Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 10975
SECOND DIVISION Docket No. 10235
2-L&N-CM-'86

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

(Brotherhood Railway Carmen of the United States
(and Canada
Parties to Dispute: (
(Louisville and Nashville Railroad Company

Dispute: Claim of Employes:

1. That the Louisville & Nashville Railroad Company improperly withheld from the payroll of Carman W. G. Metzger a total of one-hundred and twenty (120) hours in three equal installments of forty (40) hours each from his first and second pay periods of September plus the first pay period of October, 1981, and

2. Accordingly, the Louisville & Nashville Railroad Company should be ordered to recompensate Carman W. G. Metzger one-hundred and twenty (120) hours pay that was deducted from his payroll during the months of September and October, 1981.

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 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 waived right of appearance at hearing thereon.

Claimant was dismissed from service on June 13, 1977. He grieved his dismissal and, as per Second Division Award 8396, he was subsequently reinstated on August 18, 1980, without pay but with seniority rights unimpaired.

A few months later, during the first week of November 1980, the Union Committee and Carrier local management met in order to determine 1981 vacation rights for the employees in the South Louisville Division. As per the applicable provisions of the parties' Collective Bargaining Agreement, the parties made their joint determinations based upon information supplied by Carrier in

the form of a computer generated list indicating which employees had qualified for next year's vacation by working the minimum one-hundred (100) days in 1980. Said list was allegedly compiled by Carrier as of September 15, 1980.

Of interest to the instant dispute, Claimant appeared on the list as "Not Qualified" since it was indicated that he had only worked thirty-one (31) days as of September 15, 1980. Using the thirty-one (31) days figure as reported, the parties jointly determined that Claimant could still qualify for his 1981 vacation if he worked every regularly scheduled work day for the remainder of the year, a total of seventy-two (72) days. Claimant was so informed, and according to the record, he worked every available day, accumulating one hundred and three (103) days for the year 1980 - - three (3) days in excess of the minimum qualification.

Consequently, Claimant vacationed, with Carrier's approval, from June 1, 1981 through June 19, 1981. All went well until September 1981 when Carrier's Accounting Department discovered that Carrier had miscounted the number of days which Claimant had worked in 1980. In this regard, it was determined that the printout showing that Claimant had worked thirty-one (31) days through September 15, 1980, was in error as he had actually worked said number of days through September 30, 1980. In reality, therefore, Claimant had accumulated only ninety-one (91) qualification days of work in 1980, nine (9) days short of the required one-hundred (100) days contractual minimum.

While regretting the error, Carrier informed Claimant that it would recover the overpayment by deducting forty (40) hours of pay from each of Claimant's next three (3) pay periods. Each pay period on this property encompasses a two (2) week period of time. This arrangement left Claimant with only half pay for the following six (6) weeks period.

Organization filed the instant Claim in protest of Carrier's action herein. In support of said Claim, Organization argues that Carrier's recoupment constituted as assessment of discipline without a Hearing as is required by Rule 34-Discipline of the parties' applicable Collective Bargaining Agreement. In addition, Organization further argues that Carrier recovered the erroneous vacation payment in violation of Second Division Award 7987. According to Organization, Referee Cushman's Award requires a Carrier to justify recoupment of such monies on a case by case basis by proving that Claimant in fact knew that the vacation overpayment was improper. Organization maintains that no such knowledge was possessed by Claimant.

Carrier justifies its recoupment of the erroneous vacation overpayment with arbitral precedent as well as with the principle of equity. Accordingly, Carrier argues that its right to recover overpayments is well established (See: Second Division Awards 5338 and 5664; Third Division Awards 15067, 21472 and 19937). Besides arbitral precedent, Carrier further proposes that the Board decide this case upon the basis of the equity doctrine of

unjust enrichment which prohibits recovery by a party when that party unjustly enriches himself at the expense of another. According to Carrier, in the instant case, Claimant unjustly enriched himself by accepting unearned vacation pay; and since equity does not permit this type of windfall, Carrier, therefore, is entitled to recoup this overpayment.

After carefully reviewing the complete record in this dispute, we must disagree with Organization's contention that Carrier violated Claimant's due process rights as provided in Rule 34 of the Controlling Agreement. The instant controversy, quite simply, is not a matter involving discipline.

Furthermore, the Board also agrees with Carrier's position that Carrier has a right to recover Claimant's vacation overpayment and that the instant dispute is one involving a question of equity. Unfortunately, however, as the parties are no doubt well aware, this Board lacks equity jurisdiction, and so we must decide the Claim based upon an analysis of Board precedent.

In this record, Second Division Award 7987 and Third Division Award 19937 create an exception to Carrier's right to recoupment which is on point with the facts involved in the instant dispute. Those Awards hold that when an employee detrimentally relies upon information provided by Carrier, recoupment by Carrier is denied unless it can be shown that the employee knew that the overpayment was in error. This is the exact situation at bar since Carrier and Organization, utilizing information which had been supplied by Carrier, determined that Claimant would qualify for a vacation in 1981 if certain future conditions were met. Claimant did not participate in the joint determination, but rather merely did as he was advised. Consequently, this dispute falls within the parameters of the exception prescribed in Awards 7987 and 19937.

As a point of clarification, the detriment suffered by Claimant was not the fact that he had to faithfully work the remaining scheduled days of 1980, since coming to work on scheduled work days is a preexisting duty. The detriment suffered was the arbitrary means which Carrier utilized to accomplish the contested recoupment. According to the record, Carrier recovered the entire amount of the erroneous vacation overpayment in a seemingly harsh manner by forcing Claimant to receive only half pay for six (6) weeks. This particular type of adjustment is considered by this Board to be a "detriment" by any standard. Had Carrier assessed Claimant in a more equitable and less harsh manner, Claimant then would not have suffered the detriment that invoked the Award 7987 and Award 19937 exception to Carrier's right of recoupment.

Claimant is to be compensated for one hundred and twenty (120) hours at the applicable rate of pay which was in existence during the months of September and October 1981 at which time the Claimant's recoupment was assessed.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 10th day of September 1986.