Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28635
THIRD DIVISION Docket No. MS-28218
91-3-87-3-799

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

(Vincent T. Dicherico, Leslie T. Morgan, Kenneth Orman,
(John P. Halliday, Richard Hedge, August Trejo, James
(Howard, Howard Lewis, John W. Tamborski, William Pratt,
(Truman Swiney, Robert L. Capp, Barry Schilling, Bob
(Derrick, Donald Hostnick, Bill D. Morgan, and Jeff
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PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"The Railroad broke its promise that CLAIMANTS would continue to do all ramping and deramping work at the Railroad's Oakland, California facility no matter who the Railroad contracted with to operate the facility. The written agreement in dispute is attached as Exhibit A and so incorporated in this notice."

FINDINGS:

The Third 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 employes 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.

I. INTRODUCTION

This case comes to us from the United States Court of Appeals for the Ninth Circuit. 809 F.2d 607 (9th Cir. 1987). Ruling that this Board has exclusive jurisdiction to decide this case, the Ninth Circuit wrote,

"Plaintiffs argue that the Railway Labor Act does not apply because one of the defendants, [Western Pacific] Transport, is not a railroad. However, it is necessary to look at the substance of the dispute. E.G., id.; Pan American World Airways v. United Brotherhood of Carpenters, 324 F.2d 217 (9th Cir. 1963), cert. denied, 376 U.S. 964 (1964). Viewed from this perspective, this case is essentially a railway labor dispute between the railroad and certain of its employees. This dispute arises out of a labor agreement negotiated by a labor union on behalf of certain of its members and requires interpretation of the labor agreement. When a railway labor dispute involves the interpretation of a collective bargaining agreement, the Railway Labor Act requires that it be submitted to arbitration; the federal courts do not have jurisdiction to resolve the dispute. International Ass'n of Machinists v. Aloha Airlines, 776 F.2d 812, 815 (9th Cir. 1985); Fechtelkotter v. Air Line Pilots Ass'n Int'l, 693 F.2d 899 (9th Cir. 1982). [Footnote omitted.] Congress designed the Act to leave the resolution of many types of railway labor disputes to the machinery of arbitration, mediation, and bargaining. Klemens v. Air Line Pilots Ass'n Int'l, 736 F.2d 491, 497 (9th Cir. 1984); e.g., Crusos v. United Transp. Union, Local 1201, 786 F.2d 970 (9th Cir. 1986). The Act reflects strong policies in favor of arbitration and against judicial intervention. Fechtelkotter, 693 F.2d at 901.

The defendants argue that there is no agreement binding the parties. Their position could lead to the conclusion that no interpretation of an agreement is involved because there is no agreement at all and that federal court jurisdiction is therefore proper. E.g., Goclowski v. Penn Central Transp. Co., 571 F.2d 747, 756 (3rd Cir. 1977). However, Switchmen's Union of North American v. Southern Pacific Co., 398 F.2d 443, 447 (9th Cir. 1968), held that 'where the position of one or both of the parties is expressly and arguably predicated on the terms of the agreement,' the suit involves the interpretation of an agreement and must be submitted to arbitration. The plaintiffs have expressly predicated this action upon the terms of the agreement. See, e.g., Brotherhood of Railway Carmen v. Pacific Fruit Express Co., 651 F.2d 651, 652 (9th Cir. 1981) (court followed Switchmen's Union and held that if agreement is 'arguably susceptible' to party's construction it must be submitted to arbitration pursuant to the Act).

The Court of Appeals ruling obviates our otherwise numerous and serious doubts concerning this Board's subject matter jurisdiction over any aspect of this case.

II. BACKGROUND AND SUMMARY OF THE FACTS

For more than 25 years prior to 1979, the former Western Pacific Railroad Company (WPRR), which merged into the Carrier in 1982, owned but did not operate its ramp facility at Oakland, California. In the late 1970s, the Western Pacific Transport Company (WPTC), a wholly owned subsidiary of the WPRR, loaded and unloaded trailers from rail cars at the ramp facility. Also, WPTC performed local cartage functions. Both the ramp workers and the truckers were employees of WPTC. They were represented by the Brotherhood of Teamsters and Auto Truck Drivers Local 70 of Alameda County (Union).

