NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21472
Docket Number CL-21306

THIRD DIVISION

William G. Caples, 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-7891) that:

1. Carrier violated the Clerks' Rules Agreement at Deer Lodge, Montana when it improperly deducted pay from employe E. K. Humphreville's paycheck.

2. Carrier violated the Agreement further when it failed to disallow her claim for sick pay within 60 days from the date same was filed and therefore cannot now do so by making the improper payroll deduction described in Item 1, above.

3. Carrier shall be required to compensate employe E. K. Humphreville a total of 32 hours pay improperly deducted from paychecks dated March 15, March 31 and April 30, 1974.

4. Carrier shall be required to compensate employe E. K. Humphreville a total of 24 hours pay improperly deducted from paychecks dated May 15, May 31, and June 15, 1974.

5. Carrier shall be required to compensate employe E. K. Humphreville 8 hours pay improperly deducted from her paycheck dated July 15, 1974.

OPINION OF BOARD: Claimant is the regularly assigned occupant of Relief Clerk Position located in the Yard Office at Deer Lodge, Montana, Seniority District No. 44, and has a seniority date of October 2, 1969.

Claimant, who prepared her own payrolls for submission to the Payroll Department which in turn processed them for the preparation of paychecks, claimed the following time lost because of illness on half monthly payrolls:

March 12, 1973
March 20, 21, 1973
May 7, 8, 9, 1973
August 1, 1973
August 29, 1973
October 23, 1973
December 4, 5, 1973
January 23, 1974

These claims for time lost because of sickness were reflected in subsequent paychecks.

By letter dated February 26, 1974 the Carrier's Superintendent advised Claimant:

> "This letter is to advise, effective March 15, 1974, in accordance with B.R.A.C. Agreement, Memorandum No. 2, Paragraph 'E', there will be a deduction of 8 hours from each half until sick days paid in 1973 are recovered, which are as follows:
>
> 8 hours 3-12 Position 76520 at $4.6985
> 8 hours 3-20 Position 76460 at 4.6985
> 8 hours 5-07 Position 76520 at 4.7985
> 8 hours 8-01 Position 76460 at 4.7985
> 8 hours 8-29 Position 76460 at 4.7985
> 8 hours 10-23 Position 76460 at 4.7985
> 8 hours 12-04 Position 76460 at 4.7985
>
> 1974
>
> 8 hours 1-23 Position 76460 at 4.9904"

Such deductions were subsequently made as stated in the letter.

The Brotherhood filed claim that such deductions were (1) improper as violations of the Clerks' Rules Agreement per se; (2) because Carrier had failed to disallow the claims for sick pay within 60 days from the date "same was filed" and cannot do so by making improper payroll deductions and (3) Carrier should be required to compensate Claimant for the amounts deducted.

Carrier alleges Claimant was not entitled to sick pay on any of the days for which pay was originally shown on a paycheck and later deducted on another, specifically March 3, 20, May 7, August 1, 29, October 23, December 4, 1973 and January 23, 1974; each of which as an original claim was shown as the first day of an illness and because of a Memorandum of Agreement No. 2, commonly identified as the sick leave agreement, which contains the following section:

> "(E) Employes who have less than five years' seniority as a clerk will not be paid for the first day absent on account of sickness."

Carrier asserts it was not liable for pay on any of those days because Claimant was not entitled to first days of absence on account of sickness until October 2, 1974. The Carrier alleges the payments were made by virtue of an error in the payroll and when discovered the Carrier was entitled to correct the error through payroll deduction.

The Brotherhood, without conceding the method for recovery, in fact claiming it is improper although not citing wherein it violates the Agreement, argues that (a) once a determination is made by the Carrier on a "sickness" claim by any means it cannot unilaterally change such determination and ask to recoup monies that it allegedly paid in error. The rationale being that part of Memorandum No. 2 which says:

> "Payment for time lost because of 'sickness' need not be paid for a period of thirty (30) days after the employe returns to work."

is in effect a statute of limitation on the Carrier's actions; (b) the Agreement contains no provision for reclaim or recovery. The Board accepting this assertion also believes there is nothing in the Agreement to prevent it when an error is discovered within a reasonable time and the party moving to correct the error does so without being capricious or acting in a manner which would be damaging beyond the amount of money at issue.

