

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21567
Docket Number MW-21279

Walter C. Wallace, Referee

PARTIES TO DISPUTE: (**Brotherhood** of Maintenance of Way **Employees**
(
(Burlington Northern Inc.

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

(1) **The** Carrier should pay to the widow of Truck Driver D. G. **Andrews** the benefits set **forth** in "Appendix **H**" namely the sum of \$100,000 less any amounts payable under Group Policy Contract GA-23000 of the **Travelers Insurance Company** or any **other** medical or insurance policy or plan paid for **in** its entirety by the **Carrier** (System File P-P-193CfMW-46 7/25/74).

OPINION OF BOARD: **This** claim arises out of a fatal injury suffered by D. G. **Andrews** who was a truckdriver for **the** carrier **on** June 6, 1974 at 6:46 a.m. Mr. **Andrews** was hauling materials **in** the course of his employment when his vehicle was struck by another vehicle that was out of control. The incident occurred on a public highway off the carrier's property. This claim is brought on **behalf** of **the** widow and other family survivors under the provisions of Mediation Agreement A-8853, dated February 10, 1971, Article **V**, Appendix H (hereafter Appendix H) which provides in pertinent part:

Article V - Payments to **Employees** Injured Under Certain Circumstances.

Where employees sustain **personal** injuries or death under the conditions set **forth** in paragraph A below, the carrier will provide and pay such employees, or **their** personal representative, the applicable **amounts** set forth in paragraph B below, subject to **the** provisions of other paragraphs **in this** Article.

A. Covered **Conditions-**

This Article is intended to **cover** accidents involving employees **covered** by **this** Agreement **while** such **employees** are riding in, boarding, or alighting from off-track vehicles **authorized** by the carrier and are

- (1) deadheading under orders or
- (2) being transported at carrier expense

B. Payments to be **Made-**

In the event that any one of the losses enumerated in sub-paragraphs **(1)**, (2) and (3) below results from an injury sustained directly from an accident **covered in** paragraph A and independently of all other causes and such loss occurs or **commences within** the time limits set forth in subparagraphs **(1)**, (2) and (3) below, the carrier will provide subject to the terms and conditions herein contained, and less any amounts payable under Group Policy Contract GA-23000 of The Travelers Insurance Company or any other medical **or** insurance policy or **plan** paid for in its entirety by the Carrier, the following benefits:

* * * * *

C. Payment in Case of Accidental Death

Payment of the applicable amount for accidental death **shall** be made to the **employee's** personal representative for the benefit of the persons designated in, and according to the apportionment required by **the** Federal **Employers** Liability Act (45 **U.S.C.** 51 et seq., as amended), or if no such person survives the employee, for the benefit of his estate.

D. Exclusions:

Benefits provided under paragraph B shall not be payable for or under any of the following conditions:

* * * * *

(4) Accident occurring while **the** employee driver is under the influence of alcohol or drugs, or if an employee passenger **who** is under the influence of alcohol or drugs in any way contributes to the cause of the accident;

(5) **While** an employee is a driver or an occupant of any conveyance engaged in any race or speed test;

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E. Offset:

It is intended that this Article **V** is to provide a guaranteed recovery by an employee or his personal representative **under the** circumstances described, and **that** receipt of payment thereunder shall not bar **the** employee or his personal representative from pursuing any remedy **under the Federal Employers Liability** Act or any other law; provided, however, that any **amount** received by such employee or his personal representative under this Article **may** be applied as an offset by the railroad against any recovery so obtained.

F. Subrogation:

The carrier shall be subrogated to any right of **recovery** an employee or his personal representative may have against any party for loss **to** the extent that the carrier **has** made payments pursuant to this Article.

The payments provided for **above** will be made as above provided, for **covered** accidents on or after May 1, 1971.

It is understood that no benefits or payments will be due or payable to any **employee** or his personal representative unless such employee, or his personal representative, as the case may be, stipulates as follows:

"In consideration of the payment of any of the benefits provided in Article V of **the** Agreement of February 10, 1971.

(employee or personal representative)

agrees to be governed by all of **the** conditions and **provisions** said and set **forth** by **Article V.**"

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On the property **the** claim was progressed to higher levels based upon Claimant's recitation of operative facts of **the** accident **that** brought the **matter** within consideration of Appendix H. **While** on **the** property the carrier did not contest these facts. Instead, it denied coverage. **The** matter moved **to** conference and the issue **dividing the parties involved** their opposing views concerning **the** interpretations of **the** Paragraph A phrase "Being transported at Carrier expense". Thereafter, **they expanded on their** reasons for their respective views, **including** Carrier's assertion **that the** contested phrase reflects "an intent to **cover** only those bodies in passive transit." According to **claimant** no other issue was developed on **the** property except for **the matter** of the insurance settlement (**which** will be separately treated here).

In Award **20693 (Lieberman)** this Board considered the issue whether or not drivers of off-track vehicles hauling materials under Carrier orders are **covered** by the provisions of Appendix **H** in the event of an accident. The precise provisions involved here were considered and in a carefully reasoned opinion it was decided they were and the claim was sustained.