According to the Union's Assistant Shop Steward, the WPRR asked the Union, in early 1979, if it would agree to permit the WPTC to spin off the ramp functions from the cartage service. By splitting the work between two separate corporate identities, the WPTC would avoid making duplicate retirement contributions on behalf of the employees performing the drayage work. [See the March 21, 1988 Declaration of Leslie Morgan.] The Union was amenable to separating the ramp facility from the trucking operation but it was concerned that the WPRR could, at any time, substitute contractors at the ramp facility leading to the permanent displacement of the current ramp employees. In his February 5, 1986 Declaration, Union Business Agent Martin L. Frates emphasized that the Union's consent to splitting the work was conditioned on the WPRR giving present ramp employees successor rights.

The parties struck a bargain.

On April 16, 1979, the Union, WPTC and Feather River Intermodal Services Company (FRISCO), the new company created by the WPTC to operate the ramp, entered into what the parties generically label the "Transfer Agreement," to govern the shifting of ramp work from the WPTC to FRISCO. The last sentence of the prefatory paragraph of the Transfer Agreement reads: "Prior to executing this Agreement, the Employer agrees that it shall be submitted to the Western Pacific Railroad Company for review and approval." (The Transfer Agreement does not identify the party referred to as "Employer" but the heading of the Agreement alludes only to the Union and the WPTC, although FRISCO signed the Agreement as a primary party. This suggests that the "Employer" was the WPTC.) WPRR Vice President John Gray approved the Transfer Agreement immediately before the parties signed it. Article 1, Paragraph 7 of the Transfer Agreement, which is at the center of the controversy herein, provides:

"The continued successor rights of F.R.I.S.C.O. employees in the event the ramping and deramping work is contracted out to another carrier shall be guaranteed by the Western Pacific Railroad Company."

Shortly after April 16, 1979, WPTC employees elected either to stay with WPTC or to transfer with their seniority intact, to FRISCO. Leslie Morgan, in his January 21, 1986 statement, declared that generally, the more senior employees went with FRISCO because they believed that the WPRR had forever guaranteed them the right to perform the ramp work. Claimants herein are seventeen of the approximately nineteen employees who relinquished their employment with WPTC and began working with FRISCO under the auspices of the Transfer Agreement. The Union and FRISCO later incorporated the Transfer Agreement into their collective bargaining agreement via a December 13, 1979 Rider. [See Article 7 therein.]

There are two major factual disputes surrounding the negotiations culminating in the Transfer Agreement. First, Claimants contend that a WPTC negotiator, Kent Goldsworthy, orally promised the Union that Claimants would be guaranteed lifetime employment on the ramp regardless of what corporate entity the WPRR retained to perform the work. The Carrier denies that there was any direct oral agreement between the WPRR and the Union. Second, Claimants interpret Article 1, Paragraph 7 of the Transfer Agreement as a guarantee of lifetime employment. Conversely, the former President of WPTC, Dennis Van Wagner, in his Declaration dated February 20, 1986, claimed that Article 1, Paragraph 7 was never intended to confer Claimants with lifetime employment. Mr. Goldsworthy, who became the General Manager of FRISCO, referred to the provision as guaranteeing FRISCO employees the ramp work should it be contracted to an independent carrier. [Affidavit of Kent Goldsworthy dated June 2, 1980] This Board will address these factual disputes later in its Opinion. Nevertheless, Article 1, Paragraph 7, at the very least, can be aptly characterized as a successor rights clause.

In 1980, the WPRR sold FRISCO to Reacon, a corporation totally unaffiliated with the WPRR. Reacon agreed to be bound by the existing collective bargaining agreement between FRISCO and the Union which expired in 1982.

