Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11704
SECOND DIVISION Docket No. 11042
89-2-85-2-167

The Second Division consisted of the regular members and in addition Referee Thomas F. Carey when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen of the United States and Canada
(
(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM:

1. That the Southern Pacific Transportation Company (Eastern Lines) violated the Vacation Agreement, Addendum I, as amended, when they arbitrarily denied Carman B. S. Fisher his earned fifteen (15) days' vacation in the Year 1984, Houston, Texas.

2. That accordingly, the Southern Pacific Transportation Company (Eastern Lines) be ordered to compensate Carman Fisher in the amount of one hundred twenty hours (120') at the pro rata rate of $13.22 per hour account being denied his vacation in 1984.

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.

The Organization points out that the Claimant made an inquiry through the Organization to determine whether or not he was due a vacation in the year 1984. The matter was referred to the Carrier, and Claimant was notified that he was qualified for vacation, and a vacation selection sheet was furnished by his supervisor who signed him up for three (3) weeks vacation. The Claimant elected to take his fifteen (15) days of vacation beginning April 21, 1984, which was granted, and he was not notified that he was not qualified for vacation until he returned to work at the completion of his vacation period. The Organization charges if an error was made in granting the vacation, it was Carrier's responsibility and the Claimant should not be required to suffer monetarily for Carrier's failure to notify him that his vacation request would not be granted prior to taking his vacation.

It is the Organization's position that to deny the Claim would result in the Claimant losing three weeks' pay when he would have worked, if he was notified prior to commencing his vacation.

The Carrier contends that Claimant requested through his Organization whether or not he was due a vacation in 1984. The Organization then made a request of a Carrier officer to determine if Claimant was eligible for a vacation in 1984.

The Carrier submits that the Carrier officer then contacted timekeeping in San Francisco in order to determine if Claimant was eligible for a vacation in 1984. Timekeeping responded by stating that Claimant had not worked enough days in 1983 to qualify for a vacation in 1984, account being discharged May 25, 1983, for failure to comply with the terms of Award No. 3 of Public Law Board 2876. However, he was reinstated to service December 21, 1983, on the basis of the Interpretation to Award No. 3 of Public Law Board 2876.

The Carrier asserts that the Organization advised that Claimant was qualified account Award No. 3 which reinstated Claimant to service, "with seniority and other rights unimpaired" also included vacation rights. The Timekeeper accepted the explanation and agreed to allow Claimant's vacation. However, upon returning from his vacation, Claimant was advised he was not entitled to vacation time, since he had not worked enough days in 1983 to earn a 1984 vacation.

The only way an employee can be entitled to vacation, in the view of the Carrier, requires that he comply with the provisions of the National Vacation Agreement. The National Vacation Agreement and Vacation Agreement Addendum I, as amended, of the current Agreement requires the rendering of a minimum number of days of compensated service as a means by which an employee qualified for this benefit which the Claimant failed to do.

The Carrier concludes it has not violated the Vacation Agreement Addendum I, as amended or any other Rule of the current Agreement.

The series of interrelated Claims involving Claimant span several years and include at least two decisions of Boards, an Interpretation of one of those decisions, and a Memorandum and Order, and an Agreed Final Judgment of the District Court.

The District Court tracked the somewhat tortuous route of the Claimant's grievances in its "Memorandum and Order" as follows:

> "The facts are not in dispute. Carman B. S. Fisher, a member of the plaintiff Union, was dismissed by the defendant Railroad for absenteeism. A grievance was filed and pursuant to the Railway Labor Act, 45 U.S.C. §§ 151 et. seq., and the contract between the parties was submitted for arbitration to Public Law Board 2876. Both Plaintiff and Defendant are covered by the Railway Labor Act. The Public Law Board reinstated Carman Fisher on a probationary status for one year. Toward the end of the one year probationary period, Defendant

discharged Carman Fisher once again for absenteeism. Defendant discharged Carman Fisher without a hearing, contrary to the terms of the labor contract. Plaintiff objected to Carman Fisher's dismissal without a hearing. Defendant then asked the neutral referee member of the Public Law Board for an interpretation of the prior award. The neutral referee recommended that Carman Fisher once again be reinstated, but without back pay. The referee stated that the Public Law Board could modify the terms of the labor contract as it applied to Carman Fisher, but could not say whether the hearing requirement had been abrogated by the award.

Plaintiff subsequently filed a grievance with the National Railroad Adjustment Board. The dispute was arbitrated. The issue of whether the original arbitration and the neutral referee's interpretation were res judicata or otherwise binding on the second dispute was expressly considered and rejected by the Board. The Board ordered that Carman Fisher be reinstated with back pay and benefits. Defendant, however, refused to honor the award, claiming the Board was without jurisdiction because the grievance had been previously decided by the original arbitration and the neutral referee's interpretation."

