

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21613
Docket Number MW-21378

Dana E. Eischen, Referee

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: (
(The Atchison, Topeka and Santa Fe Railway Company

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

(1) The Carrier should pay to the widow of Track Foreman R. L. Gabel the benefits set forth in Article V of the February 10, 1971 Mediation Agreement, namely the **sum** of \$100,000.00 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 11-1220-1).

OPINION OF BOARD: While driving a company **truck** during regular working hours in the course of his employment Track Foreman R. L. Gabel was involved in a collision with another employee who also was driving a company vehicle. Gabel, **who** was severely injured, died on September 17, 1974 as a result of the accident. On September 25, 1974 the General Chairman of the Organization filed the instant claim requesting payment to the deceased employee's widow as personal representative under the Off-Track Vehicle **Agreement**. (Article V of the February 10, 1971 National Agreement) which reads in part pertinent hereto as follows:

"ARTICLE V - PAYMENTS TO EMPLOYEES INJURED
UNDER CERTAIN CIRCUMSTANCES

* * *

"(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 order or
- (2) being transported at carrier expense.

(b) Payments to be Made -

In the event that any one of the losses enumerated in subparagraphs (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:

(1) Accidental Death or Dismemberment

The carrier will provide for loss of life or dismemberment occurring within 120 days after date of an accident covered in paragraph (a):

Loss of Life	\$100,000
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* * *

(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.

* * *

(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."

While this claim under the **Agreement was** pending, Agent **M.P. Smith,** a representative of Carrier's Claim Department contacted Mrs. Gabel directly relative to monies due her following her husband's accident and death. On October 3, 1974 she received from Carrier the sum of \$450.00 as living expenses and also as disability benefits under the Kansas No Fault Insurance Law (Carrier is self-insured) and as advancement for liability under **FELA**. On October 14, 1974 she accepted a \$1000.00 payment for funeral expenses. That same date she signed a "Release In Full" prepared by **Carrier in** consideration of a "compromise settlement" of \$75,000.00 for which she released Carrier of 1) "all past, present and future claims and right to compensation under the Kansas No Fault Insurance Law," and 2) "all claims which I have or may be deemed to have had for compensation under the **provisions** of the 'Off Track' Agreement entered into between [Carrier] and [Organization], the labor **union** and bargaining representatives of **my** husband, Mr. Richard Gabel." The release agreement signed by Mrs. Gabel and Claim Agent Smith also contained the following paragraph which should be noted:

"It is further understood and agreed that any payment or compensation obtained from the Railway Company, or ~~judgement~~ against said company, for benefits for myself, ~~my~~ heirs or assigns under the provisions of said 'OFF Track' agreement shall be ~~deminished~~ by the total amount of consideration set forth in this release, less such amounts due under the Kansas 'No Fault' Insurance Law."

Following ~~execution~~ of the release, the widow received from Carrier the sum of \$75,000.00. **The record** shows that she also received from Travelers Insurance Company under Group Policy GA 23000 the sum of \$10,000.00 for loss of life and accidental death.

Following the foregoing arrangements with Mrs. Gabel, conference was held by Carrier and the Organization to discuss the claim filed by the General Chairman on September 25, 1974. Thereafter by letter dated January 14, 1974 Carrier declined the claim on the following grounds:

"This will confirm discussion of this case in conference at Chicago on December 2, 1974 during which I advised you of the following:

- (1) At the time of the accident which subsequently resulted in the death of Extra Gang Foreman R. L. Gabel, he was driving a company leased vehicle in the normal course of his regular duties.

Article V of the February 10, 1971 Mediation Agreement, Case No. A-8853 Sub-No, 2, covers only those accidents involving ~~em-~~ **ployes** 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's expense, '

Neither of these two prerequisites was involved in the instant claim and, therefore, the accident involving Mr. Gabel does not fall within the purview of Article V of the aforementioned Mediation Agreement and the benefits claimed are not payable.

- (2) A settlement was made with the widow of the deceased on October 14, 1974 wherein she (Sharon K. Gabel) released the Company from all claims in connection with the death of Mr. R. L. Gabel."

In subsequent handling on the property the Carrier adhered to the foregoing two-fold bases for denying the claim and the Organization countered **as follows:**
1) The Off-Track Agreement is applicable and controlling in **Gabel's** situation and 2) **The** purported settlement by the widow is not effective to extinguish entitlement to the **full** amount provided by the Off-Track Agreement. Despite mutual efforts to reach an agreement on the property **the** matter comes to us **with** the dispute unresolved and the positions essentially unchanged from those originally adopted.