John Skonberg, FRISCO's chief spokesperson during the 1982 negotiations, declared that in 1982, FRISCO's goal was to reach a single, unified labor agreement vitiating all side bar contracts and past practices. [See Declaration of John M. Skonberg dated March 3, 1986.] Most notably, FRISCO sought to eliminate the successorship clause. Fearful that the successor rights provision would not be renewed, the Union's Business Agent wrote to now WPRR President, John Gray, asking whether the WPRR would approve successor rights for FRISCO employees. [See letter from Business Agent Jack Spratt to John Gray dated September 24, 1982.] Mr. Gray responded on October 1, 1982 as follows:

> "As you are aware, Feather River Intermodal Services Company and The Western Pacific Railroad Company are separately owned and separately operated companies. Therefore, we have no control whatsoever over the labor relations of Feather River Intermodal Services Company.
>
> I have no authority to dictate the labor relations policies of Feather River Intermodal Services Company, and I have no desire or intention to meddle in those matters.
>
> Accordingly, I must advise you that we will not in any way guarantee the Successor's Rights of the employees of Feather River Intermodal Services Company or any other unrelated company."

Replying to Mr. Gray's letter on October 6, 1982, Union Business Agent Frates reiterated the Union's view of WPRR's contractual commitment under the Transfer Agreement. In the second paragraph of his correspondence, the Union Business Agent announced:

> "Please let me remind you that the Western Pacific Railroad guaranteed certain rights to their employees as outlined in the Transfer Agreement dated April 16, 1979. Teamsters Local 70 will enforce the Transfer Agreement and expects the Western Pacific Railroad, W.P.X. Freight Systems, Inc., Western Pacific Transport Company, Feather River Intermodal Services, etc. to live up to their obligations and commitments to their employees. We will hold all the above companies liable for all lost wages, benefits, etc."

Both Shop Steward Morgan and Union Business Agent Spratt emphasized that the WPRR was completely uninvolved in the 1982 negotiations between Union and FRISCO. [See March 21, 1988 Declaration of Leslie Morgan and February 27, 1986 Declaration of John G. Spratt.] Mr. Skonberg confirmed that the WPRR was not a participant in the 1982 bargaining sessions and further related that the Union was unsuccessful in making the WPRR a party to the 1982 Union-FRISCO collective bargaining agreement.

A successor rights provision does not appear in the December 9, 1982 collective bargaining agreement between the Union and FRISCO.

The Carrier calls our attention to an integration or "zipper" clause in the December 9, 1982 Union-FRISCO Agreement. Article XV, Section 13 provides:

> "This Agreement supersedes all previous agreements and understandings, whether written or oral, and any preexisting such [sic] agreements are null and void. This Agreement represents the complete understanding between the parties and shall not be modified except by mutual consent expressed in writing by both parties. The Employer agrees not to enter into any agreement or contract with its employes, individually or collectively. Any such agreement shall be null and void."

On January 10, 1986, the Carrier placed the Oakland ramp operation under the control of its wholly owned trucking subsidiary, Union Pacific Motor Freight (UPMF). Although the UPMF eventually hired three Claimants, it originally replaced all Claimants with persons referred to the UPMF through the Union's hiring hall.

The UPMF's decision to use workers other than Claimants to perform Oakland ramp duties triggered protracted litigation.

On February 7, 1986, the Union and the nineteen FRISCO employees who had transferred from the WPTC instituted an action in United States District Court for the Northern District of California (No. C86-0364WWS) for injunctive relief and money damages against the Carrier, the WPRR and the WPTC. The suit was brought under 28 U.S.C. § § 1331, 1337 and 29 U.S.C. § 185. The latter citation is commonly known as Section 301 of the National Labor Relations Act. Specifically, the Union sought to enforce Article 1, Paragraph 7 of the Transfer Agreement and prayed for an affirmative order from the Court compelling the Carrier to direct the UPMF to hire Claimants, assign them the ramp work and to continue to employ Claimants so long as the ramp work existed.

