Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27071
THIRD DIVISION Docket No. MW-26532
88-3-85-3-272

The Third Division consisted of the regular members and in addition Referee Edwin A. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Union Pacific Railroad Company

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

(1) The Carrier violated the Agreement when it withheld four hundred sixty-four dollars ($464.00) from Mr. W. S. Taylor in the semi-monthly pay period ending February 15, 1984 and when it failed and refused to allow Mr. Taylor ten (10) days of vacation or compensation in lieu thereof during 1984 (System File M-38/013-210-44).

(2) As a consequence of the aforesaid violations, Mr. W. S. Taylor shall be paid four hundred sixty-four dollars ($464.00) and he shall be allowed pay in lieu of his ten (10) days of 1984 vacation as stipulated in Rule 44."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

At the time this dispute arose, Claimant was a Track Operator on Steel Gang 8806 at Red House, Nevada. On April 11, 1983, Claimant was recalled and returned to service. According to Claimant, in May 1983, he approached the Timekeeper for Gang 8806 and inquired whether or not he qualified for vacation during 1983. Claimant was directed to the vacation seniority roster posted by the Carrier which showed that Claimant was entitled to ten days vacation during 1983. Claimant asserts that he relied upon the Carrier's records and requested two periods of five days of vacation commencing during November 1983, and again in December 1983, from General Foreman R. Hamilton and Foreman R. Quals. In both instances, Hamilton and Quals checked the vacation seniority roster, determined that Claimant was eligible and in accord with his requests, Claimant received ten days vacation with pay.

Commencing in November 1983, the Carrier determined that due to errors in its record keeping system, certain employees were receiving vacation pay when they were not entitled to those payments. On or about February 1, 1984, Claimant was advised by the Timekeeper that the 1983 vacation seniority roster was in error since Claimant did not work a sufficient number of days during 1982 to qualify for a 1983 vacation and that he was not entitled to the ten days given to him during 1983. Claimant's paycheck for the period ending prior to February 15, 1984, contained a deduction of $464.00 to cover the overpayment for vacation days taken by Claimant on November 28, 29, 30, December 1 and 2, 1983. Upon further inquiry, Claimant was advised by the Timekeeper in Salt Lake City, Utah, that a computer error resulted in the erroneous vacation seniority roster and that Claimant would be required to repay the ten days pay through deduction.

On April 16, 1984, the Organization filed a claim for the $464.00 deduction reflected in Claimant's paycheck for the period ending February 15, 1984. By letters of June 12, 1984, from Division Engineers G. H. Maxwell and J. T. Smith, the Carrier stated that it could not confirm whether Claimant requested information concerning the amount of vacation to which he was entitled, but both stated that "I am instructing the Utah Division Maintenance of Way timekeeper to restore the ... [$464.00] deductions, but I am also considering the 1984 accumulated vacation credits as having been taken as a result of the restored deductions." A second claim dated August 6, 1984, followed as a result of the revocation of Claimant's 1984 vacation asserting that Claimant worked sufficient days during 1983 for a 1984 vacation.

According to the Organization, notwithstanding the direction of the Division Engineers on June 12, 1984, to the Timekeeper to restore the $464.00 deduction, Claimant did not receive those funds. Further, the Organization asserts that Claimant was not permitted to take a vacation during 1984.

There is no dispute that Claimant, in fact, did not work sufficient days during 1982 to qualify for 1983 vacation. Claimant worked 93 days during the preceding year when 110 days were required under the provisions of Section 1(b) of the National Vacation Agreement. However, in Third Division Award 19937 (relying upon Third Division Awards 17142 and 15912 which presented similar fact situations) we nevertheless sustained a claim for a similarly deducted extra vacation day stating:

> "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."

Similarly, in Second Division Award 7987 a claim for the deduction of one week's vacation pay was sustained stating:

> "On balance, where, as here, the claimant says that she relied on notice as to the amount and kind of vacation she was to take, which was posted by the Carrier and made up by the Carrier, the Board believes that the Carrier has not satisfied its burden of proof to show that the claimant was aware that an error had been made by the Carrier."

We believe the rationale of those Awards to be controlling of the particular facts presented in this matter. As in Third Division Award 19937, this case presents "more than a mere recouping of an overpayment." As stated in that Award, we do not dispute the general right of a Carrier to make recoupment. But more is presented in this case. Here Claimant inquired if he was eligible for vacation; was told to check the roster prepared by the Carrier which showed that he was eligible for ten days; later asked his supervisors if he could take vacation and after they checked the roster, Claimant was granted the vacation time only to find out later that the Carrier made an error in formulating the roster. The record sufficiently establishes that Claimant relied upon the erroneous information given to him and but for that erroneous information, we are satisfied that Claimant would have worked and received compensation for his services.

