Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28178
THIRD DIVISION Docket No. MW-26998
89-3-86-3-36

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Missouri-Kansas-Texas Railroad Company

PARTIES TO DISPUTE: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it withheld one thousand four hundred sixteen dollars and eighty cents ($1,416.80) from Mr. L. Churchill (System File 0-21).

(2) As a consequence of the aforesaid violation, Mr. L. Churchill shall be paid one thousand four hundred sixteen dollars and eighty cents ($1,416.80) plus twelve percent (12%) interest."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was first employed by the Carrier on September 12, 1961, but left on his own accord on October 5, 1961. Claimant then established seniority as a Track Laborer on April 10, 1972. Due to family problems, Claimant resigned on October 29, 1979. At that time, Claimant was given two weeks pay in lieu of vacation. Claimant states that he was repeatedly called to return to work and agreed to do so effective December 20, 1979. According to Claimant, "after I inquired, I was told that I had lost all my seniority but my vacation time would stay the same."

Because of the two week pay out received by Claimant, Claimant received no vacation in 1980. During the summer of 1981 Claimant was given three weeks vacation. Claimant asserts that he called the Carrier's Payroll Department to verify if the amount of vacation allotment was correct and was assured that he was entitled to three weeks vacation. Between 1981 and 1983 Claimant continued to receive three weeks vacation. According to Claimant,

during the summer of 1983 Claimant's Foreman called the Carrier to question Claimant's vacation time and was informed that Claimant was entitled to three weeks. Further, according to Claimant, the Roadmaster also called the Carrier and was given the same information. Claimant asserts that the Roadmaster told him that the issue "was closed." Statements supplied show that the Foreman called the Carrier's Payroll Department in June, 1983, and was told that Claimant was entitled to three weeks vacation and that the Roadmaster made a similar call in 1981 and received the same information. During the relevant time period, the vacation rosters showed Claimant as being entitled to three weeks vacation.

During Claimant's vacation in July, 1984, the Carrier informed Claimant that he was not entitled to three weeks vacation and instructed him to return to work after two weeks. Further, at that time the Carrier informed Claimant that he was overpaid for four weeks vacation during the period 1981 through 1983. Although receiving three weeks vacation each year, Claimant was only entitled to one week in 1981 and two weeks in 1982 and 1983. The Organization does not dispute that under the National Vacation Agreement Claimant was not entitled to three weeks vacation per year during this period. The Carrier thereafter deducted and recouped the four weeks pay ($1,416.80) from Claimant's paycheck in equal installments of $150 per month.

It is well-established that absent language in the Agreement prohibiting recoupment, the Carrier has the right to recoup erroneously paid sums of money. Second Division Awards 11072, 8684, Third Division Awards 21472, 15067. We find no language in the Agreement prohibiting such action and therefore, as a general principle, we find that the Carrier has the general right to recoupment.

However, although the Carrier has the general right to recoup erroneously paid monies, that general principle does not dispose of this matter. Third Division Award 19937 addresses an exception to the general rule entitling the Carrier to recoupment:

> "We are not prepared to state that overpayments may never be recouped: Surely they can. If an employee receives an obviously incorrect paycheck as a result of a clerical or computer error, certainly the employee cashes the check at his peril. The Board could speculate on numerous other potential circumstances wherein the Carrier may properly recoup. But, as cautioned above, each such case must be considered on its own individual merits.
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> In this dispute we are faced with more than a mere recouping of an overpayment. What caused the overpayment? A supervisor gave erroneous information. Claimant relied on that information, to her detriment. The record supports

> Claimant's contention that she would not have been absent from work on December 23, but for Supervisor's statement. Thus, in this case, to deny the claim would result in Claimant losing one day's pay, when, in fact, she would have worked, and received pay had the Supervisor given her accurate information."

The record in this matter places this case into the above exception to the general rule entitling the Carrier to recoupment. At various times during the three year period at issue Claimant spoke to the Carrier's Payroll Department and supervisors and was assured that he was entitled to three weeks vacation. Indeed, the Carrier's Roadmaster assured Claimant that the matter "was closed." This record sufficiently establishes that Claimant relied upon those representations along with the posted vacation entitlements to his detriment. We are satisfied that but for those representations and published vacation rosters stating that Claimant was entitled to three weeks vacation, Claimant would have worked during those periods for which recoupment was made by the Carrier.

We find no demonstration that Claimant intended to deceive the Carrier. The fact that Claimant made inquiries concerning the amount of vacation he had coming does not demonstrate an intent to deceive, but merely demonstrates that Claimant was not certain of his entitlement. Similarly, the fact that the Organization and the Carrier jointly signed the vacation rosters does not dictate a different result. There is also no evidence that the Organization sought to deceive the Carrier with respect to Claimant's vacation entitlement. Additionally, the fact that only designated officials of the Carrier and the Organization have the authority to agree upon vacation rosters is inconclusive. The narrow issue here is reliance by Claimant and this record establishes that Claimant was entitled to justifiably rely upon the representations of the Carrier's Payroll Department and supervision. Therefore, under the analysis set forth in Award 19937, we believe that recoupment in this particular case was improper. We shall therefore require that Claimant be reimbursed for the amount of money recouped by the Carrier.

However, we deny the Organization's request for interest. We can find no support in the Agreement for the imposition of interest. Third Division Awards 24710, 18433. The Organization's argument that we should impose an award of interest in this case draws analogies to the National Labor Relations Board's imposition of interest on backpay awards as part of make-whole remedies. The Organization's argument is not persuasive in this case. The NLRB's action in that regard is in exercise of discretion based upon statutory authority. Our function in this matter is limited to the interpretation of the parties' Agreement and the Agreement does not provide for interest awards in this type of case. Nor is this a case as set forth in authority relied upon by the Organization where a party unsuccessfully contests an award in court and the court within its discretionary authority imposes pre-judgment interest. Finally, we do not find that the Carrier acted in bad faith when it determined that recoupment was necessary.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1989.