The Carrier did not contest the Federal Court's jurisdiction. It raised two primary defenses. First, the WPRR was not bound by the Transfer Agreement. Second, the zipper clause in the 1982 Union-FRISCO collective bargaining agreement extinguished the successor rights clause in the rider (Transfer Agreement) to the preceding collective bargaining agreement. At a March 7, 1986 Hearing, the United States District Court granted the Defendants' Motion for Summary Judgment. The Court observed that the Plaintiffs had not come forward with an agreement signed by the WPRR. The record of the March 7, 1986 Hearing is unclear as to whether the Court found a triable issue of fact regarding the WPRR's liability, under alter ego or agency legal theories, for any breach of the successor rights provision inasmuch as the WPRR approved the Transfer Agreement before it was signed by two of its wholly owned subsidiaries, FRISCO and the WPTC. In any event, the Court ruled that FRISCO employees, including Claimants, took whatever rights they acquired from the WPRR into their collective bargaining relationship with FRISCO. If the employees went into the 1982 bargaining round with the successorship clause, they did not come away from the bargaining table with the clause intact. Apparently, the Court relied heavily on the tight integration clause (Article 15, Section 13) in the December 9, 1982 collective bargaining agreement.

When they appealed the District Court's judgment to the Ninth Circuit Court of Appeals, seventeen of the nineteen individual plaintiffs (Claimants herein) retained their own legal counsel. On appeal, Claimant argued that the WPRR was forever bound by the successor rights clause in the Transfer Agreement since it derived a lucrative benefit, splitting the cartage work from the ramp functions, from the same agreement. Thus, Claimants characterized the Transfer Agreement as three separate contracts: between the Union and FRISCO, the Union and the WPTC and the Union and the WPRR. The defendants raised jurisdiction as an issue on appeal to the extent that Claimants were seeking to enforce an agreement directly between either Claimants or their representative on the one hand and the WPRR on the other hand. As this Board discussed at the onset, the Ninth Circuit ruled that the District Court erred by considering the merits of the dispute since the controversy should have been dismissed for want of jurisdiction. Thus, the Ninth Circuit vacated the District Court's decision. The Union, but not Claimants, petitioned the Ninth Circuit for rehearing. The Union represented to the Ninth Circuit that if the case was remanded to the District Court, the Union would amend its complaint to delete any prayer for injunctive relief against the Carrier to solidify jurisdiction under the National Labor Relations Act. The Ninth Circuit denied the petition on April 29, 1987. The Union filed a Writ of Certiorari which the United States Supreme Court denied on October 5, 1987. On October 28, 1987, the District Court entered an order dismissing the case for lack of subject matter jurisdiction.

After the Ninth Circuit's ruling that this dispute was governed by the Railway Labor Act, the Carrier's highest designated officer and Claimants' attorney met to discuss the Claim in Oakland on July 14, 1987. Unable to settle the dispute, Claimants proceeded to this Division. They seek back wages of approximately $507,000.00 per year, annual fringe benefits of an estimated annual value of $102,000.00, ten years future compensation totalling approximately $6 million (plus interest at the rate of twelve percent) and an additional $3 million to be spread equally among Claimants for the stress, pain and suffering stemming from the financial difficulties Claimants have experienced since being replaced at the ramp.

III. RAILWAY LABOR ACT PROCEDURES

The Carrier urges us to summarily dismiss this Claim because it is riddled with numerous and fatal procedural defects. While we are overruling all the Carrier's procedural challenges, each contention warrants some discussion.

First, the Carrier contends this Board lacks jurisdiction to adjudicate this case since Claimants are not employees and UPMF is not a carrier as defined in Section 1 Fifth and Section 1 First of the Railway Labor Act. 45 U.S.C. § 151. Section 151 Fifth defines an employee as a person employed by an employer subject to the Railway Labor Act. In turn, Section 151 First specifically excludes a corporate entity performing trucking service, even if a carrier controls the trucking firm, from the definition of a carrier.

