NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20693
THIRD DIVISION Docket Number MW-20701

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

Because of the injury sustained on April 9, 1973 while riding in a Carrier owned truck, the Carrier should pay to Mr. Ross Sacco the sum of $36.50 per week beginning on May 10, 1973 and to continue for 156 weeks or until Mr. Sacco is able to return to work (System File D-9-90/MW-3-73).

OPINION OF BOARD: Claimant, assigned as a truck driver, was injured on April 9, 1973, when the truck he was driving overturned. On May 8, 1973 Petitioner filed the original claim on the property requesting payment for time loss as provided in Article V of the February 10, 1971 Agreement. Article V of that Agreement provides in pertinent part:

"ARTICLE V - PAYMENTS TO EMPLOYEES INJURED UNDER CERTAIN CIRCUMSTANCES

Where employees sustain personal injuries or death under the conditions set forth in paragraph (a) below, the carrier will provide and pay such employees, or their personal representative, the applicable amounts set forth in paragraph (b) below, subject to the provisions of other paragraphs in this Article.

(a) Covered Conditions -

This Article is intended to cover accidents involving employees covered by this agreement while such employees are riding in, boarding, or alighting from off-track vehicles authorized by the carrier and are

(1) deadheading under orders or

(2) being transported at carrier expense.

* * * * *

(d) Exclusions:

Benefits provided under paragraph (b) shall not be payable for or under any of the following conditions:

(1) Intentionally self-inflicted injuries, suicide or any attempt thereat, while sane or insane;

(2) Declared or undeclared war or any act thereof;

(3) Illness, disease, or any bacterial infection other than bacterial infection occurring in consequence of an accidental cut or wound;

(4) Accident occurring while the employee driver is under the influence of alcohol or drugs, or if an employee passenger who is under the influence of alcohol or drugs in any way contributes to the cause of the accident;

(5) While an employee is a driver or an occupant of any conveyance engaged in any race or speed test;

(6) While an employee is commuting to and/or from his residence or place of business."

* * * * *

Carrier first argues that the Claim presented herein is not the same claim originally presented to the Division Engineer on the property and therefore should be dismissed. This argument is further amplified in that Carrier asserts the Organization never alleged that Claimant was being transported at Carrier expense and that the provisions of Paragraph (d) of Article V "....were never presented by the Organization during the handling of this claim on the property and Carrier objects to any consideration of these subjects by your Board." With respect to the argument that the Claim should be dismissed, we find that this contention is without proper support. The Claim before us is substantially the same as that handled on the property; the Claim has not been enlarged upon nor has the Carrier been misled. The issue involved in this dispute was clearly understood by the parties during the handling on the property and has not been materially changed in its presentation to this Board. See Awards 18687, 18785 among others. Similarly we do not agree with Carrier's argument with respect to the statement concerning Claimant being transported at Carrier expense; there is no record support for this contention. Also, as is well established, we are certainly not precluded from examining the entire Agreement with respect to this dispute.

The issue in this dispute is whether or not drivers of off-track vehicles (in this case engaged in moving material) are covered by the provisions of Article V, supra, in the event of an accident.

Carrier argues that Paragraph V (a) does not cover the operators of off-track vehicles; furthermore Claimant being the driver of the truck was neither deadheading nor being transported. The Carrier asserts that if the parties had intended to cover all employees engaged in the operation of off-track vehicles under paragraph (a) it would have been a simple matter to have done so. However, this was not done and this Board, it is argued, cannot via interpretation, amend or change the Agreement. Carrier insists that the only recourse available to Petitioner is through negotiation rather than through a proceeding before this Board. It is pointed out that the Section 6 Notice served by the Organization, resulting in the Agreement referred to above, did not include "driver" or "operator" of off-track vehicles in its language (which was adopted by the parties). Carrier persistently argues that employees being deadheaded or transported are not performing actual work for Carrier, even though under pay, and this is distinctly different than driving a truck, which is performing actual work.

The Organization states that the clear language of Article V embraces employes covered by the Maintenance of Way Agreement; no class or group of employes were excluded except those specified in V (d) of the Agreement. It is argued that an employe who is driving a vehicle is obviously "riding in" that vehicle; furthermore, it is asserted, Claimant herein was being transported at Carrier expense and indeed as instructed by Carrier. Contrary to Carrier's position, the Organization contends that drivers are included in paragraph (a) in the absence of specific language excluding them. The only exclusions are those found in paragraph (d) which do not exclude truck drivers. The Organization states that this Board has consistently found that where one or more exceptions are stated, others will not be implied. Petitioner concludes that the clear and unambiguous language of the Agreement supports the Claim.

We are unaware of prior determinations with respect to the issue herein. It is necessary to evaluate the possible ambiguity in the language of Article V in the context of the entire article. Paragraph (d) in Section (4) refers to "....the employee driver is under the influence of alcohol or drugs, or if an employee passenger who is under the influence ....."; further, we note that Section (5) excludes payment "While an employee is a driver or occupant of any conveyance engaged in any race or speed test;". It seems clear from the language cited that the parties contemplated the inclusion of employes as drivers generally and only excluded them under certain specified circumstances. Further, we find that to hold that an employe driving a vehicle is not "riding in" or "being

transported" in a vehicle is illogical and unfounded. While we recognize the distinction Carrier makes with respect to an employe working while operating a vehicle (as herein), rather than merely being transported, we fail to find that concept expressed in Article V. For example, an employe assigned to ride in the back of a truck to assist in securing material being transported would certainly be "working" and yet clearly would be covered by the Agreement and Article V.

In Award 18287 this Board said:

"It is also a principle of contract construction that expressed exceptions to general provisions of the contract must be strictly complied with and no other exceptions may be inferred. Were we to digress from those principles we would exceed our jurisdiction."

This principle has been followed consistently over the years (see for instance Awards 19158, 19189, 19976 and 20372). In this dispute we may not exceed the particular exceptions set forth in Article V (d) of the Agreement. Further, we conclude that it would be a wholly incongruent construction of paragraph (a) to hold that it excludes, by inference, only the class of truck drivers. Based on the reasoning above, and the entire record, we must sustain 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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 17th day of April 1975.

DISSENT OF CARRIER MEMBERS
TO
AWARD 20693, (DOCKET MW-20701)

Award 20693 is in serious error and we dissent.

Operators of off-track vehicles, when performing their regularly assigned duties, simply are not included under Article V(a) of the February 10, 1971 Agreement. If the negotiators of Article V(a) had intended to cover all operators of off-track equipment, it would have been a simple matter to have done so, but they did not.

It is well settled that this Board must apply Agreements as written, and cannot, through the guise of an interpretation amend or change them. This referee has previously held:

> "It is well recognized that this Board has no authority to re-write the rules." (Award 19894).

and

> "Since this Board is not empowered to write rules, it is clear that issues, such as the one before us, must be resolved in direct negotiations between the parties." (Award 19764).

If the referee had adhered to his previously announced sound principles, rather than engage in the tortuous reasoning that Award 20693 exhibits, the claim could only properly have been denied.

P C Carter

G J Taylor

G M Yeandle

H J McDonnell