Award No. 15067
Docket No. TE-12157

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arnold Zack, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

NEW YORK CENTRAL RAILROAD
(Southern District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Cleveland, Cincinnati, Chicago & St. Louis Railway, that:

1. Carrier violated the terms of the Agreement when on May 10, 1960, it unlawfully deducted $124.28 from the pay of E. G. Jammerson.

2. Carrier shall now pay E. G. Jammerson $124.28 with interest at 6% from May 10, 1960.

EMPLOYES' STATEMENT OF FACTS: Claimant E. G. Jammerson was employed by the New York Central Railroad on December 12, 1952. He was inducted into the Armed Forces on January 14, 1953, and returned to railway service on May 26, 1955. In 1960, while working at AB Communication Office, Indianapolis, Indiana, claimant Jammerson received the following communication:

"The Payroll Inspector, while making an inspection of the payrolls, found that you were allowed 10 days' vacation in 1956 and 10 days in 1957. You were employed by the New York Central on December 12, 1952, inducted into the armed forces on January 14, 1953, and returned to railroad service on May 26, 1955. The vacation allowed should have been only 5 days in 1956 and 7½ days in 1957, which means that you were overpaid $78.96 in 1956 and $45.32 in 1957 — a total of $124.28.

Because of the overpayments listed above, I must deduct from your vacation the equivalent time amounting to $124.28.

This means that you will be allowed only four (4) days' vacation in 1960, and $1.11 will be deducted from your wages in the pay period during which the vacation is taken."

By letter of June 27, 1960, General Chairman Livengood appealed claim to General Manager Salter. See ORT Exhibit No. 15.

By August 1, 1960 letter General Manager Salter informed General Chairman Livengood that the Carrier was going to stand by its decision to deduct the amount of $124.28 from the wages of Mr. Jammerson. See ORT Exhibit No. 16.

By letter of August 2, 1960, General Chairman Livengood informed General Manager Salter that his decision was not acceptable. See ORT Exhibit No. 17.

This claim having been handled through the highest officer designated by the Carrier on the property and declined by him, it is now presently properly before your Board for final determination.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: Mr. Jammerson was employed as a telegrapher on the Illinois Division of this Carrier on December 12, 1952. On January 14, 1953, he was inducted into the Armed Forces, returning to the service of the Carrier as a telegrapher on May 26, 1955. At various times during the months of March, April, and June, 1956, he was allowed a total of ten days' vacation. On July 23, 1956, Claimant was assigned to a telegrapher's position in Carrier's AB Telegraph Office at Indianapolis, and, erroneously, but on the strength of having been granted ten days' vacation during 1956, he was also granted ten days' vacation in 1957, which was taken February 3, 4, 7 and April 8 to 19, 1957, inclusive.

When the over-allowance of vacation (5 days in 1956 and 2½ days in 1957 — amount $124.28) was discovered in December, 1959, Carrier immediately contacted Claimant (Carrier's Exhibit No. 1), advising him of the over-allowance of vacation during the years 1956 and 1957 and, feeling that he would probably prefer to forego sufficient days of his 1960 ten-day vacation allowance to compensate therefor, informed him that he would only be allowed four days' vacation in 1960, plus an additional deduction of $1.11.

Organization's position, as set out in General Chairman Livengood's letter of March 26, 1960 (Carrier's Exhibit No. 2), was that Claimant was entitled to ten days' vacation during 1960 (which he was, under the Agreement), and he was to be given the full ten days off or Carrier would be compelled to pay time and one-half rate in addition to his regular vacation pay for each day he was required to work during his assigned vacation period, as per Section 4 of the August 21, 1954 Agreement, referred to above. Carrier's only alternative then was to deduct the total over-allowance of $124.28 from Claimant's earnings, which was done in the second half of April, 1960. It is this deduction which forms the basis for the present claim.

(Exhibits not reproduced.)

OPINION OF BOARD: Mr. E. G. Jammerson, a telegrapher on the Illinois Division with a hiring date of December 12, 1952, was in the Armed Forces from January 14, 1953, until May 26, 1955. In 1956 and again in 1957, he was granted 10 days' vacation. In December, 1959, the Carrier discovered an error in its 1956 and 1957 vacation allowance for Jammerson

and sought to reduce his 1960 vacation by the amount of the earlier overage. This Jammerson refused to do, leading the Carrier to deduct the value of the excess time taken, $124.28, from his earnings, giving rise to the instant complaint.

The Organization contends that the Carrier is estopped from rectifying an alleged computation error occurring three or four years earlier; that the vacation time and pay due him for 1960 are required by the Agreement and cannot be reduced by unilateral action of the Carrier, and that the Claimant is, therefore, entitled to restitution of the $124.28 improperly deducted with interest charges at 6%.

