

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States  
and Canada  
{ Western Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Western Pacific Railroad Company violated the controlling Agreement when they assigned Carman L. E. Layton four weeks vacation, then after taking four weeks vacation, they instructed him he had only been entitled to three weeks and withheld approximately \$305.60 from his next check.
2. That Carman L. E. Layton should be reimbursed the amount of \$305.60 that was withheld from his check because of an error made by the Carrier and not corrected within eight (8) months.

Findings:

The Second 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 employe 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 waived right of appearance at hearing thereon.

Claimant, Carman L. E. Layton, Jr., a Welder employed at Carrier's Shop Facility located at Sacramento, California, had at the time of the instant dispute, fourteen (14) years of continuous service with Carrier. With this amount of continuous service, Claimant was entitled to an earned paid vacation of fifteen (15) days as pursuant to the pertinent provisions of the December 17, 1941, National Vacation Agreement. However, due to an error of unknown origin, the Carrier indicated to Claimant by way of a written notation on the Form used to specify Choice of Vacation Dates, that he had a total of twenty (20) earned vacation days due him. The Claimant indicated on lines provided for first, second and third choice his preference as to which twenty (20) days he wanted to take for his vacation. Ultimately, Claimant was awarded his first and second choice which amounted to a total of fifteen (15) days off between June 27 and July 15, 1977, and five (5) days off between September 26, and September 30, 1977. Subsequently, Carrier's Payroll Department discovered the error of the additional five (5) days of paid vacation allotted the Claimant and deducted from his regular paycheck of October 25, 1977, an amount totalling \$305.60.

The Organization contends the source of the error rests solely with the Carrier, attributing it to sloppy bookkeeping. Because this error was not discovered until after Claimant took the balance of five (5) days at the end of September of 1977, almost eight (8) months after Claimant had initially filed his Choice of Vacation Dates Form, this had the effect, argues the Organization, of penalizing the Claimant in that he was precluded from working a full week in 1977. Had the error been discovered prior to this taking the last five (5) days in September, he would not have been deprived of his right to earn a week's pay. The Organization further argues that Claimant, in signing up for twenty (20) days of vacation rather than the fifteen (15) days he was entitled to, was simply complying with Carrier's directive and believed, because of his unfamiliarity with provisions of the 1941 National Vacation Agreement, that he was, in fact, entitled to twenty (20) days of vacation as the Carrier had so indicated. The Organization strongly asserts there was absolutely no intention on the part of the Claimant to defraud the Carrier and that Carrier has failed in its burden of proof to demonstrate Claimant was dishonest by knowingly taking an additional five (5) days of paid vacation he was not entitled to receive.

The Carrier argues that the error committed in the case at bar is not solely its alone but must be borne jointly, as the vacation dates were assigned by a group made up of Carrier officials at the local level and a Local Committee of the Organization. In this vein also, Carrier argues Claimant had a responsibility to notify it that he had been assigned five (5) additional days of earned vacation he was not entitled to receive. Carrier observes it finds it difficult to accept the Organization's contention that Claimant, with fourteen (14) years of seniority was not knowledgeable as to the amount of earned vacation contractually provided for. But aside from these arguments, Carrier asserts it has the contractual right under the Controlling Agreement, effective February 1, 1946 and reprinted May 1, 1973, to recoup overpayments. In support of its position, Carrier cites a number of Third Division Awards which specifically address this principle, such as Awards 9117, 9581 and 15067 in which the Board held:

"There is little doubt that Jammerson was given extra vacation in 1956 and 1957. The essential question is whether the Carrier has the right to recoupment of that excess payment four years after making the error.

There is nothing in the parties' Agreement which precludes the Carrier from recovering the excess payment. The Agreement is quite clear in imposing time limits for filing of claims concerning employes, but it contains no comparable restriction upon the employer when it seeks to rectify an error. Referee Johnson in Award 9581 stated:

'...the rule obviously does not apply to deductions and we have no authority to extend its application.'

It is clearly beyond our authority to rewrite the parties' Agreement to provide for such a time limit. That is a proper subject for negotiation between the parties. As noted by Referee Begley in Award No. 9117:

'There is no rule in this applicable agreement, as there is in some agreements denying the Carrier the right to deduct the payments made to the claimant in error for the holidays.'

In sum, the Carrier asserts the Organization has failed to demonstrate that its actions here of recouping the vacation overpayment is in violation of any provisions of the parties' Controlling Agreement.

The Board holds, upon scrutiny of the entire record, that nothing in the Controlling Agreement bars the Carrier from recouping overpayments made to employees, regardless of whether or not those overpayments derive from an error solely committed by management and/or irrespective of the elapsed amount of time it took management to discover the error. Thus, Carrier was within its rights in the instant case to take back the \$305.60 it erroneously paid to the Claimant in paid vacation time Claimant was not entitled to receive.

However, the Board is somewhat troubled by the "one-way street" of equity produced by our judgment, as it is definitely true that had the error been discovered prior to Claimant's taking the five (5) vacation days he was not entitled to, he would not have been deprived of the opportunity to work those days in 1977. Assuming arguendo he really was unaware of the amount of his vacation entitlement, such foreclosure of that opportunity to work is all the more a bitter pill to swallow. We believe therefore, that a more equitable resolution of the issue can be obtained through imposition of a unique second part remedy, which shall be implemented without prejudice to other cases similar in nature but encompassing a different set of factual circumstances. While upholding Carrier's right to recoup the loss and therefore retain the overpayment of \$305.60, we direct Carrier to provide Claimant with the option of working a portion of his vacation in either calendar year 1981 or 1982, whichever is deemed by Carrier to be more appropriate, which portion shall be determined in terms of hours by dividing the total of \$305.60 by the prevailing pro rata rate for Claimant's current position. The number of hours resulting shall be rounded to the nearest whole number so as to bar Claimant from earning an amount greater than \$305.60. If Claimant declines this option, such option shall automatically become null and void and any liability on the part of the Carrier due to said option shall cease to exist.

A W A R D

Claim disposed of as per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of April, 1981.