Award No. 12838
Docket No. CL-12686

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Hamilton, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4944) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rule 3-C-2, when it abolished position of Usher, rate of pay $17.74 per day, located at the Wilmington Passenger Station, Delaware, effective March 2, 1958.

(b) The position should be restored in order to terminate this claim and that H. W. Simmons and all other employes affected by the abolishment of this position should be restored to their former status (including vacations), and be compensated for any monetary loss sustained by working at a lesser rate of pay; be compensated for any loss sustained under Rule 4-C-1; be compensated in accordance with Rule 4-A-2 (a) and (b) for work performed on holidays, or for holiday pay lost, or on the rest days of their former position; be compensated in accordance with Rule 4-A-3 if their working days were reduced below the guarantee provided in this rule; be compensated in accordance with Rule 4-A-6 for all work performed in-between the tour of duty of their former position; be reimbursed for all expenses sustained in accordance with Rule 4-G-1 (b); that the total monetary loss sustained, including expenses, under this claim be ascertained jointly by the parties at time of settlement (Award 7287).

(c) That Leonard Flait, Claimant in this case, be paid the sum of $2,287.90 together with interest at the rate of one-half of one per cent per month from February 1, 1960, until adjusted.

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company — hereinafter referred to as the Brotherhood and the Carrier, respectively.

OPINION OF BOARD: This claim is in the nature of a request to interpret the settlement of a claim made by these parties. The settlement provided that the Carrier would allow the Claimant Flait "actual wage loss sustained for the period beginning March 2, 1958, and ending when the violation ceased on May 13, 1959."

Claimant alleges that under the application of this language, he is entitled to receive $2,287.90 in compensation of his wage loss. The Carrier maintains that Claimant's outside earnings exceeded what he would have made under the Agreement, and therefore he suffered no wage loss.

The original claim arose over the abolition of an usher's position. Prior to said abolition, Claimant had been performing eight days' service in a work week. This work was performed an an usher on Monday, Tuesday, Saturday and Sunday; assistant station master, Wednesday and Thursday and station master Saturday and Sunday. After the abolition of the usher's job, Flait worked as an usher, Monday and Tuesday; assistant station master Wednesday and Thursday, and as station master Saturday and Sunday, or a total of six days per week.

Claimant alleges that he should be allowed compensation for the two days per week which he did not work as an usher, due to the abolition of the usher's job.

The Carrier contends that under the Agreement Claimant was only entitled to five days' work in the first place, not eight. They further contend that since after the violation, Claimant worked six days per week, he, in fact, made more money than he would have received prior to the violation, for a five day week, under the Agreement.

We find Carrier's contention on this point to be wholly untenable. We simply do not find anything in the Agreement to lend credence to this position. The record clearly indicates that prior to the violation, Claimant actually worked the equivalent of eight days, four of which were as an usher. After the violation, his services were only utilized six days per week. He lost wages for those Saturdays and Sundays he did not work as an usher. The record indicates that this wage loss amounted to $2,287.90. Carrier has failed to show that Claimant received outside earnings tending to lessen this amount. Therefore, under our interpretation of the settlement made between these parties, we hold that Claimant is entitled to receive $2,287.90, based on actual wage loss sustained.

INTEREST

Claimant further asks that this Board order the Carrier to pay him interest "at the rate of one-half of one per cent per month from February 1, 1960, until adjusted."

It would seem proper to this Board to allow interest in a case where a sum certain was recognized as due and owing one party to the other, and the former simply refused to make the physical delivery of the payment. This would tend to rest upon the theory that the obligation was in the nature of a default judgment.

In this case the parties had reached a settlement, but apparently did not agree as to what the language of that settlement meant when translated into dollars and cents.

It is the opinion of this Board that the words "actual wage loss" are so uncertain, ambiguous and subject to construction that we cannot consider this settlement as one in the nature of a default judgment. The interest claimed is denied.

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 Agreement was violated.

AWARD

Claim sustained as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of August 1964.

CARRIER MEMBERS' DISSENT
TO
AWARD 12838, DOCKET CL-12686
(Referee Hamilton)

That part of this decision sustaining the claim must be considered void and without any legal effect. The Majority completely ignored record facts brought to their attention which showed that Claimant exercised his seniority on an Usher's position on March 2, 1958, but then, **of his own volition,** failed to work that position and, instead, worked as a Station Master and Assistant Station Master. The exercise of this preference is not chargeable to the Carrier. Had the Claimant worked the position on which he displaced, he would have worked five days as an usher, which was one day more than he was working as an usher before the alleged improper abolishment occurred. In short, his losses under the Clerks' Agreement were four days' pay as usher, but he could have worked an usher job five days a week after his displacement. He failed to do so through his own choice.

The only damages chargeable to the Carrier in this case are those which Claimant sustained under the Clerks' Agreement. The Claimant had an obligation to mitigate his damages under that Agreement, but failed to do so after displacing a regular employe. See **Award 11074** (Dorsey) and **Second Division Award 2216.** His loss of two days' Usher pay was attributable solely to his failure to comply with the foregoing principle of law and work the position on which he displaced.

