts have consistently held that absent compliance with Section 6 of the Act, agreements cannot be modified. Supporting authority: 421 F2d 660 (6th Cir. 1970); 351 F2d 183 (5th Cir. 1965); 439 F2d 1359 (5th Cir. 1971); 472 F. Supp. 104 (D.C.N.Y. 19791; and 551 F2d 1141 (9th Cir. 1977).

Decisions of the National Railroad Adjustment Board include Award No. 4756 in which the predecessor carrier was the Galveston Wharves Company. The dispute involved the Maintenance of Way Organization. This Board held that formal ratification or renegotiation is not necessary to insure the continued life of an agreement after a sale. On the contrary, it was held that the agreement survives a sale if (1) no Section 6 notice has been given; and (2) the successor carrier "constructively ratifies" the agreement by complying with virtually all of its provisions. The rationale of this award has been followed by this Board in Awards Nos. 4757, 4758, 4759 and 4760.

The nature of the railroad industry requires that a collective bargaining agreement survive a change in ownership. This is clearly implied in recent decision by the U. S. Supreme Court. United Transportation Union v. Long Island Railroad Company, et al., 455 US 678 (1982).

Here, the Long Island Railroad, formerly under private ownership, was acquired by New York State in 1966. Some 13 years later, the United Transportation Union, representing the employees of the railroad, and the railroad, failed to reach an agreement after conducting collective bargaining negotiations pursuant to the Railway Labor Act. Also, mediation efforts failed to produce an agreement. This condition triggered a required cooling off period under the Act, at the expiration of which the Act permitted the union to resort to strike. Anticipating that New York would challenge the applicability of the Railway Labor Act to the Long Island Railroad, the union sued in Federal District Court, seeking a declaratory judgment that the labor dispute was covered by that Act, and not the Taylor Law, the New York law prohibiting strikes by public employees. The railroad then filed suit in a New York state court seeking to enjoin an impending strike by the union under the Taylor Law. Before the state court acted, the Federal District Court held that the railroad was subject to the Railway Labor Act and that the Act, rather than the Taylor Law was applicable. The District Court rejected the railroad's argument that application of the Railway Labor Act to a state-owned railroad was inconsistent with National League of Cities v. Usery, 426 U.S. 833, wherein it was held that Congress could not impose the requirements of the Fair Labor Standards Act on state and local governments. The Court of Appeals reversed, holding that the operation of the railroad was an integral state governmental function, that the Railway Labor Act displaced "essential governmental decisions" involving that function, and that the state's interests in controlling the operation of the railroad outweighed the federal interests in having the Federal Act applied.

The Supreme Court reversed the Court of Appeals and held in the Long Island Railroad case, among other things, that application to a state-owned railroad of Congress acknowledged authority to regulate labor relations in the railroad industry does not so impair a state's ability to carry out its constitutionally preserved sovereign function as to come in conflict with the Tenth Amendment. Pp 4-12. Also, the decision in National League of Cities, supra, was distinguished. Further, the court held that operation of a railroad engaged in interstate commerce is clearly not an integral part of traditional state activities generally immune from federal regulation; and that federal regulation of state-owned railroads, whether freight or passenger, simply does not impair a state's ability to function as a state.

The Supreme Court added that to allow individual states by acquiring railroads -

"to circumvent the federal system of railroad collective bargaining, or any of the other elements of federal regulation of railroads, would destroy the longstanding and comprehensive uniform scheme of federal regulation of railroads and their labor relations thought essential by Congress and would endanger the efficient operation of the interstate rail system. Moreover, a state acquiring a railroad does so knowing the railroad is subject to such schema of federal regulation". (Emphasis added)

This opinion was delivered by the Chief Justice for a unanimous court.

The decision of the Supreme Court in 1982 in the Long Island Railroad case followed earlier similarly held views of the same court. Brotherhood of Ry. & S.C., etc. v. Florida E.C. Ry. Company, 384 US 240, 245 (1966). There, the Supreme Court referred to the need to avoid "calamities" by the interruption of rail service. It noted that the Railway Labor Act contains detailed procedures that must be followed before any agreement is terminated. The Court emphasized that those procedures must be strictly construed: "... any power to change or revise the basic collective bargaining agreement must be closely confined and supervised. These collective bargaining agreements are the products of years of struqqle and negotiation . .." ibid at page 246.

It may be fairly inferred from these decisions not only that the State of Vermont is a carrier within the meaning of the Railway Labor Act but that such Act must be read and applied under its own authority, traditions, conventions, practice and policy, as to such questions as continuity of the collective bargaining agreement. As there was no Section 6 change to the collective bargaining relationship in issue and the railroad was not abandoned, or anything similar, there is substantial basis to conclude that the collective barqaining agreement survived the sale of the railroad to the State of Vermont and that the employees had continuing rights thereunder, including unpaid vacation benefits.

Not all the equities in this case favor the employees or their organization (because of their calculated silence in proceedings before the Interstate Commerce Commission when that agency was considering the predecessor owner's request for authority to abandon the railroad and the concessions by other railroad employee organizations to induce the Commission to permit operation of the railroad upon the sale to the State of Vermont). But, the employees who have filed claims for earned vacation pay are within their rights to be paid such claims and the party to pay the claim is the railroad for whom the employees worked at the time the claim was made which was the St, Johnsbury and Lamoille Valley Railroad, as owned at the time by the State of Vermont. Such railroad, at the time of the claim, had due notice and opportunity to defend its interests in proceedings before this Board.

The Board, therefore, reaffirms prior Award No. 21524

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 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.

A W A R D

Board Award No. 21524 in Docket No. MW-21531, dated May 19, 1977, is reaffirmed in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day of January, 1984