

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 51

Carrier File No. 3MWB 90-07-05

Organization File No. T-D-482-H

STATEMENT OF CLAIM

1. The Carrier violated the Agreement when it recovered the sum of eight hundred seventy-four dollars and three cents (\$874.03) from Sectionman B. D. Nitschke.

2. As a consequence of the aforementioned violation Mr. B. D. Nitschke shall be paid eight hundred seventy-four dollars and three cents (\$874.03).

FINDINGS

During 1987 the Claimant worked in the Maintenance of Way Department and, based on his years of service, qualified for three weeks' vacation, which he observed in 1988. While on furlough in early 1988, he applied for and was granted the right to work in an Operating Department position from March 2 to July 25, 1988. Thereafter, he returned to a Maintenance of Way position for the remainder of the year.

At issue here is the Claimant's vacation entitlement for 1989, based on service in 1988. At the end of 1989, he was absent but

under pay from December 11 through December 31. According to the Organization, he "requested and received permission" for vacation for this period, while the Carrier asserts that he "placed himself on vacation".

In February 1990, the Carrier accurately determined that the Claimant had not performed compensated service of at least 100 days in 1988 and thus was not entitled to vacation under the Non-Operating Vacation Agreement in 1989 (although he was entitled to one week based on his Operating Department service). As a result, the Carrier withheld the appropriate amount from the Claimant's pay for what it regarded as an overpayment.

The Organization does not dispute that the Claimant was not entitled to vacation, in view of his less than 100 days' 1988 Maintenance of Way service. There is also no doubt that a carrier may, in many instances, properly recoup overpayment to employees. Here, however, the circumstances lead to a different conclusion. The Claimant may be faulted for not understanding the difference in Operating and Non-Operating service as to vacation qualification. On the other hand, the Board makes the reasonable presumption that, at minimum, the Claimant's supervisor must have been aware of his intention/request to take vacation. Had the Claimant been advised of his non-eligibility at the time, he would have had the alternative of working the remainder of December without loss of earnings. The Claimant cannot be held solely responsible. In addition, this is not a case of erroneous overpayment to an

otherwise fully employed employee. These particular circumstances do not justify withholding pay from the Claimant's later earnings.

A W A R D

Claim sustained. The Carrier is directed to place this Award into effect within 30 days of the date of this Award.



HERBERT L. MARX, Jr, Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



D.J. MERRELL, Carrier Member

NEW YORK, NY

DATED:

*February 24, 1944*