Award No. 17247
Docket No. CL-17623

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John B. Criswell, Referee

PARTIES TO DISPUTE:

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

CENTRAL CALIFORNIA TRACTION COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6410) that:

(a) Carrier violated the rules of the current Clerks' Agreement at Stockton when it wrongfully withheld from the December, 1966 paycheck of Mr. A. E. Colen, Jr. the sum of $224.93; and,

(b) Mr. A. E. Colen, Jr. shall now be compensated in the amount of $224.93 that was wrongfully withheld from his December, 1966 paycheck plus six percent interest per annum commencing January 1, 1967, as a result of such violation of Agreement rules.

EMPLOYES' STATEMENT OF FACTS: In 1965, the employes of the Central California Traction Company, working in the class or craft of clerical, office, station and storehouse employes, designated the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as their representatives in all matters relating to employment, rates of pay, working conditions, etc. In the process of securing certification as authorized representatives of this group of employes, the services of the National Mediation Board were invoked and in a representation election, conducted by the National Mediation Board, (Case No. R-3754), these employes elected the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as their authorized Representative. This authorization was certified by the National Mediation Board on May 7, 1965.

As result of this certification and in accordance with the desires of these employes, they were placed under the jurisdiction of the Santa Fe System Board of Adjustment. Under the Constitution and Laws of this Brotherhood, the Negotiating Committee of the Santa Fe System Board of Adjustment has full authority to negotiate agreements with the Central California Traction Company, (hereinafter referred to as the Carrier), covering all matters relating to employment, rates of pay, working conditions, etc. for the employes under their jurisdiction.

Subsequent to the notice of certification by the National Mediation Board, notices were served, under the applicable provisions of the Railway Labor Act, of our desire to negotiate agreements and requesting that the

By letter dated January 22, 1967, copy attached as Carrier's Exhibit "G," Petitioner's Protective Committee Representative filed claim in behalf of claimant for $224.93 in addition to earnings for service performed during December 1966, plus six per cent interest per annum on that amount commencing January 1, 1967. That claim was denied in letter dated February 6, 1967, copy of which is attached as Carrier's Exhibit "H." (Claim was also presented in Petitioner's letter of January 22, 1967 for compensation in lieu of a third week of vacation in 1966 for claimant; however, that claim was subsequently abandoned by Petitioner and is not before the Board in the instant case.)

By letter dated February 10, 1967 (Carrier's Exhibit "I"), Petitioner's Vice General Chairman appealed the claim to Carrier's General Manager who denied the claim by letter dated March 17, 1967 (Carrier's Exhibit "J"). Further conference on this matter was held on April 6, 1967, confirmed by Petitioner's letter of April 12, 1967 (Carrier's Exhibit "K") and Carrier's letter of April 28, 1967 (Carrier's Exhibit "L").

(Exhibits not reproduced)

OPINION OF BOARD: Claimant contends that $224.93 was improperly withheld from his December, 1966, paycheck based on a Memorandum of Agreement effective October 1, 1965, which he believes guaranteed him $700 monthly.

It is important to be aware of certain action and correspondence between the Organization and the Carrier in the adoption of the Memorandum in question. The Memorandum as approved and signed said:

> "It is understood and agreed that Mr. A. E. Colen, Jr., presently occupying position of Crew Dispatcher, may not be displaced from such position by an employe having a displacement right, so long as Mr. Colen occupies this position.
>
> "It is further understood and agreed that in any calendar month in which Mr. Colen's earnings are less than $700.00, the company will reimburse him for the difference between his earning and $700.00.
>
> "This agreement shall become effective October 1, 1965, and shall remain in effect thereafter subject to the provisions of the Railway Labor Act."

When the draft Memorandum was sent by Carrier to the Organization for signature it contained the additional words in the second paragraph:

> ". . . less compensation for any calendar days Mr. Colen is absent on which he otherwise would be entitled to compensation."

The Vice General Chairman returned the draft memorandum, eliminating the language immediately above cited with the statement:

> "These words are being eliminated because they were not a part of the Agreement which we made at Stockton."

Carrier then eliminated the language in question and returned the draft which became the adopted Memorandum which we now consider.

Carrier did tell the Organization as it returned the final draft:

"It was not the intended purpose of the Agreement to provide Mr. Colen with compensation on days on which he would not otherwise be entitled to compensation or other allowances under the current Agreement, and we will so apply this Agreement in the future."

The disagreement continued in correspondence, but not in the final Memorandum which is binding. While Carrier claimed an intent, it eliminated the language which would have granted its right to exercise the very intent it claims.

The $224.93 in question was taken from the December paycheck of the Claimant because of days missed due to illness. It is agreed that under Rule 42 of the Agreement, had it applied, Claimant would have been entitled to only 14 days sick leave during 1966—a number he passed long before December. Carrier claims that these payments were in error.

We must find that the language of the Memorandum of Agreement concerning this Claimant as adopted is clear—that he was to be compensated each month at the rate of $700. If we were to apply the "reasonable man" test, as the Carrier asks in its argument to the Board, without the clear record of the Carrier's action in considering and then agreeing to eliminate the cited language, we might find merit in its argument. But in applying this test in view of the full facts of the record we can only find that a reasonable conclusion is that Carrier contracted away rights which it would have this Board reinstate.

Therefore, we sustain Section (a) of the claim.

In Section (b) Claimant asks for interest on the amount withheld. The amount in question is certain and the language of the Memorandum of Agreement is clear. Following such awards as 2611 and Special Board No. 259, Award 3, Case 2, we allow the claim.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of June 1969.

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