The Court of Appeals judgment implicitly rejected the notion that Claimants are beyond the definition of employees in the Railway Labor Act. It viewed this case as a "...dispute between the railroad and certain of its employees." [Emphasis added.] Furthermore, Claimants herein allege that a direct oral guarantee existed between the WPRR and the Union. As the Ninth Circuit stated, issues concerning whether or not such an agreement exists, the terms of any oral promise, and the interpretation of those terms are relegated to this Board because these issues are arguably premised on a Railway Labor Act agreement. We have jurisdiction to decide these issues especially since Claimants are not trying to enforce the successor rights clause against the UPMF which is a trucking firm outside the coverage of the Railway Labor Act. However, we will discuss the exact extent of our jurisdiction later in this opinion.

Second, the Carrier argues that this Board lacks jurisdiction under Section 3 First (i) of the Railway Labor Act since the dispute does not grow out of an interpretation of an agreement involving the WPRR. 45 U.S.C. § 153 First (i). The Carrier's jurisdictional challenges begs the question. As we explained in the prior paragraph, the existence of an agreement between the WPRR and either Claimants or the Union is a disputed fact. This Board has the power to answer the threshold question: was there an agreement between the WPRR and the Union?

Third, the Carrier contends that Claimants failed to properly progress the Claim on the property and to this Board in the "usual manner." 45 U.S.C. § 153 First (i). While the Carrier correctly points out that Claimants did not follow the grievance procedure in the 1982 collective bargaining agreement between the Union and FRISCO, the two primary agreements in dispute, the Transfer Agreement and the alleged WPRR-Union oral agreement, do not contain a claim handling procedure. Thus, as Claimants contend, there is no usual practice for handling claims. More importantly, because the Carrier initially concurred that jurisdiction lay under Section 301 of the National Labor Relations Act, the Carrier is estopped from now contending that this Claim was not handled, from its commencement on the property, in accord with the Railway Labor Act. In addition, Claimant satisfied the conference requirement in Section 2, Second, of the Railway Labor Act.

Fourth, the Carrier charges that Claimants did not file this case with the appropriate Division of the Adjustment Board but it noticeably neglects to identify which of the other three Divisions is the appropriate Division. Section 3 First (h) of the Railway Labor Act contemplates separate jurisdiction for each Division but the statute does not preclude some potential overlap, at least, where there is some ambiguity concerning the class of employees progressing the claim. 45 U.S.C. § 153 First (h). We need not decide if this Claim could have been properly filed with another Division because Claimants can reasonably be classified as "freight handlers" which is an employee group expressly listed in Section 3 First (h).

IV. THE POSITIONS OF THE PARTIES

A. Claimants' Position

The Union would never have agreed for Claimants to permanently relinquish their seniority over local freight hauling work unless the WPRR had guaranteed them lifetime employment on the Oakland ramp. By splitting the drayage and ramp functions, the WPRR reduced its expenditures for retirement contributions. The price for receiving this benefit was the WPRR's promise that Claimants would continue to perform the ramp work regardless of what corporate entity actually operated the ramp facility. The WPRR's successor now wishes to renege on this promise after the WPRR has already reaped substantial savings.

The WPRR's officers entered into a binding oral agreement with the Union to guarantee Claimants' jobs for their lives. Oral agreements under the Railway Labor Act are enforceable. Third Division Award 20190. The Transfer Agreement was formulated as a result of the independent verbal arrangement. Thus, the guarantee which the WPRR entered into with the Union is described in the Transfer Agreement. The WPRR did not sign the Transfer Agreement simply because there was not an historical collective bargaining relationship between the Union and the WPRR. The oral promise is clearly binding on the WPRR even though it evolved during negotiations between the Union and the WPTC because the management negotiators held interlocking positions with the WPRR and the WPTC. Since the WPRR approved the Transfer Agreement before its execution, the WPRR implicitly verified its previous promise to guarantee Claimants lifetime employment.