Moreover, the fact, if it were a fact, that he could not work as an Assistant Station Master or Station Master, if he would have worked on the Usher's position upon which he displaced, is not pertinent to this dispute. The Clerks' Organization cannot properly lay claim to damages allegedly sustained by Claimant under another agreement or working in another capacity. The fact remains that Claimant would have sustained no losses under the Clerks' Agreement had he worked the Usher's position upon which he displaced. He exercised his own free choice in this matter, and Carrier cannot be expected to pay for his rash judgment.

We agree with the Majority; there is no valid basis for the payment of interest in this case, although it should have been premised upon the same reasoning set out in Second Division Award 2675 (Whiting), to wit:

> "The claim seeks interest, but there is no basis therefor in the rules, and this Board is not a court of general jurisdiction, so such request must be denied."

W. F. Euker
R. E. Black
R. A. DeRossett
G. L. Naylor
W. M. Roberts

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 12838, DOCKET CL-12686

The Dissentors are much too late to attempt to argue that there was an "alleged" improper abolishment of the Usher's position in this case. In fact, their endeavor is not quite understood, for the fact of the matter is that the abolishment was recognized as being improper by the Carrier long before the claim reached this Board. Moreover, because of its improper action, Carrier had agreed to pay Claimant "actual wage loss sustained for the period beginning March 2, 1958, and ending when the violation ceased on May 13, 1959."

Carrier then proceeded to compute the "actual wage loss sustained", arriving at a loss to Claimant of 125 days' wages at rates running from $17.74 to $18.70 per day, a total actual wage loss of $2,287.90. Carrier notified the Organization that said amount was carried on the payroll the last half of January, 1960. Upon learning of the amount of the settlement, the Carrier's "highest officer", who had made the settlement agreement and ordered the payment of actual wage loss sustained, then ordered the payment stopped. The money, $2,287.90, representing Claimant's actual wage loss sustained account Carrier's breach of the Agreement, although due on the last half January, 1960, payroll, was not paid to Claimant. In short, the clear and uncontested facts of the case are that an agreement to settle the claim was reached in conference between the General Chairman and Carrier's highest officer of appeal. The agreed-to settlement was affirmed by letter; but, prior to satisfying the settlement by paying Claimant Flait, the Carrier reneged.

Immediately thereafter, Carrier began arguments similar to what the Dissentors here argue, all of which the Referee quite properly held to be

"wholly untenable." They were and remain untenable by virtue of the fact that the Carrier's breach of the contract had caused Claimant Flait wage losses amounting to $2,287.90. The fact that Carrier entered a contract to pay Claimant's actual wage loss, which was correctly figured by Carrier's own Superintendent of Personnel to be $2,287.90, whereupon the Superintendent then advised the Organization by letter that:

> "* * * adjustment in the amounts shown opposite their names was granted Messrs. Flait and Bailey on the payroll covering January 26, 1960, in settlement of this dispute.
>
> | | |
> |---|---|
> | Leonard Flait | $2,287.90 |
> | Douglas Bailey | 159.66" |

should have, contrary to the Referee's holding, met the normal test usually applicable for awarding of interest, e.g., in **Roe v. Baggett** (326 F. 2d 298) (CA 5) the Court said:

> "The Alabama decisions interpreting the above mentioned code section clearly hold that pre-judgment interest runs only on such sums as are certain or are capable of being made certain. In our opinion, the rule is best stated by the Supreme Court of Alabama in Grand Bay Land Co. v. Simpson, 207 Ala. 303, 92 So. 789 (1922):
>
> > 'In his law of interest, Mr. Perley formulated some general rules for the allowance of interest, deducible from the great mass of decisions, to wit:
> >
> > (1) The amount due must be certain;
> >
> > (2) the time when it is due must be certain;
> >
> > (3) the amount due and time of payment must be known to the debtor.' "

Arbitrators, courts, and decisions under the National Labor Relations Act, as well as this Board, have come to the conclusion that an award based on a breach of contract is founded in damages.

In the instant case, it was clearly shown, the Referee's decision to disallow interest in this case nothwistanding that (1) the amount due was $2,287.90, which was correctly computed by Carrier's own Superintendent–Personnel. Thus, even if "actual wage loss sustained" were uncertain at the time disposition of the claim was agreed to, it is certain that mere mathematical calculation and a check of Carrier's records was all that was needed to make the amount certain. The sum certain under test (1), that is, $2,287.90, having been carried on the payroll covering January 26, 1960, was due in February, 1960. As for test (3), the amount due was computed by the Carrier and placed on Carrier's payroll covering January 26, 1960, to be paid in February, 1960; thus, it could not reasonably be argued that the amount due and time of payment was not known to the debtor.

Insofar as founding Awards on damages, the following is quoted from Williston and Thompson, Selections from Williston's Treatise on the Law of Contracts, Rev. Ed. N. Y., 1938, Sec. 1338, p. 832:

"In fixing these damages, the general purpose of the law is, and should be, to give compensation, that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract."

Here, if the Carrier had kept its contract, Claimant would have had the use of his money from February, 1960, forward. As it were, Carrier deprived him of the use of his money in the agreed amount of $2,287.90, and, consequently, Carrier was unjustly enriched. To place Claimant in as good a position as he would have been in had Carrier kept the contract would have only been brought about by paying him for the loss of the use of his money which, as was called to the Referee's attention, is payable as interest at the rate of six per cent (6%) per annum until paid. Interest, then, is considered as payment for the loss of the use of one's money. It clearly should have been allowed in this case.

D. E. Watkins
Labor Member