NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21567
THIRD DIVISION Docket Number MW-21279

Walter C. Wallace, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Inc.

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

(1) The Carrier should pay to the widow of Truck Driver D. G. Andrews the benefits set forth in "Appendix H" namely the sum of $100,000 less any amounts payable under Group Policy Contract GA-23000 of the Travelers Insurance Company or any other medical or insurance policy or plan paid for in its entirety by the Carrier (System File P-P-193C/MW-46 7/25/74).

OPINION OF BOARD: This claim arises out of a fatal injury suffered by D. G. Andrews who was a truck driver for the carrier on June 6, 1974 at 6:46 a.m. Mr. Andrews was hauling materials in the course of his employment when his vehicle was struck by another vehicle that was out of control. The incident occurred on a public highway off the carrier's property. This claim is brought on behalf of the widow and other family survivors under the provisions of Mediation Agreement A-8853, dated February 10, 1971, Article V, Appendix H (hereafter Appendix H) which provides in pertinent part:

> Article V - Payments to Employes Injured Under Certain Circumstances.
>
> Where employes sustain personal injuries or death under the conditions set forth in paragraph A below, the carrier will provide and pay such employes, 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 employes covered by this Agreement while such employes 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

B. Payments to be Made-

In the event that any one of the losses enumerated in sub-paragraphs (1), (2) and (3) below results from an injury sustained directly from an accident covered in paragraph A and independently of all other causes and such loss occurs or commences within the time limits set forth in subparagraphs (1), (2) and (3) below, the carrier will provide subject to the terms and conditions herein contained, and less any amounts payable under Group Policy Contract GA-23000 of The Travelers Insurance Company or any other medical or insurance policy or plan paid for in its entirety by the Carrier, the following benefits:

* * * * *

C. Payment in Case of Accidental Death

Payment of the applicable amount for accidental death shall be made to the employe's personal representative for the benefit of the persons designated in, and according to the apportionment required by the Federal Employers Liability Act (45 U.S.C. 51 et seq., as amended), or if no such person survives the employe, for the benefit of his estate.

D. Exclusions:

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

* * * * *

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

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

* * * * *

E. Offset:

It is intended that this Article V is to provide a guaranteed recovery by an employe or his personal representative under the circumstances described, and that receipt of payment thereunder shall not bar the employe or his personal representative from pursuing any remedy under the Federal Employers Liability Act or any other law; provided, however, that any amount received by such employe or his personal representative under this Article may be applied as an offset by the railroad against any recovery so obtained.

F. Subrogation:

The carrier shall be subrogated to any right of recovery an employe or his personal representative may have against any party for loss to the extent that the carrier has made payments pursuant to this Article.

The payments provided for above will be made as above provided, for covered accidents on or after May 1, 1971.

It is understood that no benefits or payments will be due or payable to any employe or his personal representative unless such employe, or his personal representative, as the case may be, stipulates as follows:

> "In consideration of the payment of any of the benefits provided in Article V of the Agreement of February 10, 1971.
>
> (employee or personal representative)
>
> agrees to be governed by all of the conditions and provisions said and set forth by Article V."

* * * * *

On the property the claim was progressed to higher levels based upon Claimant's recitation of operative facts of the accident that brought the matter within consideration of Appendix H. While on the property the carrier did not contest these facts. Instead, it denied coverage. The matter moved to conference and the issue dividing the parties involved their opposing views concerning the interpretations of the Paragraph A phrase "Being transported at Carrier expense". Thereafter, they expanded on their reasons for their respective views, including Carrier's assertion that the contested phrase reflects "an intent to cover only those bodies in passive transit." According to claimant no other issue was developed on the property except for the matter of the insurance settlement (which will be separately treated here).

In Award 20693 (Lieberman) this Board considered the issue whether or not drivers of off-track vehicles hauling materials under Carrier orders are covered by the provisions of Appendix H in the event of an accident. The precise provisions involved here were considered and in a carefully reasoned opinion it was decided they were and the claim was sustained.

In its submission to this Board Carrier maintains that Award 20693 should be distinguished from this case because the issues are different. Here it is claimed the issue involves petitioner's burden of establishing all elements of a claim. Insofar as that burden had not been met with respect to the condition that the decedent employe was "being transported at carrier expense", the claim fails. Petitioner opposes this view claiming the only defense raised on the property was that decided in Award 20693. It follows that we must consider at the outset whether Carrier's argument in terms of intention and burden of proof is properly before us for consideration.