The Carrier argues that Claimant was given excessive vacation in 1956 and 1957; that Carrier only belatedly discovered this error; that it is not bound by the time limit on employes filing claims; and that, therefore, it is entitled to restitution for the 1956–1957 error.

There is little doubt that Jammerson was given extra vacation in 1956 and 1957. The essential question is whether the Carrier has the right to recoupment of that excess payment four years after making the error.

There is nothing in the parties' Agreement which precludes the Carrier from recovering the excess payment. The Agreement is quite clear in imposing time limits for filing of claims concerning employes, but it contains no comparable restriction upon the employer when it seeks to rectify an error. Referee Johnson in Award 9581 stated:

> ". . . the rule obviously does not apply to deductions and we have no authority to extend its application."

It is clearly beyond our authority to rewrite the parties' Agreement to provide for such a time limit. That is a proper subject for negotiation between the parties. As noted by Referee Begley in Award No. 9117:

> "There is no rule in this applicable agreement, as there is in some agreements denying the Carrier the right to deduct the payments made to the claimant in error for the holidays."

The Organization alternatively argues that the equitable doctrine of laches should preclude recoupment, particularly where there was no fraud on the part of the recipient and he had enjoyed the largess for such a long period.

While this argument has appeal, we feel sufficiently constrained by the language of the parties' agreement, and the fact that Carrier acted to get recovery within a reasonable time following the discovery of the error, to conclude that the doctrine of laches cannot prevail in this case.

In view of the foregoing, we must hold that the Carrier acted properly and, therefore, the claim 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1966.

DISSENT TO AWARD 15067, DOCKET TE-12157

Considered as resulting from an abstract and coldly mechanistic process, it might be argued — perhaps successfully — that Award 15067 is correct. But I do not believe this Board is properly performing its mandatory duty when it renders decisions with computer-like rigidity.

The claimant was a young man who, after a little more than a month's service with the Carrier, answered the call of duty to serve as a member of our country's armed forces for a period in excess of two years. Congress has declared, as a matter of public policy, that members of the armed forces shall be treated, upon their return, as if their public service were their employers' service, as, indeed, it is.

When the claimant returned to the Carrier's service, he was restored to the status he would have occupied if he had not been away. He was given the vacation he would have normally been entitled to. He was also given a normal vacation in the following year. Then, four and three years, respectively, later, someone in the Carrier's hierarchy discovered that under an agreement between the Carrier and its non-operating employes the claimant's one month of service prior to his entering the armed forces was not sufficient to require inclusion of his military service as qualifying time for vacation purposes.

The Carrier then attempted to induce this young man to forego most of the vacation he had currently earned and pay the Carrier $1.11 so that it would not be out anything because of its allegedly improper application of the vacation agreement four and three years before. Claimant quite properly declined. The Carrier then forcibly deducted $124.28 from Mr. Jammerson's current earnings, precipitating the dispute that resulted in Award 15067.

In presenting the Employes' position to the Referee, I cited numerous awards of this Board which have applied equitable principles, including the

doctrine of laches, to disputes where an employe has been dealt with in a clearly inequitable manner.

The Referee apparently gave little value to these awards. Instead, he chose to consider the whole incident as an "error", and relied on awards which have approved deduction of earnings to correct errors in computation and the like as support for the Carrier's action here.

I also cited a decision of a Federal Court which held that no agreement between employers and unions can deprive a veteran of the rights accorded him by law; and that one of those rights is to have his service in the armed forces treated as if it were rendered in private employment. **Accardi v. Pennsylvania R.R.** (15 L. ed. 2d 717).

This latter citation was not mentioned in the decision, although I pleaded that it be discussed so that railroad employes may be assured that Court decisions in their favor, as well as those that support a carrier argument, are given consideration.

When the proposed award was issued by the Referee I re-argued the case both orally and by means of a written memorandum, although I seldom find it necessary to go to such lengths. A few changes in language was all that this procedure accomplished.

The award is seriously wrong, because it fails to respond to the intent of Congress that this Board shall be an instrument to "adjust" grievances so that strife between carriers and their employes will be lessened, with a corresponding stability in rail transportation, a public necessity.

The award is morally wrong, because it permits a mighty railroad, one part of what is presently envisioned as perhaps the greatest railroad system in the world, to take $124.28 away from a humble employe — money which he earned by more than a week of honest toil — simply because that carrier says it failed to properly apply an agreement four years earlier. I hope those responsible will in time feel some tugging of conscience.

The award is technically wrong, because it was the Carrier's responsibility to properly apply the agreement in the first place, and if it gave Jammerson more time off than was required, the payment merely represented meeting its obligation under the guarantee rule.

The award may be legally wrong, because it completely ignores the law as set forth in the decision of the Court referred to above.

For all of the foregoing reasons, and so that all concerned will be fully informed of my disagreement with Award 15067, I hereby register most emphatic dissent.

J. W. Whitehouse
Labor Member

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