NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19937
Docket Number CL-19826

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7105) that:

1) Carrier violated the Clerks' Rules Agreement when it failed to afford employe C. Mascolo a fair and impartial investigation.

2) Carrier violated the Clerks' Rules Agreement when it arbitrarily penalized employe Mascolo by deducting a day's pay from her wages after Carrier found it had erred in allowing her one too many vacation days.

3) Carrier shall be required to return the day's pay it deducted from employe Mascolo's pay check which she received on February 19, 1971.

4) Carrier shall be required to reimburse employe Mascolo for all wage losses suffered in attending the appeal hearing held on March 31, 1971.

OPINION OF BOARD: Claimant was assigned a scheduled vacation from August 3, 1970 to August 14, 1970, however, with her Supervisor's consent, she was allowed to consume her ten days of vacation one day at a time. In December, 1970, Claimant asked her Supervisor if she had any more vacation time due her, and she was advised that she had one more day of entitlement. As a result, she took (and was paid for) December 23, 1970 as a day of vacation.

In point of fact, Claimant had utilized her final day on November 18, 1970, and December 23, 1970 represented an eleventh (11th) day of vacation. When Carrier discovered this fact, it deducted one day of pay; which prompted this claim.

Carrier resists the Claim, not only on its merits, but upon procedural grounds.

We will consider the procedural objections initially. In March of 1971, Claimant requested an "unfair and unjust treatment" hearing. Rule 22(f) states:

> "An employe, irrespective of period employed, who considers himself unjustly treated other than covered by these rules, shall have the same right of investigation and appeal, in accordance with preceding sections of this rule, provided written request, which sets forth employe's complaint, is made to the immediate superior officer within fifteen (15) days from cause of complaint."

Although Carrier preserved its position that Rule 22(f) was not applicable, and that the request was not proper, a hearing was held, and Carrier determined that the "unjust treatment" allegation was not supported. After appeals of that ruling (which were denied), the matter was submitted, as a grievance, to the Vice President - Labor Relations.

Carrier asserts that the case should have been handled "in the customary manner" and that failure to handle the claim under the provisions of Rule 36, within the time specified, rendered the claim invalid and barred.

Rule 36(a) specified, in material part:

> "All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based."

The question of the interrelationship of Rules 22 and 36 is not novel to this claim. The issue has been previously considered by this Board in two cases dealing with these same parties. In Award 17595, Referee Gladden noted that:

> "We do not believe it is a proper construction of the two rules to require Claimant to abandon his remedy under Rule 22 and require him to initiate a new claim under Rule 36 when he has not obtained a final decision from the Carrier with [sic] 60 days of the initial action taken by the Carrier under Rule 22. Nor do we believe it is the intent of the parties that an employe maintain concurrent claims or grievances under Rules 22 and 36 arising from the same act of the carrier; seeking the same relief and from the same officer of the Carrier."

Referee Gladden concluded that the "occurrence" referred to in Rule 36-1(a) was the "final decision" which dismissed the complaint under Rule 22.

In Award 19601, Referee O'Brien quoted portions of Award 17595, and likewise concluded that the "occurrence" referred to in Rule 36-1(a) was the final decision under Rule 22.

The claims in Awards 17595 and 19601 dealt with disciplinary matters, rather than the alleged "unjust treatment" here presented, but the dispute centers around the same Rules. While it would appear that Claimant could have moved directly to the procedures of Rule 36, she chose, instead, to pursue the remedy of Rule 22 in the first instance. This Board is not prepared to state that she could not avail hereself of those proceedings. Once having done so (under the procedures on this particular property, as affirmed in Awards 17595 and 19601) she preserved her rights to then pursue redress under Article 36 after the final decision under Rule 22. She did so in a timely manner.

Carrier urges that Claimant, in any event, failed to comply with Rule 36(a) because her claim thereunder was not presented in the first instance to the officer of the Carrier authorized to receive same. In its Ex Parte Submission, Carrier refers to a February 19, 1970 letter to the General Chairman which, it urges, required presentation to the "Manager Work Operations - Personnel" (who, in point of fact, was the hearing officer under the Rule 22 proceedings) rather than to the Vice President of Labor Relations (who was the final appeal). In support of its position, Carrier cites Award 18553, in which Referee Rimer noted that a claim must be filed with the representative duly designated by the Carrier to receive claims. Because the record there demonstrated that the claim was never presented to the proper official of the Carrier (at any time during the handling on the property) the Board was precluded from considering the substantive issue in the claim.

In its Rebuttal Brief in answer to Carrier's Ex Parte Submission, the Organization cites Rule 22(i) which became effective January 1, 1971:

> "Claims in behalf of employees involved in the application of this rule will be presented to the Vice President - Labor Relations for consideration prior to the presentation to the Third Division of the National Railroad Adjustment Board should such action be necessary to resolve the issue within ten (10) days from date of receipt of decision. Except for the time limit period governing the presentation of claims filed hereunder the provisions of Rule 36 are applicable to such claims."