The "Memorandum and Order" also noted and found in pertinent part:

"The purpose of the Railway Labor Act is to resolve minor disputes between covered employers and unions through arbitration, avoiding resort to the courts. Brotherhood of Locomotive Engineers vs. St. Louis Southwestern Railway Company, 757 F.2d 656, 658-59 (5th Cir. 1985). Once an arbitration decision has been issued, the Act forecloses relitigation of the same issues in court. Id. at 659. The scope of review of such awards is limited to:

> (1) failure of the board to comply with the Act; (2) fraud or corruption; or (3) failure of the Board to confine its order or award to matters within its jurisdiction.

Id. at 661. Here, Defendant states the board was without jurisdiction due to the preclusive effect of the prior arbitration and interpretation.

> Whether arbitration awards are to be given a res judicata or stare decisis effect is itself a subject for arbitration if the parties can not agree on the effect of the award. New Orleans Steamship Association, 626 F.2d at 468. Here, the res judicata effects of the original arbitration and the neutral referee's interpretation were expressly decided by the second arbitration. Thus, the res judicata issue was properly submitted to arbitration and, having been arbitrated, can not be relitigated here. The Court thus finds the original arbitration and interpretation did not divest the Board of jurisdiction.
>
> The Court would further note, however, that neither the original award nor the neutral referee's interpretation expressly address the issue of whether Carman Fisher could be discharged during his probation without a hearing. Moreover, the Court believes it is beyond argument that the second discharge without a a hearing gave rise to a new grievance not encompassed within the original dispute. Thus, if the Board's res judicata decision is not binding on this Court, the Court would find this is a new dispute and thus the Board had jurisdiction."

The Court's Final Judgment ordered, in pertinent part, that:

> "....Defendant pay to claimant, Ben S. Fisher, all monies due him pursuant to Award No. 10636 of the National Railway Adjustment Board, Second Division, together with interest at the statutory rate from November 30, 1985, until paid; that Defendant restore claimant's vacation benefits and seniority rights which were impaired as a result of his improper dismissal;...."

There is need in any analysis and finding on the merits of the instant claim to distinguish what decision control what part of what claim. The Court found that Second Division Award 10636, in effect, was controlling as it pertained to any rights Claimant was to enjoy during his last chance probationary period granted by the Public Law Board 2876. It must be noted that the one year probationary period ran from approximately June 30, 1982, to May 30, 1983.

The Public Law Board Award, issued on April 26, 1982, put the Claimant back to work without back pay and its Interpretation on December 2, 1983,

"recommended" he be "immediately reinstated to work under the same conditions, without pay." Given the subsequent Award of the Second Division and the decision of the Court, it appears, from the record before this Board, that the period from the date of his termination on May 25, 1983, to his court-ordered reinstatement, pursuant to Award 10636, sustained the Claims for the period "beginning May 25, 1983 until returned to service." That Award granted reimbursement for all monetary losses and "vacation rights and seniority rights unimpaired."

Any reasonable reading of either the decision of that Second Division Award or the Court indicates both sustained those aspects of the Claim cited above which commenced with the Claimant's dismissal on May 25, 1983. The critical calendar year to determine vacations eligibility to be taken during 1984 is the "service rendered" during 1983. In the facts before this Board, the Claimant did work for the Carrier under the terms of his last chance probationary reinstatement for the first five (5) months of 1983 granted by Public Law Board 2876. In addition, the Second Division Award reinstatement with pay and "vacation rights" commenced with May 25, 1983, and thus established the Claimant's employment status with the Carrier for the balance of 1983. It could be argued that the two decisions together establish that the Claimant was in retrospect an "employee" of the Carrier during both periods of 1983.

However, it must be noted that Award 10636 was not issued until October 30, 1985, and the Court Order until May 19, 1987. The instant Claim of the Organization was instituted on June 6, 1984. In its July 6, 1984, denial of the Claim, the Carrier stated:

> "With reference to your letter of June 6, 1984 concerning claim of Carman B. S. Fisher, alleging violation of Vacation Agreement, Addendum I.
>
> It is true the Local Committee made request of the Division Mechanical Officer's office to determine if Carman B. S. Fisher was due a vacation in 1984. The response from the San Francisco Timekeeper was that Carman Fisher had not worked enough days in 1983 to qualify for vacation, account being discharged May 25, 1983 and reinstated December 21, 1983.
>
> When you were notified that Mr. Fisher was not qualified for vacation in 1984, you advised Mr. Fisher was qualified account the award reinstating him to service 'with seniority and other rights unimpaired' also included vacation rights; therefore, Mr. Fisher was entitled to his 1984 vacation.
>
> The San Francisco Timekeeper accepted your explanation and agreed to allow Mr. Fisher's vacation; however, was overruled when he endeavored to pay Mr. Fisher for his vacation.

