NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20518
THIRD DIVISION Docket Number CL-20423

David P. Twomey, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7412) that:

1) Carrier violated the Clerks' Rules and/or agreements at St. Paul. Minnesota on August 21. 1972 when it declined the "Earnings Statement;' covering the second half of June 1972.

2) Carrier shall now be required to compensate employe E. H. Orf the difference of payment received and his protected rata of pay.

OPINION OF BOAW: First we must consider the procedural issue raised by the Carrier that the claim presented to this Board is not the same claim presented and argued on the property and therefore should be denied.

Quoting first a letter from the Carrier and then the response from the Organization to demonstrate that the Carrier's position was properly presented on the property; and to demonstrate that the Organization had wide opportunity to respond to the Carrier's position and thus properly frame the issue(s) for this Board. In a letter dated January 19, 1973 /Carrier's Exhibit A, RP-12/ Carrier's Vice President--Labor Relations wrote to the Organization's General Chairman in part:

> "You apparently contend the 40 days of vacation paid in lieu thereof as of the date claimant retired should have been his protected rate; however, vacation payments are made pursuant to the terms and conditions of the December 17, 1941 Vacation Agreement, as revised, particularly Section 7(e) which is applicable in this case...."

The General Chairman's reply /Carrier's Exhibit F, RP-32/ stated in pact:

> "... The only reason he was called and used to perform work is because Carrier was obligated with respect to compensation due him in accordance with the provisions of Article IV, Sections 1 and 2 of the February 7, 1965 Agreement. He could not be

"placed in a worse position with respect to compensation than the normal rate of compensation enjoyed on his regularly assigned position on October 1, 1964, therefore, carrier used him whenever and wherever it could....

The claimant is entitled to the compensation while on vacation the same as if he was working, and the fact that he retired had nothing to do with his earnings as a protected employe."

In the Local Chairman's letter of October 8, 1972, it was alleged that Carrier violated Rule 17(a) and the February 7, 1965 Agreement. The General Chairman's letter of appeal, dated December 28, 1972, cited a violation of the February 7, 1965 Agreement. The General Chairman's letter of March 26, 1973, quoted in part above, argued that the Carrier had violated Article IV, Sections 1 and 2 of the February 7, 1965 Agreement (dealing with compensation due protected employees).

The Carrier's position was presented on the property that it had relied on Article 7(e) of the December 17, 1941 Vacation Agreement. The Organization's theory on the property in essence was that the *Carrier violated* the February 7, 1965 Agreement. Nowhere in the correspondence on the property, or from reasonable inferences derived from the entirety of the record concerning rules cited and arguments made on the property, can we find reference made to Article 7(b). Yet the Organization in its submission to this Board argues Article 7(b) as the sole basis for their position before this Board. Nor was the theory presented on the property that if Article 7(e) was found to be the proper paragraph of Article 7 to apply *in* this case, then the Claimant was still not properly paid under Article 7(e) on the basis of the "average daily straight time compensation earned in the last pay period preceding the vacation" (emphasis added).

As stated by Referee Dorsey *in* Award 13741 "... it is the intent of the Act that issues in a dispute, before this Board, shall have been framed by the parties in conference on the property". This Board earnestly scrutinized the entire record *in* this case in an effort to get beyond the procedural issue and reach the merits, but the variance in the claim handled on the property and that presented to this Board is so substantial that we must dismiss the 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 claim be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Panka
Executive Secretary

Dated at Chicago, Illinois, this 8th day of November 1974.

LABOR MEMBER'S DISSENT TO
AWARD 20518 (Docket CL-20423)
(Referee Twomey)

Award.20518 dismisses a valid claim on pseudo-technical grounds and evades the obligation of this Board to resolve disputes on their merits. The Award self-servingly states:

> "This Board earnestly scrutinized the entire record in this case in an effort to get beyond the procedural issue and reach the merits, but the variance in the claim handled on the property and that presented to this Board is so substantial that we must dismiss the claim."

Such self-serving concluding remarks cannot override the fact that examination of the Award discloses that the majority, instead of scrutinizing the Record in an effort to get beyond the procedural issue, split and resplit hairs to fashion an Award that dismissed the claim on procedural issues. For example, the Award stresses remarks made by the General Chairman concerning the February 7, 1965 Agreement, to wit:

> "The General Chairman's letter of appeal, dated December 28, 1972, cited a violation of the February 7, 1965 Agreement"

just after quoting and ignoring his argument in the same letter that:

> "The claimant is entitled to the compensation while on vacation the same as if he was working, and the fact that I-E retired had nothing to do with his earnings as a protected employe.'" (emphasis added)

"Compensation while on vacation" is controlled by the Vacation Agreement, and one is not required to participate in "reasonable inferences" to realize that the Vacation Agreement, and payment under Section 7, were subjects of discussion on the property, Reasonable inferences do not have to be dram when certain facts are self evident.

Only when the Carrier Sot to its Rebuttal Submission did it argue that Section 7 of the Vacation Agreement was not discussed and that the issue was not joined when the matter was handled on the property, The majority bought this argument, in spite of the fact that both the Employes and the Carrier get into a discussion of this very section in their original submissions. Obviously, the Carrier must have had some basis for doing so. Just as obviously, if Carrier discussed its interretation of Section 7 of the Vacation Agreement, Employes discussed theirs. Any other conclusion is stupid, or naive, or both.

Dismissing the Employes' claim in this case constitutes grievous error and requires dissent,

J. C. Fletcher
11-14-74