Award No. 18869
Docket No. MW-19287

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, in lieu of payment in the amount of $414.37 to which R. H. Fuytinck was entitled for "bunk car allowance" and travel time pay under the retroactive provisions of the Memorandum of Agreement dated May 7, 1969, the Carrier submitted payment in the amount of $94.50. (System File A-9129/D-5090)

(2) Claimant R. H. Fuytinck now be allowed an additional $319.87 because of the violation referred to within Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Claimant R. H. Fuytinck was assigned to District Gang 709 during the period extending from May 1, 1967 to June 30, 1968. During the period extending from May 1, 1967 to and including February 5, 1968, Gang 709 was headquartered in outfit cars. During the period subsequent to February 5, 1968 the gang was assigned to a specific headquarter point without outfit cars.

During the period extending from July 1, 1968 to January 10, 1969, the claimant was assigned to the helper's position and the operator's position respectively on Tractor Mower BK-6. He was reimbursed for actual necessary expenses incurred during this period (July 1, 1968 through January 12, 1969) under the provisions of paragraph 6 of the Letter of Agreement dated May 23, 1940 (revised June 28, 1955) which reads:

"Diesel-Electric locomotive crane operators, track mowing machine operators and helpers, ballast discer operators and helpers, ballast regulator machine operators and helpers, Jackson Multiple Tamper machine operator not furnished outfit cars will be allowed expenses provided for in Article 5, Rule 30, of the Maintenance of Way Agreement."

Article 5, Rule 30, referred to within the aforequoted rule, reads as follows:

At the initial stage of handling on the property, the claimant was allowed $94.50. Thus the claim appealed to this Board is for the balance of $319.87 ($414.37 less $94.50).

Claim was timely and properly presented and handled by the Employes at all stages of appeal, up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated April 1, 1951, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: On September 30, 1967, Arbitration Board No. 298 rendered its award, hereinafter referred to as Award 298, providing for certain meal, lodging, travel time and transportation cost payments for, among others, employes represented by the Organization party in this dispute. Section V of Award 298 contains the following provision:

> "Insofar as there are presently agreements in effect between any of the carriers and organizations party to this arbitration which agreements include provisions dealing with the types of employe benefits provided for in Sections I, II and III, and the subparagraphs thereof in this award, the organizations party to such existing agreements shall have the option of accepting any or all of the benefits provided in this award or of continuing in effect any or all of the provisions of the existing agreement in lieu thereof. Such election must be exercised on or before December 31, 1967. There shall be no duplication of benefits."

Lengthy negotiations were conducted on the property in an effort to make applicable the provisions of Award 298 in combination with the Organization's elections as provided for in Section V of the Award. Following extensive negotiations and subsequent interpretations rendered by reconvened Arbitration Board No. 298 to eleven questions submitted by the Organization, the parties entered into a Memorandum of Agreement signed May 7, 1969, copy of which is attached hereto as Carrier's Exhibit A.

Payment of allowances provided for in the Agreement of May 7, 1969 was made by the Carrier on a current basis beginning June 1, 1969. Payments due the individual employes were made retroactively for the period October 15, 1967 to May 31, 1969. Payment alleged to be due for this retroactive is here involved.

(Exhibits not reproduced.)

OPINION OF BOARD: The Organization alleges that Carrier violated the Agreement when it paid Claimant $94.50 rather than $414.37 to which Claimant was entitled for bunk car allowance and travel time pay under the retroactive provisions of the Memorandum of Agreement dated May 7, 1969.

Both Carrier and the Organization agree that the amount due Claimant under the retroactive provisions of said Memorandum of Agreement is $414.37. This claim arises because Carrier offset the sum of $319.87, which Carrier alleges is an overpayment for Claimant's allowable expenses.

On December 2, 1969, Carrier determined that Claimant was entitled to $543.10 under the provisions of Award 298 for expenses during his service

on Gangs 709 and 950. Carrier deducted from said $543.10 the sum of $448.60, which was what Carrier had reimbursed Claimant for expenses while on said aforesaid gangs.