At the Board level Carrier urged that because of the settlement and release by the widow the claim under the Off-Track Agreement was mooted and therefore we have no jurisdiction to consider the dispute. Both parties cited numerous conflicting Awards on this point all of which we have reviewed In **our** earlier Award 20237 we analyzed the divergent Awards and conflicting policy consideration on the question and concluded:

"...we are convinced that the sounder principle is the one upholding the Organization's right, indeed its duty, to police the Agreements it has negotiated, irrespective of individual **employee** settlements. It appears self-evident that this principle is most compelling in cases such as the instant one where not just a monetary claim is at stake but alleged violations of the negotiated procedural safeguards surrounding the imposition of **employee** discipline. Accordingly, we hold that notwithstanding the purported settlement on the property, this claim is properly presented for consideration by the Board. See Awards 3416, 4461, 5793, 5834, 5924, 6324, 6958."

In subsequent Award 20832 we reiterated and expanded upon those views to wit:

"we do not dispute the conclusion of Award 20237 that an Organization has a right and a duty to police its agreements; and surely a Claimant's action in a given case does not constitute a binding precedent upon an Organization when the Organization is not a party to that action."

Recognizing the validity of 'some of the countervailing policy considerations, however, in Award 20832 we suggested an ad hoc approval to such cases and found, on the basis of the particular record therein, that the claimant had terminated the viability of the claim with a compromise settlement and release in full. Applying the principles of Awards 20237 and 20832 to the instant case we are **pursuaded** that the **release** signed by Mrs. Gabel does not operate to **defeat** the viability of the claim progressed by the Organization on her behalf under the Off-Track Agreement. **This** conclusion flows from consideration both of the Organization's right to police Agreements made by it for all employees it represents (Award 20237) and of the particular facts and circumstances surrounding **the consummation of** the release in question in this case (Award 20832). On the last point the record developed on the property contains unrefuted assertions that Mrs. Gabel, who acted without counsel, did not exercise a fully informed consent and was misled to her detriment by the Claim Agent who procured the release. Based upon all of the foregoing we do not view the settlement as a bar to further progression of the Off-Track Agreement claim or to

our jurisdiction to resolve same on its merits.

Turning to the second issue in this case we find guidance from our earlier decision which virtually is on all fours with the instant dispute relative to coverage and applicability of the Off-Track Agreement. See Award 20693. In that earlier Award the Carrier argued that Article V(a) ("Covered Conditions") "does not cover the operators of off track vehicles; furthermore Claimant being the driver of the truck was neither deadheading nor being transported." In a carefully reasoned Opinion the Board weighed both sides of the argument and concluded in pertinent part as follows:

"It is necessary to evaluate the possible ambiguity in the language of Article V in the context of the entire article. Paragraph (d) in Section (4) refers to '... the employee driver is under the influence of alcohol or drugs, or if an employee passenger who is under the influence...'; further, we note that Section (5) **excludes** payment 'While an employee is a driver or occupant of any conveyance engaged in any race or speed test;'. It seems clear from the language cited that the parties contemplated the inclusion of **employees** as drivers generally and only excluded them under certain specified circumstances. Further, we find that to hold that an **employee** driving a vehicle is not 'riding in' or 'being transported' in a vehicle is illogical and unfounded. While we recognize the distinction Carrier makes **with** respect to an employee working while operating a vehicle (as herein), rather than merely being transported, we fail to find that concept expressed in Article V. For example, an employee assigned to ride in the back of a truck to assist in securing material being transported would certainly be 'working' and yet clearly would be covered by the Agreement and Article V.

"In Award 18287 **this** Board said:

"It is also a principle of contract construction that expressed exceptions to general provisions of the contract must be strictly complied with and no other exceptions may be inferred. Were we to digress from those principles we would exceed our jurisdiction.

"**This** principle has been followed consistently over the years (see for instance Awards 19158, 19189, 19976 and 20372). In this dispute we may not exceed the particular exceptions set forth in Article V (d) of the Agreement. **Further, we** conclude that it would be a wholly incongruent construction of paragraph (a) to hold that it excludes, by inference, only the class of truck drivers. Based on the reasoning above, and the entire record, we must sustain the claim."

Following Award 20693 we reached like results in Awards 21125 and 21126. Carrier herein would have us dismiss all of these Awards as 'palpably erroneous.' Upon consideration of the entire record we can find herein no basis to depart from the conclusions relative to Article V(a) stated in Award 20693. The Off-Track Agreement was applicable and controlling in Mr. Gabel's situation and by its express terms his personal representative was entitled thereunder to the payment of \$100,000.00. The record shows clearly that Mrs. Gabel has already received from Carrier and Travelers Insurance a total of \$86,450 which must be offset against the benefit payable under the Off-Track Agreement. Accordingly, on the **basis** of the record before us, we are **sustaining** these **claims** in the **amount of \$13,550**.

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.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1977.