

PROCEEDINGS BEFORE PUBLIC LAW BOARD NO. 1682

AWARD NO. 12

CASE NO. 7

MARCH 31, 1977

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

v.

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim filed for and in behalf of Mr. E. W. Yountz, former Agent-Operator, Albemarle, North Carolina, for lump sum separation pay, as provided in the MASTER IMPLEMENTING AGREEMENT COVERING MOBILE AGENCY ROUTES, dated April 1, 1971, when his former position, Agent-Operator, Albemarle, North Carolina, was closed with close of business 5:00 P.M., Friday, January 10, 1975, to become a part of Mobile Agency Route NC-10.

FINDINGS: This Board upon the whole record and all the evidence finds that:

The carrier and the employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

OPINION: The Claimant is a former employee of the Norfolk Southern Railway Company (NS) who entered the employ of this Carrier via the acquisition in 1973 of the NS by the Carolina and Northwestern Railway Company (C&NW), which is a wholly owned subsidiary of this

Carrier. After working for this Carrier for a period of time, the Claimant applied for a lump sum separation allowance under the protective provisions of Article 11 of the parties' Agreement concerning Mobile Agency Routes dated April 1, 1971. The Carrier declined to pay the allowance on the ground that the Claimant had lost his protected status under Article 11 while in the employ of the NS, and that this fact is established by the notation of "NP" which is set opposite the Claimant's name on the NS seniority roster, and which is said to signify a non-protected employee. The Carrier also asserts a time limits defense, in that the Claimant did not protest the NS seniority roster bearing "NP" after his name within six (6) months after its issuance.

There is no dispute that the Claimant has a May 1958 seniority date with the NS and that he acquired a protected status while in the employ of the NS; consequently, there is no dispute that such status, if still existing, is applicable to this Carrier's April 1, 1971 Agreement, subject, of course, to the Carrier's time limits defense.

The facts of the case now follow.

The Claimant entered the employ of the NS as an Operator-Clerk on May 12, 1958. On December 28, 1973, this Carrier, the NS, the C&NW, and BRAC entered into an agreement whereby the operations, facilities, and employees of the three railroads were coordinated and the clerks and agent-operators on the NS and C&NW were placed under the existing Agreement between this Carrier and BRAC. Provision was also made, in three protective agreements, for the merger of the NS and C&NW seniority districts.

and seniority rosters with those of this Carrier, and for the retention of full pre-merger seniority rights by all NS employees.

On January 1, 1974, the Carrier gave notice that certain positions, including the one held at that time by the Claimant, were to be abolished as part of the plan for combining operations. The Claimant, in accordance with the above mentioned protective agreements, transferred with his 1958 seniority to the Carrier's Charlotte Seniority District and displaced the junior Agent-Operator at Albemarle, N.C. The Claimant held this position until it was abolished by the Carrier effective January 10, 1975, because of the establishment of Mobile Agency Route NC-10 which began servicing the Carrier's customers in the Albemarle area effective January 12, 1975.

On January 13, 1975 the Claimant made a claim for a lump sum separation payment under Article 11 of the April 1, 1971 Master Implementing Agreement Covering Mobile Agency Routes, Addendum N-8, which reads as follows:

"11. Any protected employee transferring to a new point of employment with the Carrier as a result of these technological, operational or organizational changes made under this Agreement will be entitled to all the protective benefits of the Mediation Agreement of April 3, 1965 (Southern System Lines) or April 15, 1965 (C&NW). Regularly assigned occupants of the agency positions at stations to be closed within a mobile agency route, as well as those who may be displaced as a result of the change, may, when their positions are abolished or they are displaced, exercise their seniority rights under the basic Telegraphers' Agreement or accept a lump sum separation allowance (consisting of 360 days' pay) if they have fifteen (15) or more years of employment relationship and are protected employees, as provided in Article V of the aforementioned Mediation Agreements. (See appended excerpts from Stabilization Agreements of 1965 and Washington Agreement of 1936. (Underlines added.)

The pertinent above mentioned excerpt from the Stabilization

Agreement of 1965, Article I of Addendum N-7, reads as follows:

"Section 1 -

All employees, other than seasonal employees, who were in active service as of October 1, 1964, or who after October 1, 1964, and prior to the date of this Agreement have been restored to active service, and who had two years or more of employment relationship as of October 1, 1964, and had fifteen or more days of compensated service during 1964, will be retained in service subject to compensation as hereinafter provided unless or until retired, discharged for cause, or otherwise removed by natural attrition."

The Carrier, as previously noted, interposes the defenses that the claim is barred by the six month time limits provision regarding the seniority roster and that the notation of "NP" on that roster signifies that the Claimant is a non-protected employee. The record does not support this first defense, in that the claim is filed under the April 1, 1974 Agreement and the seniority roster's time limits are not applicable to that Agreement. The Carrier's second defense is in the nature of an affirmative defense and thus the Carrier has the burden of proving that the Claimant is in fact a non-protected employee under the April 1, 1971 Agreement. On the whole record, the Carrier has not met this burden and the claim will therefore be sustained.

The record indicates, and there is no dispute between the parties, that at some time prior to 1965 the Claimant was a protected employee of NS. There also is no dispute that the Claimant had employee status, protected or unprotected, with the NS at the time of the 1973 merger; his status did not change between that time and the time this claim was filed. The Carrier "stepped in to the shoes" of NS in regard to the status of the Claimant. It thus follows that the Carrier must assume the burden of explaining

the asserted loss of the Claimant's protected status, and this it has failed to do.

There are obvious and understandable difficulties involved when one Carrier takes over the files of another and is limited to the information contained in such files. However, such difficulties cannot be permitted to outweigh a Claimant's right to have his claim adjudicated upon a proper evidentiary basis. In the herein case the Carrier presented no evidence to indicate the cause for the Claimant's loss of protected status. In fact, the record indicates that the Carrier does not know how this status was allegedly lost because the file on the Claimant contains no indication. The Organization on the other hand asserts that the Claimant's protected status was never lost, and goes on to give an account of his activities in 1964 and 1965 which appears on its face to be consistent with the retention of his protected status. The credibility and probative value of the Claimant's explanation is not, however, in issue in this case because the burden is not his but the Carrier's. On the overall record, the Carrier has failed to carry this burden and the claim must be sustained.

AWARD: Claim sustained.

By Order of Public Law Board No. 1682


Fred Blackwell, Neutral Member


J. W. Staley, Carrier Member


S. G. Bishop, Employee Member

Dated at Washington, D. C. this 31st day of March 1977.

ORDER: The Carrier shall comply with this Award within thirty (30) days from the date hereof.