

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31751
Docket No. MW-30689
96-3-92-3-479**

The Third Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Truck Driver H. W. Abeyta four (4) weeks vacation allowed him take such, thereafter discovered an error had been made and deducted one (1) week's pay from Mr. Abeyta's check (System File C-91-02/MWD 91--07-01A CSR).**
- (2) As a consequence of the aforesaid violation Mr. H. W. Abeyta shall be compensated five (5) days pay at his respective pro rata rate (\$480.40)."**

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The Claimant, H. W. Abeyta during 1990, held a regularly assigned position of Truck Driver in the Denver Division Track Department. During 1990, the Claimant took four weeks of vacation. On January 24, 1991, the Claimant received a letter from the Carrier indicating that it had overpaid him five days in the amount of \$480.40 for the fourth week of vacation during 1990. According to Carrier, the Claimant's qualifying period the previous year allowed him only three weeks of vacation.

Both the Organization and the Carrier agree that the Claimant's prior service only entitled him to three weeks vacation.

According to the Organization, as supported by a statement given by the Claimant, prior to taking his four weeks vacation, the Claimant contacted Carrier Agent Peretto and was told by Mr. Peretto that he was entitled to four weeks vacation.

The Carrier disputes that the Claimant contacted Agent Peretto and, in fact, alludes to the fact that the Agent denies that the conversation with Claimant took place.

According to the Organization's theory of the claim, Truck Driver Abeyta relied on incorrect information provided by the Carrier that he was entitled to the fourth week during 1990, he took the vacation in reliance on the erroneous information and that if he had not been erroneously advised, that he would have been ready and available to work during the disputed fourth week.

Therefore, according to the Organization, since the record contains an actual statement by the Claimant indicating that Mr. Peretto instructed him that he was entitled to four weeks vacation and since the Carrier presented no such actual statement by Mr. Peretto himself, the balance of justice falls on the side of the Claimant to sustain the claim.

On the other hand, the Carrier argues that it is well established that it is entitled to recoup overpayments. *Third Division Award 29936 and Second Division Award 10957.*

The Carrier argues that the conversation between the Claimant and Agent Peretto never took place and that the Claimant possessed sufficient knowledge of the Vacation Agreement to know that he was not entitled to the fourth week during 1990. Therefore, the Carrier argues that it was well within its rights to recover the fourth week of vacation pay paid in error to the Claimant.

The erroneous overpayment for vacation pay is not a novel dispute before this Board. This Board has struggled for years in an attempt to balance the equitable consideration of paying an employee for a benefit to which he or she is not entitled versus recognizing that employees should not be held responsible for Carrier's erroneous information on which they reasonably rely. In *Third Division Award 19937*, established a useful test to determine the appropriate balance between the Carrier's right to recoup versus the harm caused to an employee who reasonably relies on erroneous Carrier information was stated:

"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 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 the supervisor's statement. Thus, in this case, to deny the claim would result in Claimant losing one days pay, when, in fact, she would have worked, and received pay had the supervisor given her accurate information."

After considering all of the facts, we hold that the facts of this case fall more nearly in line with the Third Division precedent sustaining claims of employees who reasonably relied on Carrier's erroneous information. In this situation, the record established that the Claimant contacted Agent Peretto in order to obtain information about his vacation entitlement during 1990. Relying upon this information, the Claimant took his four weeks of vacation and was fully paid for his vacation time. It was not until the following year that the Carrier discovered its error and recouped the payment for the unearned fourth week of vacation.

While the parties dispute whether or not the Claimant actually discussed his vacation entitlement with Agent Peretto, the evidence in the record indicates that he did. The record contains a statement by the Claimant indicating that he had the alleged conversation with Agent Peretto. Furthermore, the Carrier paid the four weeks of vacation, in full, until the following year. This indicates that the Carrier essentially agreed that the Claimant was entitled to the four weeks of vacation until management discovered the error many months after paying the Claimant for all four weeks of vacation.

Therefore, since the Claimant reasonably relied upon the information provided by the Carrier and that he had a regular assignment which he would have worked had he been given correct information, we hold in line with Third Division precedent that this claim must be sustained as presented.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of October 1996.