In its submission to this Board Carrier maintains that Award **20693** should be distinguished from this case because the issues are different. **Here** it is claimed the issue involves petitioner's burden of establishing all elements of a claim. Insofar as that burden had not been met with respect to the condition **that** the decedent **employee** was "being transported at carrier expense", the claim fails. Petitioner opposes this view claiming the only defense raised on the property was that decided in Award **20693**. It follows that we must consider at the outset whether Carrier's argument in terms of intention and burden of proof is properly before us for consideration.

The objectives of the **Railway** Labor Act are best served when the parties make an earnest effort on the property to disclose their respective positions -and resolve their differences. It is this exchange on the property that becomes the record for consideration by this Board and we cannot, as a matter of jurisdiction, permit the parties to raise issues involving rules or arguments not raised on the property. Here we would have preferred an amplification of Carrier's argument concerning intent and the matter of passive **employees** in order to meet the **objectives of the act fully**. Nevertheless, we cannot say the Carrier did not meet at least the marginal requirements of disclosure on the property. We conclude, therefore, Carrier's argument along this line should not be excluded.

In its submission the Carrier recognizes the phrase "being transported at Carrier expense" results in contradictory interpretations and concedes that it contains "more than a little **degree** of ambiguity". According to Carrier, the way to resolve this ambiguity is to perceive the intent of the parties, citing various awards approving such approach. On this basis, we are provided a history of off-track vehicle agreements that includes information concerning their origin with the Trainmen and the fact that travel time by these **employees** involved, more frequently, passive service. As matters developed negotiations eventually resulted in the first off-track vehicle agreement for the benefit of the Brotherhood of Railroad Trainmen. Other operating unions followed suit and the same agreement was adopted in their contracts. The Signalmen obtained such an agreement and was the first non-operating union to do so. In 1969, the Brotherhood of Maintenance of Way **Employees** went through a Section 6 procedure that progressed to a Presidential Emergency Board on this very issue. The Carrier quotes from the Section 6

notice **and** the findings of the Emergency Board in this regard. The end result of that procedure was that the Maintenance of Way **Employees** reached an agreement **on** this issue and accepted **the** off-track vehicle agreement of the **Trainmen**, virtually without **change**. According to the Carrier, this **means** **the** parties agreed to not include employees who are in active service stating that this:

"... is suggestive of the intent to have the same coverage, and not to extend it to those **engaged** in their regular active service • the **driving** of a truck as their sole job duty."

Carrier is **correct** in pointing out that the Maintenance **of** Way agreement is virtually identical with the other off-track vehicle agreements including that of the **Trainmen**. We may not take the further step, however, and conclude it was the intention of the parties to **cover** only passive **em-**ployees and thereby exclude from coverage active employee-drivers. The agreement we are considering **involves** a portion of the complete agreement **covering** Maintenance of Way **employees**. We must assume the off-track vehicle agreement would be applied consistent with their scope rule.

There is no evidence in this record concerning the actual intention of these parties when they reached their agreement on off-track vehicles. To suggest their intention may be derived **from** the **developments in** some **other** negotiations is speculative. Moreover, it mocks credulity to suggest these parties would enter an agreement for the new protection without consideration of the fact that a **number** of those who might claim coverage were employee-drivers. We **believe** it is just as reasonable **to** postulate a different hypothesis: that the parties to this negotiation **knew precisely** what they were doing. Under the pressure of a strike deadline, they were unable to agree upon provisions tailored **to** their needs and decided to accept the wording of the **Trainmen/Signalmen** agreement without change. They could not be oblivious to the fact that the agreement would eventually be interpreted **by** this Board.

We **conclude** that this argument which attempts to prove the intention of the parties by **analyzing the history of off-track vehicle agreements** is neither Persuasive **nor** productive. **Absent such persuasive evidence we are** left with the problem of interpreting the plain meaning **of** the provisions of **Appendix H and** their application **to** the facts here. On the question of **interpretation we have analyzed the reasoning and conclusions reached in** Award 20693 **and** we agree with it in every material respect. It is our view that this Award **is controlling** here as to the application of **Appendix H to driver-employees**. Further, we have **analyzed the** representations of operative **facts** made on behalf of petitioner on the property (all of which were **un-**contested) relating to the decedent's employment, his **job assignment** and the facts connected with **the** accident that resulted in his death. We hold that petitioner has satisfied his burden of Proof to establish this **claim within the rule of** Award 20693 and this **claim for benefits under Appendix H should not have been denied.**

We come now to the matter of subrogation and offset alluded to earlier in connection with the reference to the insurance **settlement**. The offset provisions are not involved here because we are not concerned with a suit against the Carrier. With respect to subrogation, we are not disposed to outline a specific procedure for handling such matters. We interpret Appendix H provisions to include valid subrogation rights which arise in favor of the Carrier coincident with its obligations to pay benefits under this Appendix H. These matters are inextricably linked together and we conclude here they **cannot** exist one without the other. If it is claimed that Carrier in some way has lost its right of subrogation despite the fact it is obligated to make payment on this claim, we do not find basis for this view and it is rejected.

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

That the Agreement was violated as outlined in the Opinion.

A W A R D

Claim is sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this **31st** day of **May 1977**.

