PUBLIC LAW BOARD NO. 2668

AWARD NO. 40
CASE NO. 39

PARTIES TO THE DISPUTE

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees

and

Norfolk and Western Railway Company (Eastern Region)

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. Carrier is in violation of Article VI of the January 13, 1979 National Agreement when it fails and/or refuses to administer the benefits thereof to the widow and/or estate of Clerk J.A. Mearise, Norfolk, Virginia, who was fatally injured on December 3, 1981, while operating a fork lift vehicle (a Company vehicle), a requirement on his regularly assigned position.

2. Carrier shall now be required to pay the widow and/or estate of Clerk J.A. Mearise the face value of the policy in regard to fatalities, or the amount of $150,000.00, as well as interest thereon for the period of time such benefits are improperly withheld by Carrier.

OPINION OF BOARD

Mr. John A. Mearise entered the service of Carrier on July 28, 1953 as a laborer at Norfolk, Virginia. On December 3, 1981, he was working a fork lift operator position in the Material Management Department at the 38th Street Car Shop, Norfolk, Virginia, with assigned hours 7:00 A.M. to 3:30 P.M. As was customary, he was operating a fork lift vehicle used to transport company material within the Norfolk Terminal and as he was enroute between his pick up point and the delivery destination, one of the vehicle's coupler's fell to the ground and the left front wheel of the fork lift ran up onto the coupler, causing the fork lift to overturn about 50 to 75 feet from the storage pile. Mr. Mearise was thrown to the

ground by the overturning motion and the roll bar of the folk lift vehicle crushed his skull. He was instantly killed.

On March 12, 1982, the General Chairman advised Carrer's General Claim Agent that Mr. Mearise's death activated Article VI - Off Track Vehicle Accident Benefit of the January 13, 1979 Agreement, which entitled the surviving widow or the decedent's estate the amount of $150,000.00. He requested such payment. The General Claim Agent declined his petition by letter, dated, March 17, 1982, on the grounds that Article V of the February 25, 1971 Agreement and Article VI of the January 13, 1979 Agreement did not apply to this accident. Specifically, he noted that a fork lift truck was not the type of vehicle envisioned by Article V of the February 25, 1971 Agreement, as amended in 1979, and in addition, the Decedent was neither deadheading under orders nor being transported at Carrier's expense.

Article VI of the January 13, 1979 Agreement provides in part that:

"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 representatives, the applicable amounts set forth in paragraph (b) below, subject to the provisions of other paragraphs in this Article.

(a) <u>Covered Conditions</u>

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) <u>Exclusions</u>

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 therat, 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

AWARD NO. 40 -2668
CASE NO. 39

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.

In defense of its claim, the Organization contends that the Decedent was not deadheading under orders but was being transported at Carrier expense. It asserts that he was riding in an off track vehicle authorized by Carrier to transport employees from one location to another on December 3, 1981 and his untimely, accidental demise was covered by the applicable provisions of Article VI of the January 13, 1979 Agreement. It adduced several Third Division and Public Law Board Awards which dealt with similar claims and Agreement language and asserted that they were judicially dispositive herein. Carrier contends that the Decadent was not riding in, boarding or alighting from an off track vehicle authorized by it to be used by employees to deadhead under orders or to be transported from one location to another at its expense. It argues that he was performing part of his regular work assignment which was handling material in the repair yard area with a fork lift. It avers the decisions in Third Division Award No. 22103 and Award No. 12 of Public Law Board No. 1838 are on point with this case.

In our review of this case, we agree with the Organization's position. The case law cited by the Organization, particularly, Third Division Award 20693, which has become the benchmark ruling on this question, is persuasive. This decision addresses the definition of an off track vehicle driver and applies to the Decedent in this instance. He was an employee riding in an off track vehicle and was working as well, being literally transported at company expense. In Third Division Award No. 20693, the National Railroad Adjustment Board thoughtfully analyzed the relevant application of an analogous provision to a similar factual situation and articulated its interpretative parameters. The Division held in pertinent part that:

> "It seems clear from the language cited that the parties comtemplated the inclusion of employes or 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

(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 being transported would certainly be 'working' and yet clearly would be covered by the Agreement and Article V."

It defined the factual circumstances which would invoke the Benefit provisions's coverage and judicially construed the meaning of the terms, "covered provisions" and "exceptions". In a line of successor Awards, the Division consistently upheld its decision in Award No. 20693, where the fatally injured employee was actively driving an off track vehicle and performing tasks that were integral to his normal assignment. (See Third Division Award Nos. 21125, 21126, 21567, 21613, 21705 and 22061) Moreover, in Award No. 26 of Public Law Board No. 2366, involving the Brotherhood of Maintenance of Way Employees and the Illinois Central Gulf Railroad, the PLB held in part that:

"Third Division Award 20693 is clear authority that the fact that an individual is the driver of the vehicle does not exclude him automatically from coverage, and it is inappropriate to hold that an employee driving a vehicle is not 'riding in' or 'being transported'. Further, the fact that an individual may be working while operating a vehicle does not automatically exclude him from coverage."

In this case, the Claimant was operating a Model 580C Case Backhoe on a public highway during regular working hours when a tractor trailer collided with his vehicle and killed him. It is a remarkable parallel case to the one before us. We have carefully reviewed the two Awards submitted by Carrier which have denied claims under an Off Track Accident Benefit Agreement, but these cases were noticeable distinguishable from the cases supporting the Decedent's claim herein. In both instances, the Claimants were categorically exempted from coverage. In Third Division Award No. 22103, the Claimant was commuting from his residence to his assigned place of business and in Award No. 12 of Public Law Board No. 1838, the Claimants were commuting by driving their private automobile to their home.

Accordingly, upon the record and for the foregoing reasons, we find that Third Division Award No. 20693 and the others cited in this opinion are foursquarely on point with the facts herein and thus we must sustain the claim. The doctrine of Res judicata is applicable. We will not, however, sustain the claim for interest payment. The Decedent is only entitled to the benefit amount provided by Article VI of the January 13, 1979 Agreement.

AWARD NO. 40 -2668
CASE NO. 39

FINDINGS

Public Law Board No. 2668, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;

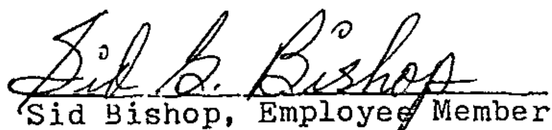
2. That the Board has jurisdiction over the dispute involved herein;

3. That the Agreement was violated.

AWARD

Claim sustained to the extent expressed herein.

George S. Roukis, Chairman and Neutral Member



Sid Bishop, Employee Member

John Gereaux, Carrier Member
Dissenting

Dated: March 16, 1983