The objectives of the Railway Labor Act are best served when the parties make an earnest effort on the property to disclose their respective positions and resolve their differences. It is this exchange on the property that becomes the record for consideration by this Board and we cannot, as a matter of jurisdiction, permit the parties to raise issues involving rules or arguments not raised on the property. Here we would have preferred an amplification of Carrier's argument concerning intent and the matter of passive employes in order to meet the objectives of the act fully. Nevertheless, we cannot say the Carrier did not meet at least the marginal requirements of disclosure on the property. We conclude, therefore, Carrier's argument along this line should not be excluded.

In its submission the Carrier recognizes the phrase "being transported at Carrier expense" results in contradictory interpretations and concedes that it contains "more than a little degreee of ambiguity". According to Carrier, the way to resolve this ambiguity is to perceive the intent of the parties, citing various awards approving such approach. On this basis, we are provided a history of off-track vehicle agreements that includes information concerning their origin with the Trainmen and the fact that travel time by these employes involved, more frequently, passive service. As matters developed negotiations eventually resulted in the first off-track vehicle agreement for the benefit of the Brotherhood of Railroad Trainmen. Other operating unions followed suit and the same agreement was adopted in their contracts. The Signalmen obtained such an agreement and was the first non-operating union to do so. In 1969, the Brotherhood of Maintenance of Way Employes went through a Section 6 procedure that progressed to a Presidential Emergency Board on this very issue. The Carrier quotes from the Section 6

notice and the findings of the Emergency Board in this regard. The end result of that procedure was that the Maintenance of Way Employes reached an agreement on this issue and accepted the off-track vehicle agreement of the Trainmen, virtually without change. According to the Carrier, this means the parties agreed to not include employes who are in active service stating that this:

> "... is suggestive of the intent to have the same coverage, and not to extend it to those engaged in their regular active service - the driving of a truck as their sole job duty."

Carrier is correct in pointing out that the Maintenance of Way agreement is virtually identical with the other off-track vehicle agreements including that of the Trainmen. We may not take the further step, however, and conclude it was the intention of the parties to cover only passive employes and thereby exclude from coverage active employe-drivers. The agreement we are considering involves a portion of the complete agreement covering Maintenance of Way employes. We must assume the off-track vehicle agreement would be applied consistent with their scope rule.

There is no evidence in this record concerning the actual intention of these parties when they reached their agreement on off-track vehicles. To suggest their intention may be derived from the developments in some other negotiations is speculative. Moreover, it mocks credulity to suggest these parties would enter an agreement for the new protection without consideration of the fact that a number of those who might claim coverage were employe-drivers. We believe it is just as reasonable to postulate a different hypotheses: that the parties to this negotiation knew precisely what they were doing. Under the pressure of a strike deadline, they were unable to agree upon provisions tailored to their needs and decided to accept the wording of the Trainmen/Signalmen agreement without change. They could not be oblivious to the fact that the agreement would eventually be interpreted by this Board.

We conclude that this argument which attempts to prove the intention of the parties by analyzing the history of off-track vehicle agreements is neither persuasive nor productive. Absent such persuasive evidence we are left with the problem of interpreting the plain meaning of the provisions of Appendix H and their application to the facts here. On the question of interpretation we have analyzed the reasoning and conclusions reached in Award 20693 and we agree with it in every material respect. It is our view that this Award is controlling here as to the application of Appendix H to driver-employes. Further, we have analyzed the representations of operative facts made on behalf of petitioner on the property (all of which were uncontested) relating to the decedent's employment, his job assignment and the facts connected with the accident that resulted in his death. We hold that petitioner has satisfied his burden of proof to establish this claim within the rule of Award 20693 and this claim for benefits under Appendix H should not have been denied.

We come now to the matter of subrogation and offset alluded to earlier in connection with the reference to the insurance settlement. The offset provisions are not involved here because we are not concerned with a suit against the Carrier. With respect to subrogation, we are not disposed to outline a specific procedure for handling such matters. We interpret Appendix H provisions to include valid subrogation rights which arise in favor of the Carrier coincident with its obligations to pay benefits under this Appendix H. These matters are inextricably linked together and we conclude here they cannot exist one without the other. If it is claimed that Carrier in some way has lost its right of subrogation despite the fact it is obligated to make payment on this claim, we do not find basis for this view and it is rejected.

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 as outlined in the Opinion.

A W A R D

Claim is sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Panka
Executive Secretary

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