The Employees contend that the provision cited above required a filing of the claim with the Vice President - Labor Relations in the first instance, and had they done otherwise the Carrier would have urged that the claim is barred.

In its Reply, Carrier merely referred to its position, "as fully and conclusively set forth in its Ex Parte Submission.", and reaffirmed same.

On the property, the Carrier raised the issue and the Organization promptly disagreed, citing Rule 22(i) as authority for direct submission of the claim to the Vice President of Labor Relations. The Carrier did not, on the property or in the documents submitted to this Board refer to Rule 22(i) in any manner. Thus, the Board is without benefit of Carrier's view of the Employee's interpretation of that Rule as authorizing, requiring or permitting filing of the claim directly with the Vice President of Labor Relations.

This Board cannot alter the language of an agreement. As stated by Referee Rimer in Award 18553:

> "The Board has consistently held in numerous awards that a claim must be filed with the representative duly designated by the Carrier to receive same."

But here, there is a dispute as to the identity of the representative. A review of the record fails to convince the Board that the Carrier established that the claim was improperly filed in the first instance.

For the reasons set forth above, the claim is properly here and will be considered on its merits.

Questions of recoupment of overpayments are not easy of resolution, as general rules are not simply equatable to all instances. Each case must be considered on its own individual merits and in most instances, one must view the facts and circumstances which gave rise to the overpayment.

In this dispute, clearly Claimant received pay for one (1) more day of vacation than that to which she was entitled. The Carrier has suggested that the Claimant was aware of that fact when she took the day, and that she was "testing" her Supervisor when she asked if she had any more vacation days due. If the Board were convinced that Carrier's speculations are accurate, then, for reasons set forth below, this claim would be quickly disposed of. However, Carrier, who has the burden of proving such an allegation (see Award 15912 - McGovern, cited below) fails to present any evidence to substantiate its assertion.

The testimony of the Supervisor adduced at the Rule 22 hearing shows that:

> "You /Claimant/ asked if I had a day open and I said 'yes', after I looked at the report."

Further, Claimant testified that:

> "The only reason I took the day was because I was informed I had one day vacation coming to me for the year 1970. I would not have taken off otherwise."

While Carrier may read improper motives into Claimant's answer, absent any showing that she was scheming or plotting to obtain an advantage not due her, the Board can only conclude that she relied on the misinformation given her and assumed December 23rd would be her tenth (10th) day of vacation.

Carrier cites various Awards dealing with recouping overpayments. The most significant appears to be Award 15067 (Zack). In that case, Carrier deducted from earnings the value of vacation time given three and four years before. The Board noted that there was nothing in the agreement which precluded a recovery of excess payment; that the controlling agreement did not contain a time limit restriction on rectifying an error; and that the doctrine of "laches" could not prevail in the dispute.

Award 9581 (Johnson) concerned deduction for double payment of holiday pay. The Board rules:

> "In any event, for the reasons shown above, payment for those particular days was not required by the Vacation Agreement; consequently any payment made by the Carrier in excess of the regular rate for the positions, whether in accord with a past practice or not, was either on error, as the record indicates here, or a gratuity. Consequently, it was no violation of any rule for the Carrier to make a deduction for part of the overpayment."

Similarly, Award 9117 (Begley) allowed Carrier to deduct holiday payments made in error. Award 16920 (McGovern) was resolved "solely" on time limits.

But, the Board has precluded Carriers from recouping overpayments of vacation pay in two later Awards (disregarding Award 16920, which was limited to a time limit issue).

In Award 15912 (McGovern) the Board considered a deduction where the posted vacation schedule listed Claimant as entitled to three weeks and it was subsequently discovered that he was ineligible because he had not worked sufficient days to qualify. Claimant had requested to work during the vacation period, but was refused. The Organization pointed out that responsibility for preparation of the vacation list rests solely with the Carrier, and that it was reasonable for Claimant to assume he was entitled, after posting. Because Carrier failed to offer any evidence to show that Claimant knew he was ineligible, or that he intentionally deceived the Carrier, the claim was sustained.

In Award 17142 (Devine) the Board sustained a claim where the employee requested a fifteen (15) day vacation, when he was only entitled to ten (10) days. The posted schedule showed fifteen (15) days. The Award stressed that Carrier, who participated in preparing the vacation schedule, failed to check its records to determine if Claimant was entitled to fifteen (15) days. Such a check would have detected the error prior to the vacation period.

None of the cited Awards deal with the precise factual circumstances of the instant dispute. 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.

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 Board is of the view that this dispute more closely falls within the authority of Awards 15912 and 17142 than the other cited Awards, and consequently, we will sustain claims (2) and (3).

The above result makes it unnecessary to explore claim (1). Accordingly, that claim is dismissed, without a consideration of its merits.

