Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7987
SECOND DIVISION Docket No. 7853
2-SCL-CM-'79

The Second Division consisted of the regular members and in addition Referee Bernard Cushman when award was rendered.

Parties to Dispute: (System Federation No. 42, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Seaboard Coast Line Railroad Company

Dispute: Claim of Employes:

1. That the Seaboard Coast Line Railroad Company violated terms of the controlling agreement when they withheld one (1) week's pay from the check of Mrs. M. B. Leath, Hialeah, Florida.

2. That the Seaboard Coast Line Railroad Company be ordered to compensate Mrs. M. B. Leath for one (1) week's pay at pro rata rate.

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.

The claimant, Mrs. M. B. Leath, was employed by the company as a coach cleaner on December 6, 1942. When the vacation list for 1976 was compiled by the Carrier, the claimant was erroneously scheduled for five (5) weeks vacation. Subsequent to the time at which the claimant took the vacation as scheduled, the Carrier discovered that the Carrier had made an error in their eligibility list, and that the claimant was entitled to four weeks vacation rather than five. In 1975, the claimant had received three weeks vacation and was, in fact, entitled to four weeks vacation in 1976, since she had 20 qualifying years of service, pursuant to the terms of the vacation Agreement of December 17, 1961, as amended by Agreement of October 7, 1971.

Paragraph (d) of Article III - Vacation reads:

> "Effective with the calendar year 1973, an annual vacation of twenty (20) 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 twenty (20) 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 twenty (20) of such years, not necessarily consecutive."

When the company discovered the error, it withheld one week's pay from the claimant.

The Organization filed a claim as stated above for the one week's pay to be paid to the claimant. Briefly stated, the Organization claims that the Carrier violated Rules 1, 15 and 23 of the Agreement.

The Board has carefully considered the various awards submitted by the Carrier and the Organization with regard to the recoupement of payments mistakenly made by the Carrier, and in particular those awards that deal with overpayments for vacations. The Board has paid special attention to Third Division Award 9117 (Referee Begley), to Third Division Award 9581 (Referee Johnson), Third Division Award 15067 (Referee Zack) and Third Division Award 21472 (Referee Caples). The Board has also considered all of the awards submitted by the Organization and has paid particular attention to Awards 15912, 17142, and 19937, all of which are Third Division Awards. This Board is of the view that the circumstances of the case dictate whether overpayments may be recouped. As stated by Referee Sickles in Third Division Award 19937:

> "None of the cited Awards deal with the precise factual circumstances of the instant dispute. We are not prepared to state that overpayments may never be recouped: Surely they can. If an employee receives an obviously incorrect paycheck as a result of a clerical or computor error, certainly the employee cashes the check at his peril. The Board could speculate on numerous other potential circumstances wherein the Carrier may properly recoup. But, as cautioned above, each such case must be considered on its own individual merits."

Where the claimant is shown to have been aware of the impropriety of the payment in question, recoupement may be had.

The Carrier here has taken the position that the claimant was aware of the fact that she was not entitled to a five weeks vacation. If this Board were convinced that the Carrier's position was sound, the Board would deny the claim. It is the Carrier, however, who has the burden of proving such an allegation (Award 15912 - McGovern). The statement of Yvonne M. deLagneau is double hearsay and the statement of Lillie H. Adams hardly has probative significance. The claimant gave a written statement of her own to the effect

that when she took her vacation in 1976 she thought she was entitled to five weeks and at no time prior thereto was she advised she was not so entitled. This was, of course, a self-serving statement but its credibility must be viewed against the fact that the Carrier posted her name as one entitled to five weeks vacation. 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. The only question that the record raises as to the claimant's statement in view of the fact that the Carrier made up the vacation list and posted the vacation notice, is the jump from three to five weeks in the amount of vacation listed as the claimant's vacation. In this connection, it should be noted that the Claimant was a coach cleaner who had worked for the Carrier for some twenty years. The record fails to show that the claimant was familiar with the terms of the collective bargaining agreement with reference to vacations. The record does not indicate what degree of education the claimant had. On balance, where, as here, the claimant says that she relied on notice as to the amount and kind of vacation she was to take, which was posted by the Carrier and made up by the Carrier, the Board believes that the Carrier has not satisfied its burden of proof to show that the claimant was aware that an error had been made by the Carrier. To deny the claim would result in the claimant losing one week's pay when, in fact, she undoubtedly would have worked and received pay had the Carrier provided her with accurate information. The Board is of the view that this dispute falls more closely within the Award of Referee Sickles referred to above and consequently the Board will sustain the claim.

A W A R D

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 20th day of June, 1979.