We find nothing in the record to support a conclusion that Claimant was purposely abusing the vacation benefits. As we stated in Third Division Award 19937:

> "If the Board were convinced that Carrier's speculations are accurate, then, ... this claim would be quickly disposed of. However, Carrier, who has the burden of proving such an allegation ... fails to present any evidence to substantiate its assertion. * * * [A]bsent any showing that [Claimant] was scheming or plotting to obtain an advantage not due her, the Board can only conclude that she relied on the misinformation given her ...."

The Carrier's arguments do not change the result in this case. First, procedurally, we do not find either of the Claims were premature, abandoned or untimely filed. The Claims were inexorably intertwined. Rule 49 requires presentment of disputes within sixty days from the date of the occurrence. Both Claims were filed within that period. The April 16, 1984, Claim was filed on the basis of the deduction found in the paycheck for the period ending February 15, 1984, and the August 6, 1984, Claim was filed based upon the revocation of the Claimant's 1984 vacation as reflected in the Division Engineers' letters of June 12, 1984. Moreover, the definitive statements by the Division Engineers in their June 12, 1984, letters that they were treating Claimant's vacation credits "as having been taken" constitute a sufficient occurrence within the meaning of Rule 49 to permit the filing of a Claim.

Second, the fact that the Division Engineers were "unable to confirm" that Claimant requested any information concerning the amount of vacation days he had accumulated prior to his going on vacation does not sufficiently refute Claimant's statements to the contrary that he made specific inquiries to the Timekeeper and his supervisors and therefore justifiably relied upon the responses given to him that he was eligible for vacation days during 1983.

Third, the Awards cited by the Carrier are distinguishable or unpersuasive in light of Third Division Award 19937 and Second Division Award 7987, supra. In Award 19937 we found that the facts presented in Third Division Awards 15067, 9581 and 9117 did not "deal with the precise factual circumstances of the instant dispute." Award 7987 came to the same conclusion. We are of the same opinion in this case. Award 15067 did not demonstrate the elements found in this case of Claimant requesting information concerning his vacation entitlement from his supervisors and relying upon the Carrier's vacation seniority roster. Award 9581 concerned the receipt of a double payment for holiday pay and Award 9117 concerned the recoupment of payment for the Thanksgiving holiday for an extra employee holding a temporary vacancy who was not entitled to holiday pay. Neither Awards 9581 nor 9117 showed the employee foregoing a work opportunity, as here, based upon information prepared by the Carrier. Further Awards cited by the Carrier lead to the same result. In Second Division Award 10957 the Claimant therein knew that he used the allocated vacation days which prompted the conclusion that "when a person is aware of an impropriety, that person is not entitled to be made whole for his loss ...." No such evidence exists in this record. Second Division Award 8684 relies upon the rationale of Awards 15067, 9581 and 9117, supra, which Awards we have found to be inapplicable to this particular case. Moreover, we note that a remedy was nevertheless formulated in Award 8684 that took into consideration the "foreclosure of that opportunity to work [which] is all the more a bitter pill to swallow."

We shall therefore sustain the Claims. The Carrier asserts in its rebuttal that due to the misplacement of records it cannot verify if Claimant was reimbursed $464.00 in accord with the instructions of the Division Engineers to the Timekeeper in their June 12, 1984, letters. Nevertheless, the Organization's assertions of nonpayment remain unrefuted. We shall therefore require that Claimant be reimbursed the $464.00 that was withheld from his paycheck for the period ending February 15, 1984. With respect to the

Carrier's cancellation of Claimant's 1984 vacation, it appears that Claimant was not granted vacation during 1984. He shall therefore be reimbursed accordingly. We do, however, reject the Organization's argument that reimbursement for the 1984 vacation days must be at a rate above the normally computed vacation rate. Section 5 of the National Vacation Agreement quoted by the Organization requires time and one-half pay for work performed during vacation periods in addition to regular vacation pay where the "carrier finds that it cannot release an employe for a vacation during the calendar year because of the requirements of the service...." We are not satisfied that the unique facts of this case demonstrate that the Carrier did not grant a vacation to Claimant "because of the requirements of the service." Absent a showing that the Carrier attempted to circumvent the Vacation Agreement, vacation pay, if any, for 1984 shall be at the regularly computed rate.

A W A R D

Claims sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of May 1988.