Award No. 16086
Docket No. CL-16676

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 (Eastern Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6091) that

(1) Carrier violated the Clerks' Agreement when it refused to allow vacations earned during the calendar year 1965 or pay therefor for the following employes:

Name	No. of Days	Name	No. of Days
Lakawitch, J. Jr.	10	Victory, J.	5
Specht, C. J.	10	Walsh, M.	5
Taylor, C. T.	10	Kubiak, R.	5
Rodriguez, R.	10	Flores, F.	5
Rodriguez, Seb.	10	Tatum, J.	5
Mijatovich, M.	10	Echemarria, E.	5
Mazurowski, J.	10	Hickey, J.	5
Burke, J.	10	Becker, Roy	5
Seibert, W.	10	Gilreath, E.	5
Reyes, R.	10	Portillo, Rogelio	5
Vastalo, C.	10	Sikorski, J.	5
Cegielski, F.	5	Sepulveda, Jos.	5
Pozniak, T.	5	Torres, Wm.	5

(2) Carrier shall now be required to allow vacation pay due the claimants listed above.

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.

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: It has been stipulated by the parties, that the facts of this case are not materially distinguishable from the facts in Award No. 16085. For the reasons stated in said Award, the claim in the instant case will be sustained.

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 Rwy. 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 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 Northwestern 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 & Northwestern-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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