

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31879
Docket No. CL-32018
97-3-94-3-379

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

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Southern Pacific, Chicago and St. Louis Railroad
(Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11069) that:

- (1) The Carrier violated Section 5 - Bonus: (a) and (b) of the September 9, 1992 Memorandum of Agreement between the SPCSL Corporation and the Transportation Communications Union (TCU), when it failed to provide each of the TCU represented employees with a \$500.00 bonus in the month of January 1993 and further failed to provide TCU or any of the below named Claimants with proof that the SPCSL Corporation exceeded a 90.1% operating ratio in the year of 1992, prior to the expiration of January 1993.
- (2) This claim is in addition to any other compensation earned by the Claimants.
- (3) Consider this as a claim in behalf of each of the twenty-three (23) below named Claimants for the amount of \$500.00 each.

<u>CLAIMANTS:</u>	R. E. Parr	F. G. Storbeck
	M. E. Barkoviak	A. M. Hedtkamp
	K. D. Wright	A. L. Manestar
	M. L. Jones	R. L. Mehl
	B. D. Griffin	L. A. Dowllar

R. B. Blough	C. A. Napier
J. L. Aebel	P. C. Butler
G. A. Thompson	C. E. Jones
R. D. Warner	M. T. Fregly
B. J. Copeland	R. G. Thompson
M. O. Myers	J. L. Warren
D. C. Herrell	

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 Southern Pacific, Chicago and St. Louis Railroad Company began operating on November 9, 1989, as a result of the purchase of a portion of the former Chicago, Missouri and Western Railroad. On September 9, 1992, Carrier and the Organization entered into a Wage Agreement. Section 5 of that Agreement provided for payment of an annual bonus. Paragraphs (a) and (b) of Section 5 provided:

"(a) All employees subject to this Agreement shall be entitled to receive an annual bonus of \$500.00, providing the average operating ratio during each calendar year does not exceed 90.1%, commencing with calendar year 1992 and running through calendar year 1995.

(b) Annual bonuses shall become payable in January of the year following achievement of the 90.1% operating ratio."

When the \$500.00 bonus was not paid in January 1993, the Organization, on February 23, 1993, filed a claim on behalf of its 23 represented employees contending that it was due and payable, and alleging that Carrier had failed to provide the Organization with any data that the operating ratio had exceeded 90.1% in the preceding year.

The United Transportation Union has in its Agreement with Carrier, an identical bonus provision. When its members did not receive their bonus payments in January 1993, a similar claim was filed on February 15, 1993, contending that its Agreement was violated when the bonuses were not paid and it was not furnished proof of lack of achievement of the operating ratio.

On April 21, 1993, Carrier responded to the Organization's claim. The letter of response stated:

"A check of Carrier's records indicated that the operating ratio for calendar year 1992 was 98.7% which exceeds 90.1%, the benchmark figure triggering payment of the bonus, therefore no bonus is due.

Please find attached chart outlining the SPCSL operating revenue for the first and second halves of 1992, and for the full calendar year of 1992. You will note that some of the categories are higher for the second half of the year compared to the first half. The following comments explain the increases.

FREIGHT REVENUE

SPCSL estimates revenues based upon car movements from TOPS and adjusts the revenues based on actual revenue settlements. The estimate includes a revenue offset to cover contract allowances, switching charges and other revenue offsets. In June and July, we received switching bills from BRC and IHB. The bills were much larger than we had estimated, accordingly, future revenues were adjusted to reflect a higher per car switching charge and to eliminate the overestimates in the first six months. Additionally, a favorable audit adjustment of \$2.0 million was booked in the first half of the year.

MOF W

This increase is primarily volume driven. The BN Joint Facility Maintenance and Operetta expense is calculated by gross ton miles.

MOE

The increase is primarily a result of SSW billing SPCSL for locomotive maintenance. For the first six months the bill was flat rated at \$100,000 per month. This rate was adjusted to reflect the actual units (56) and the actual daily maintenance (\$208/day). The under accrual during the first six months was corrected over the last six months.

TRANSPORTATION

The increase is primarily due to increased fuel and intermodal expenses. During the first six months, SPCSL was accruing an intercompany fuel charge by SSW. Operational changes resulted in locomotive fueling by the BRC at a higher cost than had been accrued. Additionally, higher volume resulted in increased consumption and a favorable audit adjustment of 2.2 million was booked in the first half of the year. Intermodal expenses increased as a result of the rental of the IMX terminal and a BN train inspection fee.

EQUIPMENT RENTS

Increase is a result of increased volume and an increase in the number of short term locomotives from 37 to 56.

Based on the foregoing, it is clear that this claim is without merit. Section 5 - Bonus: (a) and (b) of the September 9, 1992, Memorandum of Agreement was not violated, nor were any other rules contained in the current Clerks' Agreement."