As the award reinstating Mr. Fisher to service did not also grant him a vacation to 1984, as you claimed, your time claim for 120 hours at the rate of $13.22 per hour in behalf of Carman B. S. Fisher is respectfully declined."

The Organization then advanced the Claim to this Board on June 4, 1985, when the dispute could not be satisfactorily adjusted on the property.

This Board, therefore, must limit its review to the conditions that existed at the time the Claim arose in 1984 and cannot properly consider post facto events or the subsequent decisions of either Second Division Award 10636 or the Court. This necessary restriction by the Board in the case at bar, in no way alters the significance of those two decisions or their application to other appeals or other Claims. However, neither was formulated in June 1984, when the instant Claim for denied 1984 vacation benefits, based upon 1983 service, was initiated.

This Board finds controlling the Award of PLB 2876, Award 3 issued on April 26, 1982, and the subsequent "Interpretation" on December 2, 1983, which resulted in Claimant being reinstated on December 21, 1983. In both determinations, the Claimant was restored to service without pay. Based on the record as it then existed, Claimant rendered "compensated" service only from January 1, 1983 to May 25, 1983, and from December 21, 1983, to December 31, 1983, less whatever days he was absent during those periods. Whatever his "impaired rights" were based upon, these two determinations in terms of any vacation rights claimed, must conform to the conditions of the Agreement. The instant claim charges a violation of the Vacation Agreement Amendment I and charges the Claimant was arbitrarily denied his earned fifteen (15) days' vacation in 1984. The controlling Vacation Agreement provides in pertinent part:

"ARTICLE III - VACATIONS

Section 1. Insofar as applicable to the employees covered by this Agreement who are also parties to the Vacation Agreement of December 17, 1941, as amended, Article 1 of that Agreement, as last amended by the Agreement of September 2, 1969, is hereby further amended effective January 1, 1973, to read as follows:

(c) Effective with the calendar year 1973, an annual vacation of fifteen (15) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than

one hundred (100) days during the preceding calendar year, and who has ten (10) or more years of continuous service, and who during such period of continuous service renders compensated service on not less than one hundred (100) days (133 days in the years 1950-1959 inclusive, 151 days in 1949, and 160 days in each of such years prior to 1949) in each of ten (10) of such years, not necessarily consecutive."

The language of the Vacation Agreement is clear and unambiguous. As a condition precedent to be eligible for vacation in 1984, Claimant must show that he rendered "compensated service on not less than one hundred (100) days during the preceding calendar year." Absent some showing to the contrary, there was no evidence in June 1984 that the Claimant's compensated service in 1983 met this contractual requirement. The Carrier thus had grounds at that time to deny his Claim for vacation benefits in 1984.

While there is no dispute that the Timekeeper erroneously granted the vacation based upon an inaccurate interpretation and application of the Public Law Board decisions, the Board finds unpersuasive the Claim that the Carrier should thus be bound by this unintended error of its Agent.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1989.

LABOR MEMBERS DISSENT TO

AWARD NO. 11704, DOCKET NO. 11042

(Referee Thomas F. Carey)

The Majority gravely erred in their denial decision of this dispute when they erroneously stated after lengthy review of the record that,

> "This Board, therefore, must limit its review to the conditions that existed at the time the Claim arose in 1984 and cannot properly consider post facto events or the subsequent decisions of either Second Division Award 10636 or the Court."

Both the Award 10636 and the action taken by the Federal Court are substantiated in public documents, both of which support the Claimant and if properly considered should have resulted in a Sustaining Award in favor of the Claimant.

As to the rationale used wherein it was decided that the Vacation Agreement Amendment I, being applicable, the Majority failed to consider from the record, that the Claimant was advised by the Carrier that he was entitled to the 15 days vacation.

Such rationale is contrary to Awards of this Division such as Award 7987 and 10975 wherein it was held that:

> Award 7987 Referee Bernard Cushman
>
> "The Carrier failed to show any evidence that any representative of the Carrier at any time prior to the taking of the claimant's vacation advised her in any fashion that she was not entitled to the fifth week as stated in the vacation notice."

Award 10975 Referee John J. Mikrut,Jr.

"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 istant 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."

Since the Majority failed to properly consider these prior decisions, they erroneously were led to this improper, and grossly erroneous decision.

For these reasons Award 11704 is palpable in error and contains no precedental value and the Labor Members vigorously Dissent.

R. A. Johnson

M. Filipovic

D. A. Hampton

R. E. Kowalski

B. T. Proffitt

CARRIER MEMBERS' CONCURRING OPINION
TO
AWARD 11704, DOCKET 11042
(Referee Carey)

While the Board's decision rejecting the efficacy of Second Division Award 10636 is clearly correct, we believe the more appropriate rationale for doing so was set forth in our Dissent to that Award, which we incorporate herein by reference.

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

P. V. VARGA

J. E. YOST