Claim (4) requests the reimbursement for wage losses suffered in attending the appeal hearing on March 31, 1971. Although the claim was raised on the property, Carrier noted that it was not supported by "schedule rules and/or agreement." In its Rebuttal Brief, the Organization justifies the claim by asserting that the employee would be further penalized through an additional loss of wages to prove she was unjustly treated. Because the Organization has failed to demonstrate this Board's authority or a basis for favorable consideration claim (4) is dismissed.

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.

A W A R D

Claim (1) is dismissed for reasons set forth in the Opinion.

Claim (2) is sustained.

Claim (3) is sustained.

Claim (4) is dismissed for reasons set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 7th day of September 1973.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19937
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Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
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STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7105) that:

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2) Carrier violated the Clerks' Rules Agreement when it arbitrarily penalized employe Mascolo by deducting a day's pay from her wages after Carrier found it had erred in allowing her one too many vacation days.

3) Carrier shall be required to return the day's pay it deducted from employe Mascolo's pay check which she received on February 19, 1971.

4) Carrier shall be required to reimburse employe Mascolo for all wage losses suffered in attending the appeal hearing held on March 31, 1971.

OPINION OF BOARD: Claimant was assigned a scheduled vacation from August 3, 1970 to August 14, 1970, however, with her Supervisor's consent, she was allowed to consume her ten days of vacation one day at a time. In December, 1970, Claimant asked her Supervisor if she had any more vacation time due her, and she was advised that she had one more day of entitlement. As a result, she took (and was paid for) December 23, 1970 as a day of vacation.

In point of fact, Claimant had utilized her final day on November 18, 1970, and December 23, 1970 represented an eleventh (11th) day of vacation. When Carrier discovered this fact, it deducted one day of pay; which prompted this claim.

Carrier resists the Claim, not only on its merits, but upon procedural grounds.

We will consider the procedural objections initially. In March of 1971, Claimant requested an "unfair and unjust treatment" hearing. Rule 22(f) states:

> "An employe, irrespective of period employed, who considers himself unjustly treated other than covered by these rules, shall have the same right of investigation and appeal, in accordance with preceding sections of this rule, provided written request, which sets forth employe's complaint, is made to the immediate superior officer within fifteen (15) days from cause of complaint."

Although Carrier preserved its position that Rule 22(f) was not applicable, and that the request was not proper, a hearing was held, and Carrier determined that the "unjust treatment" allegation was not supported. After appeals of that ruling (which were denied), the matter was submitted, as a grievance, to the Vice President - Labor Relations.

Carrier asserts that the case should have been handled "in the customary manner" and that failure to handle the claim under the provisions of Rule 36, within the time specified, rendered the claim invalid and barred.

Rule 36(a) specified, in material part:

> "All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based."

The question of the interrelationship of Rules 22 and 36 is not novel to this claim. The issue has been previously considered by this Board in two cases dealing with these same parties. In Award 17595, Referee Gladden noted that:

> "We do not believe it is a proper construction of the two rules to require Claimant to abandon his remedy under Rule 22 and require him to initiate a new claim under Rule 36 when he has not obtained a final decision from the Carrier with [sic] 60 days of the initial action taken by the Carrier under Rule 22. Nor do we believe it is the intent of the parties that an employe maintain concurrent claims or grievances under Rules 22 and 36 arising from the same act of the carrier; seeking the same relief and from the same officer of the Carrier."

Referee Gladden concluded that the "occurrence" referred to in Rule 36-1(a) was the "final decision" which dismissed the complaint under Rule 22.

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"The only reason I took the day was because I was informed I had one day vacation coming to me for the year 1970. I would not have taken off otherwise."

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In Award 17142 (Devine) the Board sustained a claim where the employee requested a fifteen (15) day vacation, when he was only entitled to ten (10) days. The posted schedule showed fifteen (15) days. The Award stressed that Carrier, who participated in preparing the vacation schedule, failed to check its records to determine if Claimant was entitled to fifteen (15) days. Such a check would have detected the error prior to the vacation period.

None of the cited Awards deal with the precise factual circumstances of the instant dispute. 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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The Board is of the view that this dispute more closely falls within the authority of Awards 15912 and 17142 than the other cited Awards, and consequently, we will sustain claims (2) and (3).

The above result makes it unnecessary to explore claim (1). Accordingly, that claim is dismissed, without a consideration of its merits.

Claim (4) requests the reimbursement for wage losses suffered in attending the appeal hearing on March 31, 1971. Although the claim was raised on the property, Carrier noted that it was not supported by "schedule rules and/or agreement." In its Rebuttal Brief, the Organization justifies the claim by asserting that the employee would be further penalized through an additional loss of wages to prove she was unjustly treated. Because the Organization has failed to demonstrate this Board's authority or a basis for favorable consideration claim (4) is dismissed.

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.

A W A R D

Claim (1) is dismissed for reasons set forth in the Opinion.

Claim (2) is sustained.

Claim (3) is sustained.

Claim (4) is dismissed for reasons set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 7th day of September 1973.