The chart mentioned in paragraph 2 above, indicated:

SPCSL OPERATING INCOME - 1992			
	1992 JAN-JUN <u>ACTUAL</u>	1992 JUL-DEC <u>ACTUAL</u>	1992 <u>ACTUAL</u>
Operating Revenues			
Freight Revenues	51,935	35,062	86,997
Other Revenues	<u>605</u>	<u>1,089</u>	<u>1,694</u>
Total	52,540	36,151	88,691
Operating Expenses			
Maintenance of Way	9,781	10,395	20,176
Maintenance of Equip.	1,925	4,365	6,290
Distribution Services	192	1,147	1,339
Transportation	11,354	15,714	27,068
General	788	669	1,457
Taxes Other Than Income	1,896	1,412	3,308
Equipment Rents	9,369	12,792	22,161
Jt. Facility Rents	<u>2,861</u>	<u>2,873</u>	<u>5,734</u>
Total Operating Expenses	38,166	49,367	87,533
Income From Rail Operations	14,374	(13,216)	1,158
OPERATING RATIO	72.6%	136.6%	98.7%

Further efforts by Organization to settle its bonus claim were unsuccessful. However UTU's claim fared differently. In October and December 1993 that Organization and Carrier agreed that the claim would be settled by payment of a "Christmas bonus," upon the withdrawal of UTU's claim TRN 93-105 (the original claim filed on February 15, 1993 contending that the Agreement was violated when Carrier failed to pay the bonus and/or supply operating data supporting the notion that

it exceeded an operating ratio of 90.1%). Additionally, at that time, Carrier paid a \$500.00 bonus to several Engineers, who worked from time to time in LRFU jobs, even though their Organization was not a party to any bonus arrangement agreements.

There are a number of aspects of this case that are bothersome to this Board. First we find that the language of the "Bonus Rule" is, without a doubt, ambiguous. Paragraph (a) of Section 5 uses the phrase "average operating ratio during each year." The Board is aware of what a yearly "operating ratio" is, but it is totally unaware of what an "average operating ratio each year" would be. The Agreement does not describe what this term means. And the parties have not told us what it was intended to mean.

This ambiguity is compounded by the language of paragraph (b). What is meant by "achievement of the 90.1% operating ratio?"

A second bothersome aspect of this case is the belated data Carrier furnished in its efforts to establish that the "average operating ratio" exceed 90.1% during calendar year 1992. This data, as noted from review of the above, is replete with estimates, over- and under-accruals, post- and pre-fiscal settlements, audit adjustments, inter-company charges, capital expenditures in the way of lease expense, etc. The chart accompanying Carrier's explanation denoted the items as "actual," however, the explanation indicates that the data were anything but actual.

It would seem that it would be a simple task to tally expenses and compare them to revenues and from the two develop a ratio between expenses and revenues. However, look at the comments on Freight Revenues (Carrier's April 21, 1993 letter, quoted above). Instead of simply stating what its revenues were in the period, Carrier obfuscated its income category with revenue offsets, higher per car switching charges, etc., that could well be placed in an expense category. It is just impossible for the Board to make any sense out of what is stated here.

A third bothersome aspect of this case is the provision in the Agreement that the bonuses "shall become payable in January" but Carrier did not supply its belated data until several months later. A provision requiring that the bonus be paid in January, on an "average operating ratio" for the preceding year suggests that the data for development of the operating ratio is to be current data, and not that developed from belated factors or adjustments.

The fourth bothersome aspect of this case is the settlement Carrier made with UTU. The data it put forward in denial of TCU entitlement for their bonus would have to be the same data used to support any case it had with UTU. Yet it paid UTU a bonus.

And while it characterized the UTU bonus as a "Christmas bonus" the Board is not persuaded that this characterization was anything but a subterfuge, pretextually designed to give the appearance of something other than it was, a settlement of UTU's original grievance. This is supported by the claim numbers used in the correspondence on the UTU claim and the agreement to pay a "Christmas bonus." Furthermore, this conclusion is supported by statements of UTU's General Chairman. But, most importantly it is supported by Carrier's final correspondence on the issue. In a letter dated December 21, 1993, Carrier wrote:

"Reference your letter of December 10, 1993, to Mr. Tom Matthews, and telephone conference this date with Mr. Matthews and myself concerning the 'Christmas bonus.'

It was agreed in conference to pay the employees named on the attached list a \$500 bonus on a non precedent basis and with the understanding there would be no future referral by either party.

It was further agreed that you withdraw claim TRN 93-105 in order to resolve the aforementioned 'Christmas bonus.'"

It is difficult for this Board to accept the notion that Carrier would pay UTU members a bonus, a bonus by any name, if some basic entitlement did not exist requiring such payment. When the payment of the so called "Christmas bonus" (and it should be noted that it was always referred to in quotes in the UTU - Carrier exchanges of correspondence) was conditioned upon the withdrawal of the claim seeking the same amount of payment under the TCIU bonus agreement, the notion that it was simply a good will gift becomes impossible to accept as factual.

But even so, Section 5 of the Clerks Agreement requires the payment of a bonus unless the "average operating ratio" does not exceed 90.1%. The development of the "average operating ratio," whatever that may be, is totally within the control of Carrier, as Carrier is the party that has initial access to the data necessary to develop such a ratio. Further Carrier is obligated to develop the "average operating ratio" early in

January because the Agreement contemplates that the bonuses will be paid during that month. In this matter the data was not developed in a timely fashion, and in actuality it was not developed at all. The information that Carrier provided in April, suspect as it is, is at best, an "annual operating ratio," it is not, and does not purport to be an "average operating ratio." The Agreement does not allow Carrier to use an "annual operating ratio" to determine the benchmark. It must use an "average operating ratio," whatever that may be.

Carrier is not privileged to avoid payment of bonuses it agreed to pay on the basis that its "average operating ratio" exceeded 90.1% unless it timely supplies the Organization with correct data that its "average operating ratio" actually exceeded 90.1%. Carrier did not provide this information to Organization, accordingly, the claim must be allowed as presented.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date this Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 4th day of March 1997.