

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **19742**  
Docket Number **CL-19762**

John H. Dorsey, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,  
(Freight Handlers, Express and Station **Employees**

PARTIES TO DISPUTE: (

(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (GL-7087)  
that:

1) Carrier violated the terms of Mediation Agreement Case A-8853  
Sub-No. 1 (**BRAC**) dated February 25, 1971 when it failed **to** pay employee Charles  
Beasley the retroactive pay increase as required therein.

2) Carrier shall now be required to pay employee Beasley an additional  
5% (five percent) for all compensation received for the period January 1, 1970  
to and including August 9, **1970**.

3) Carrier shall be required to pay on the total amount claimed  
in Item 2 above, **7%** (seven percent) as interest **commencing** March 15, 1971  
and compounded annually until this claim is paid in full.

OPINION OF BOARD: The following statement of facts in Carrier's Submission  
stand **uncontroverted** in the record.

Claimant Charles Beasley **was** a check clerk.  
As a check clerk he was primarily responsible for  
receiving and physically checking in lading delivered  
to **a** specific area in any type of unit to determine  
if the amount of lading actually delivered corresponded  
with the units listed on Bill of Lading. If the total  
number of units actually delivered and unloaded cor-  
responded with the Bill of Lading, the delivery was  
receipted by Mr. Beasley and from the moment receipted,  
that which was receipted for became the sole respon-  
sibility of the Carrier to effect delivery of in the  
exact quantity and condition as it was received.  
Any shortage that may have occurred between what was  
receipted for by the check clerk and that which was  
actually delivered by the Carrier, the Carrier was  
liable for.

On July 30, 1970 a freight trailer was assigned  
to unloading space in an area specifically assigned  
to Claimant Beasley. Near the end of claimant's  
shift, the trailer was not completely unloaded so  
Mr. Beasley, contrary to instructions and require-  
ments of **a** check clerk, receipted for the lading  
which was still on the freight trailer, and **instruc-**

ted the driver to complete the unloading thereof. Then, not waiting for the unloading to **be** completed, Mr. Beasley left his assigned area. In other words, Beasley receipted for lading not received, thus obligating the Carrier **to be** solely liable for that lading.

**Fortunately**, the freight trailer driver. instead of **closing** the freight trailer door and driving off with the lading to dispose of it as he desired, sought out a foreman on the dock and enlisted his assistance. in this matter.

At the start of his day on July 31, 1970 Mr. Beasley admitted to a foreman of having receipted for lading not actually received and further admitted he had told no one about the partially unloaded trailer and what he had done.

In the afternoon of July 31, 1970 in the presence of two of Carrier's supervisors, Mr. Beasley **after** reading the notice of charges, refused to receipt **or** accept said notice. Under these circumstances, that very same day (July 31, **1970**), the notice of charges **was** mailed to Mr. **Beasley's** home address via Certified Mail - Return Receipt Requested. The investigation **was** held as scheduled on August 5, 1970 and neither Mr. Beasley nor his representative appeared. As **a** result of evidence adduced **at** the investigation, Mr. Beasley was notified on August 10, 1970 that his **services with** the Carrier were terminated.

The August 10, 1970, notification to Claimant, signed by the Freight Agent, reads in material **part**:

After giving due consideration to testimony developed et investigation held at **Galewood** on August 5. 1970 in connection with charges on which you were advised in notice dated July 31. 1970 and se a result of your failure to properly accomplish your Check Clerk duties on July 30. 1970.

\* \* \* \*

**X** Your services with the Company are terminated effective **August 10. 1970.**

In its Submission Clerks state: "Claim for reinstatement (of claimant) with all rights unimpaired and compensation for losses **sustained** is in the process of handling with the Third Division, **N.R.A.B.**"

The sole issues now before us are whether for the period January 1, 1970 to **and** inclusive of **August 9, 1970, Claimant** was contractually entitled to the retroactive **pay** increase as provided for in ARTICLE I - WAGE INCREASE, Section 1 **(i)** in Mediation Agreement Case No. A-8853, Sub-No. 1 **(BRAC) plus** interest **as** alleged in paragraph 3 of the Claim.

The pertinent provisions of said Mediation Agreement read:

ARTICLE I - WAGE INCREASES

Section 1. Effective January 1, 1970. all hourly, daily, weekly, monthly and piece-work rates of **pay** in effect on December 31, 1969 for employees covered by this agreement will be increased in the **amount** of 5 percent applied so as to give effect to this increase in pay irrespective of the method of **pay-ment**. **This** increase is in lieu of the increase provided **effective** January 1, 1970, by Public Law 91-541. The increase provided for in **this** Section 1 shall be applied **as** follows:

\* \* \* \*

**(i) Coverage -**

All employees who had an employment relationship after December 31, 1969, **shall** receive the amounts to which they are entitled under this Section 1 regardless **of** whether they are **now** in the employ of the carrier **except persons who prior to December 11, 1970 have voluntarily left the service** of the carrier other than to retire or who have failed to respond to a call-back to service to which they were obligated to respond under the Rules Agreement.  
... (Emphasis supplied.)

The pivotal issue, on the merits, is whether Claimant's **employment** by Carrier **was "voluntarily"** terminated by Claimant; or, as to him, was the termination "involuntary."

ARTICLE I, Section 1 (**i**), supra, defines: (1) employees eligible to receive the retroactive wage increase; and (2) employees who had an employment relationship with Carrier after December 31, 1969, expressly excepted from contractual entitlement to the retroactive wage increase. Not within the exceptions are employees whose employment relationship is terminated **as** a result of disciplinary proceedings ("involuntary").

It is a principle of contract construction that where the instrument expresses an exception or exceptions no others **can** be implied. Applying that principle we are compelled to hold that an **employee** whose employment is terminated by Carrier exercising its discipline prerogatives - - within the restraints of the collective bargaining agreement - - is "involuntarily" dismissed from service; and, consequently remains eligible for the retroactive pay provided for in Article I, Section 1 (**i**) of the Mediation Agreement. We, therefore, will sustain paragraphs 1 and 2 of the Claim.

As to paragraph 3 of the Claim, we will deny it. The preponderance of the case law of four Divisions of the National Railroad Adjustment Board, with only one or two exceptions, support the denial.

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 Employees involved in this dispute are respectively Carrier and Employees 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

Claim sustained in part and denied in part.

A W A R D

Carrier violated paragraph **of** the Claim as alleged therein.

Paragraph 2 of the Claim is a proper remedy for Carrier's violation of paragraph 1.

Paragraph 3 of the Claim is denied for lack of jurisdiction.

NATIONAL RAILROAD **ADJUSTMENT** BOARD  
By Order of Third Division

ATTEST:

  
~~Executive~~ Secretary

Dated at Chicago, Illinois, this 11th day of May 1973.