In view of the foregoing it appears to this Board that the Carrier once its error was discovered moved to regain its loss in as expeditious a manner as possible, believing in Carrier words "it is more reasonable to recapture overpayments by recapturing one day at a time from one paycheck at a time, which in this manner would not cause claimant an undue hardship."

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Panka
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1977.

LABOR MEMBER'S DISSENT
TO
AWARD 21472 (Docket CL-21306)
(Referee Caples)

Award 21472 is in palpable error. That it is without precedential value and will not be followed by more experienced referees is manifest in Award 21496 (O'Brien) adopted fifteen days later when a similar improper deduction case was considered by the Board, wherein we held:

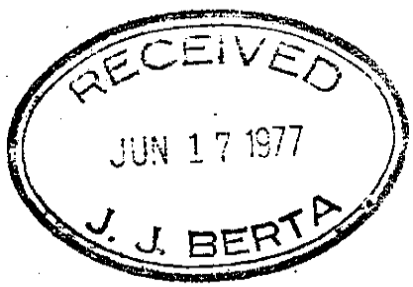
> "The Organization contends that Claimant had an understanding with Trainmaster Lockwood and with Assistant Superintendent Mobley to the effect that he would be entitled to a call plus mileage each time he made a trip to Wellington. The record further establishes that Claimant turned in time tickets for a call each day that he went to Wellington, which time tickets were approved and paid by the Carrier up to August 2, 1974. On August 2, 1974, however, Superintendent J. W. Thomas wrote Claimant that there was nothing in the controlling Agreement to warrant the call for his trip to Wellington. Thereafter, Carrier deducted the money that had been paid to Claimant for each call on and after April 1, 1974. The Organization insists that Carrier arbitrarily deducted the money paid to Claimant for making the trip to Wellington, and they herein request that Claimant be reimbursed this amount deducted.
>
> "It is significant to note that nowhere in the record has Carrier denied the existence of an understanding between Claimant and Trainmaster Lockwood and Assistant Superintendent Mobley assuring that Claimant would be paid a call for each trip that he made to Wellington. Moreover, between April 1, 1974 and August 2, 1974, <u>each time ticket submitted by Claimant in which he claimed the call was approved and paid by the Carrier without a word of protest from them. For the Carrier to now reclaim the compensation previously allowed Claimant would indeed be an arbitrary act on their part as alleged by the Organization</u>. It is readily apparent from the record at hand that Carrier's officials knew of the service

Labor Member's Dissent
to Award 21472

"performed by Claimant at Wellington and willingly acquiesced in paying him a call for this service. If they believed that such payment lacked support in the pertinent Agreement then they should have disallowed it when Claimant submitted his time tickets. For them to now reclaim the payments previously allowed strikes this Board as an unconscionable and arbitrary act. Accordingly, we shall sustain the claim." (Underscoring ours.)

Award 21472 is wrong and I dissent.

J. C. FLETCHER
Labor Member



CARRIER MEMBERS' ANSWER
TO
LABOR MEMBERS' DISSENT
TO
AWARD 21472 (Docket CL-21306)
(Referee Caples)

Comparing O'Brien's Award 21496 with Award 21472 is akin to saying an amoeba is an elephant.

The quotation from Award 21496 in the dissent clearly proves that an understanding was in effect between Claimant and the Trainmaster and Assistant Superintendent assuring that Claimant would be paid a call for each trip he made. That understanding was never denied by Carrier.

On the other hand, the Claimant in Award 21472 prepared her own timeroll and sent it to the Accounting Department, without approval of the Superintendent. On her timeroll she claimed sick pay in each instance for the first day, despite the fact that the Agreement clearly precludes payment for the first day.

When the Superintendent discovered what Claimant was doing, he immediately put a stop to it, and arranged to recover the over payments, which the Board said he had the right to do.

Carrier Members' Answer to
Labor Members' Dissent to
Award 21472

There is no similarity between the facts and circumstances in the two awards, and certainly the dissenter must have known that before he wrote the dissent. Award 21472 is correct in every respect.

G. M. YOUHN

W. F. EUKER

P. C. CARTER

G. L. NAYLOR

J. E. MASON