The verbal contract between the Union and the WPRR never expired. The 1982 collective bargaining agreement did not affect existing agreements between the WPRR and the Union. The zipper clause applied to the Union and FRISCO as opposed to either the WPRR or the WPTC. Assuming, arguendo, that the integration clause in the 1982 Agreement voided the successor rights clause in the Transfer Agreement, the integration provision did not extinguish the WPRR's promise of guaranteed lifetime employment for Claimants. Indeed, it was logical that the WPRR was uninvolved in the 1982 negotiations between FRISCO and the Union since the WPRR no longer had a parent-subsidiary relationship with FRISCO. The Carrier misplaces its reliance on the March 7, 1986 ruling of the Federal District Court on the Defendants' Motion for Summary Judgment. The Ninth Circuit Court of Appeals vacated the lower Court's findings. Similarly, Mr. Gray's October 1, 1982 letter (wherein the WPRR disavowed any future obligation to FRISCO employees) does not constitute a cancellation of the 1979 WPRR-Union verbal agreement. The WPRR could not unilaterally eliminate the guarantee. To change or cancel the guarantee in the 1979 verbal contract, the WPRR would first have to satisfy the notice and negotiation requirements in Section 6 of the Railway Labor Act. 45 U.S.C. § 156. Otherwise, the status quo endures indefinitely. Inasmuch as there has been no further bargaining between the Union and the WPRR, the guarantee survives.

Besides the description of the oral guarantee set forth in Article 1, Paragraph 7 of the Transfer Agreement, the past practice of the parties evidences the existence of the guarantee. The oral contract simply formalized the parties consistent method of dealing which they followed for decades prior to 1979. The same people continued to perform the ramp work regardless of what corporation the WPRR retained to actually operate the facility. The Transfer Agreement coupled with the past practice proves the existence of the 1979 oral agreement.

The Carrier breached the verbal agreement when it failed to insure that Claimants would be assigned to perform the ramp work when the Carrier retained the UPMF to operate the ramp.

Alternatively, the WPRR is the guarantor or surety of the promise made by its subsidiary, the WPTC, in Article 1, Paragraph 7 of the Transfer Agreement. Even though the WPRR did not sign the Transfer Agreement, it authorized and then ratified the actions of the WPTC. The WPRR approved the Transfer Agreement before it permitted its two subsidiaries, WPTC and FRISCO, to sign the contract. Absent the WPRR's ratification of the Transfer Agreement, the successor rights clause would be rendered meaningless because the WPRR had ultimate control over the ramp work. When it approved the Transfer Agreement and accepted the benefits flowing from the Agreement, the WPRR adopted Article 1, Paragraph 7.

B. The Carrier's Position

The United States District Court found that Claimants failed to produce any evidence binding the WPRR to the successorship clause in the Transfer Agreement. When Claimants brought their action in Federal Court, they did not base their Claim on any oral agreement between the Union and the WPRR. This argument arose as an afterthought when Claimants lost in District Court. Indeed, they constantly changed their position throughout the lawsuit. First, Claimants argued that the guarantee was exclusively set forth in the Transfer Agreement, a labor agreement subject to the National Labor Relations Act. When they did not prevail on that allegation, Claimants alleged the WPRR was directly bound by the Transfer Agreement because it had approved the Agreement. Since the Court of Appeals rejected that allegation on jurisdictional grounds, Claimants are now attempting to resurrect the guarantee in the Transfer Agreement in direct circumvention of the District Court's ruling. Whenever they encounter a legal obstacle, Claimants devise a novel and incredible allegation in a desperate effort to substantiate their frivolous Claim.

It is simply unreasonable that the WPRR and the Union would not reduce to writing a contract which covered an important topic like a lifetime employment guarantee. The alleged verbal agreement leaves many unanswered questions. For example, would the lifetime guarantee prevent the trucking firm from discharging one of the Claimants for cause? This is an illustration of the kinds of items that would be covered in a written agreement.