On March 24, 1970, Carrier determined that Claimant had been overpaid during the period of July, 1968 through May, 1969 in the amount of $391.80 over and above what he was entitled to under Award 298. Carrier's Director of Labor Relations, T. P. Deaton, stated in his letter of March 24, 1970 to General Chairman, C. V. Fetters, that Carrier had paid Claimant $94.50 and added to this amount the overpayment of $391.80, making a total of $486.30, which was in excess of the $414.37 due Claimant under the Retroactive provisions of the Agreement.

In its ex parte submission, at page 3, Carrier states:

> "Payments due the individual employes were made retroactively for the period October 15, 1967 to May 31, 1969. Payment alleged to be due for this retroactive is here involved."

Carrier alleges at page 5 of its ex parte submission to this Board that Claimant was entitled to a payment of $243.71 for the period he performed service as a laborer in District Gang 709 from October 15, 1967 to February 4, 1968, and was provided with outfit cars equipped for lodging and with cooking and eating facilities, but without being furnished a cook. This computation is based on a meal allowance of $2.00 per day for 113 days or $226.00 under Section I of Award 298 (see Section I B 2) and laundry expense allowance of 23 cents per day for 77 days or $17.71 (see Section I A 3 Note).

Carrier also asserts at page 6 of its ex parte submission to this Board that Claimant was entitled to a payment for expenses of $142.81 for the January 13 to May 31, 1969 period, and excluding the period Claimant did not use outfit cars, while Claimant worked in Gang No. 950. This computation is based on a meal allowance of $2.00 per day for 66 elapsed days or $132.00 and a laundry expense allowance of 23 cents for 47 days, or $10.81.

The Carrier proceeds to reach a total of $414.37 to which Claimant is entitled under the provisions of Award 298 for said time periods, including travel time. Apparently, travel time allowance is figured at $27.85. ($414.37 less the sums of $243.71 and $142.81)

Carrier in its letters handled on the property states that: (a) Claimant turned in expense accounts of $448.60 and was entitled to the sum of $543.10, resulting in a balance due to Claimant of $94.50. (See the December 12, 1969 letter of Carrier's Division Engineer to the General Chairman); (b) Claimant was reimbursed for actual necessary meal and lodging expenses amounting to $135.90 during the period of July, 1968 through May, 1969, resulting in an excess payment of $391.80, allowable against the $414.37 amount due Claimant. (See the March 24, 1970 letter of Carrier's Director of Labor Relations to the General Chairman.)

In the oral discussion before this Board, Carrier's member of the Board argued that this Board has no jurisdiction to hear the dispute because we would be interpreting Award 298, which this Board is not empowered to do, and cited several awards in support thereof. With this contention, we do not agree. We are not confronted in this instance with an issue involving an interpretation of Award 298. We are dealing here in this dispute with an issue as to whether or not Carrier was entitled to offset the sum of $319.87

from the $414.37, which Carrier agreed was due and owing Claimant for expenses incurred by him. Therefore, this Board has jurisdiction of the dispute.

The record is replete with different computations by Carrier as set out aforesaid in arriving at the figure of $319.87, which it offset against the allowed $414.37 figure. The record does not disclose sufficient information concerning Claimant's expense accounts, either as to the time period covered or as to how they were apportioned as to lodging, meals and travel, or if actual expense, for what days said expenses exceeded a maximum per day allowance, for this Board to reach the questions raised relating to the agreement between the parties. Thus, we find that Carrier failed to meet its burden of proving that it was justified in offsetting the sum of $319.87 from the allowed sum of $414.37 admittedly due and owing Claimant.

Further, the payments Carrier made to Claimant were voluntarily made by Carrier. This is clearly seen at page 4 of Carrier's rebuttal statement, when it said:

> "The Carrier has found it advantageous to reimburse employes in certain instances where it was not contractually required to do so. Such was the case where Carrier reimbursed the Claimant for his actual meal and lodging expenses during portions of the claim period."

Thus, we find in this instance that Carrier may not now offset voluntary payments made to Claimant against an admitted liability to Claimant. Under these circumstances this Board need not decide whether the amounts paid by Carrier to Claimant were or were not required by the Agreement, inasmuch as we believe they cannot validly be used to offset the present claim, and even if they exceeded the contractual obligation of Carrier. Thus, we must sustain this claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 10th day of December 1971.

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