Next, the WPRR was not a party to the Transfer Agreement. Regardless of whether or not it approved the Transfer Agreement, the WPRR never adopted the Agreement.

Even if this Board finds that the WPRR was a party to the Transfer Agreement, Article 1, Paragraph 7 was extinguished by Article 15, Section 13 of the December 9, 1982 Union-FRISCO Agreement. The strict integration clause nullified all Transfer Agreement provisions and any past practice not carried forward by the express terms of the 1982 Agreement. The successorship clause was not renewed in the 1982 Agreement. As the FRISCO negotiator stated, Reacon's primary goal was to negotiate a single, unified collective bargaining agreement unencumbered by any prior promises, past agreements or unwritten practices. The Union realized that unless the successor provision was incorporated into the 1982 Agreement, the integration clause would void Claimants' so-called rights to lifetime employment. Thus, the Union Business Agents contacted the WPRR seeking assurances. The WPRR President truthfully responded that the WPRR would no longer guarantee Claimants' successorship rights. Despite being placed on notice that the WPRR would not independently guarantee Claimants' rights, the Union entered into the 1982 Agreement knowing it did not contain a successor rights provision. Again, the District Court unequivocally ruled that the Transfer Agreement's successorship clause did not survive the 1982 Union-FRISCO negotiations.

Finally, Claimants' requested remedy is excessive. Claimants have neither mitigated their damages nor cited any contractual provision providing for back pay, front pay and interest. Damages should be restricted to Claimants' lost earnings.

V. DISCUSSION

A verbal agreement negotiated under the auspices of the Railway Labor Act is enforceable. It is, however, difficult, and often impossible, to prove the actuality and the precise terms of a verbal contract. Claimants bear the heavy burden of showing the existence of a contractual relationship between the Union and WPRR and the major provisions of such an agreement. After carefully perusing the voluminous record herein, this Board concludes that Claimants have fallen short of their burden of proof.

Even if the Board credits the veracity of the Union Business Agents who declared that WPRR officials intended to promise Claimants lifetime employment, not all representations made during the give-and-take of collective bargaining automatically rise to the sacrosanct status of a collective bargaining agreement. Holding either a union or a company liable for every proposal made during negotiations would inhibit the free flow of ideas across the bargaining table. During intensive bargaining sessions, the parties explore many alternatives which are ultimately excluded from their final agreement. Without some definitive proof, it is difficult to distinguish an absolute promise from a mere proposal. Thus, an oral representation communicated across the bargaining table is not a de facto binding agreement.

Claimants nonetheless contend that this particular oral representation matured into a contract since the guarantee was described in Article 1, Paragraph 7 of the Transfer Agreement. We disagree. Article 1, Paragraph 7 is a successor rights clause. Claimants never explained how they translated Article 1, Paragraph 7 into a guarantee of lifetime employment. Moreover, if the WPRR directly contracted with the Union to guarantee Claimants lifetime employment, the parties surely would have addressed some of the circumstances surrounding such a guarantee. To this day, the parties disagree as to the exact meaning of the successor rights provision in the Transfer Agreement. More importantly, any promise of lifetime employment would normally cover such possible occurrences as the disability, discharge or resignation of a ramp employee; the duration of the guarantee in terms of retirement; the duration of the guarantee in terms of the volume of ramp work from year to year; the ability of FRISCO or any successor to use ramp employees in another position to offset the guarantee; who is eligible for the guarantee (Article 1, Paragraph 7 could easily apply to a worker hired by FRISCO after the transfer of work); and a procedure for resolving disputes should the Union believe the WPRR breached the Agreement. Experienced Union and WPRR negotiators would almost certainly answer these questions and reduce them to writing. Thus, the single sentence in Paragraph 7 of Article 1 of the Transfer Agreement is merely a successorship clause rather than a guarantee of lifetime employment. Therefore, Article 1, Paragraph 7 does not constitute a restatement of the alleged oral contract of lifetime employment between the Union and the WPRR.

In addition Claimants did not allege the existence of this supposedly all encompassing oral agreement until Claimants filed their Submissions with this Board. In their appeal from the decision of the United States District Court, Claimants argued that the WPRR was bound by the terms and conditions of the Transfer Agreement but did not suggest the existence of a direct contract between the Union and the WPRR. If this critical oral contract existed, it surely would have been included as a cause of action in the complaint filed on February 7, 1986. Indeed, Claimants, in their Notice of Intent to file an Ex Parte Submission with this Board, clearly indicated that the "written agreement" in dispute was the Transfer Agreement. Raising the existence of this oral agreement for the first time before this Board shows that Claimants were concerned that the vacated District Court judgment would ultimately prevail. The District Court's finding, of course, would not apply to an indefinite labor agreement negotiated under the Railway Labor Act. The status quo would be preserved until the WPRR complied with Section 6 of the Railway Labor Act. Claimants belatedly raised oral agreement allegation dilutes the persuasiveness of Claimants' arguments.

Therefore, Claimants have not proved, with sufficient evidence, the existence of an oral agreement between WPRR and the Union.

When it ruled that this Board had exclusive jurisdiction over this dispute, the Ninth Circuit Court of Appeals carefully couched the language in its opinion to apply to a Claim arguably predicated on an agreement between a WPRR and Claimants. The Ninth Circuit refrained from broadly ruling that,

absent an agreement between the WPRR and Claimants, the Federal Court would still be deprived of jurisdiction. This Board interprets the Ninth Circuit's opinion to narrowly provide for our adjudication of the dispute between Claimants and the Carrier to the extent that the Claim is premised on an alleged agreement between the WPRR and the Union. Since we have found inadequate proof of the existence of such an agreement, our jurisdiction ends. The question of whether the WPRR is bound by the successor rights provision in the Transfer Agreement is beyond our authority. The WPTC and FRISCO are employers under the National Labor Relations Act. Both parties concur, and the Ninth Circuit Court of Appeals did not directly refute their view, that the interpretation of the Transfer Agreement is a matter for contractual arbitration or litigation under the National Labor Relations Act. By deferring to this Board, the Court of Appeals was promoting the strong policy in favor of arbitration and against judicial intervention in labor disputes. If this Board found an agreement between the WPRR and the Union and also adjudged that such an agreement gave Claimants lifetime employment, judicial intervention would be unnecessary. However, whether or not the WPTC, acting as an agent for its parent company, entered into the successor rights clause for the benefit and on behalf of the WPRR, is an issue involving the interpretation and application of the Transfer Agreement. If the WPRR is bound by the Transfer Agreement under an agency theory, then the WPRR is an obligor or guarantor of an agreement subject to the National Labor Relations Act. Alternatively, the WPRR may have ratified the promises of its subsidiary. If so, the next issue would be whether the guarantee was still operative in January, 1986, when Claimants lost ramp employment.

This Board emphasizes that we have only concluded that WPRR did not enter into a collective bargaining agreement with the Union. We do not express any opinion on whether or not the WPRR is primarily or vicariously liable for insuring Claimants' successor rights contained in the Transfer Agreement. Nothing in our Opinion should be construed to either endorse or reject the arguments raised by the parties with respect to the Transfer Agreement and the December 9, 1982 Union-FRISCO collective bargaining agreement.

To reiterate, since Claimants have not proven the existence of a verbal agreement between the WPRR and the Union, there is not any agreement allowing us to enforce the alleged individual employment rights. Fourth Division Award 3911. The remainder of the Claim is dismissed for want of jurisdiction.

A W A R D

Claim denied, in part, and dismissed, in part, in accordance with the Findings.

Award No. 28635
Docket No. MS-28218
91-3-87-3-799

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1991.