

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 28
)
) Award No. 26
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: November 7, 2001

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier failed and refused to properly compensate Mr. T. D. Atwood for the ten (10) days' vacation pay he was entitled to for the year of 1996 (System File N-328/1035450).
2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be compensated for ten (10) days' pay at the truck driver's rate.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The instant case is related to Case No. 27, Award No. 25. Carrier had previously dismissed Claimant from service, but on September 26, 1995, the National Railroad Adjustment Board Third Division sustained Claimant's claim and ordered him reinstated to service and made whole for all wage loss. On November 22, 1995, Carrier issued four vouchers to Claimant totaling the amount that Carrier maintained was due. However, Carrier neglected to withhold from the payments an amount necessary to repay the Railroad Retirement Board for

unemployment compensation Claimant had received while he was out of service. On at least three occasions, Carrier advised Claimant of the error and directed him to repay \$7,233.95. Claimant did not repay the money.

There is no dispute that Claimant was entitled to the ten days' vacation pay at issue in this case. However, rather than pay the money to Claimant, Carrier credited it against Claimant's alleged debt to Carrier of \$7,233.95. The instant claim challenges that action.

Before addressing the merits of this dispute, we must consider whether the claim is moot. Attached to Carrier's submission was Exhibit MM, which appears to be a release signed by Claimant growing out of an FELA claim against Carrier. At the hearing, the Carrier Member of the Board suggested that the release may encompass the instant claim and may render this case moot. After careful consideration, however, we have decided that this case is not moot.

On its face, it is unclear whether the release was limited to personal injury claims akin to the FELA claim that was settled, or whether it was broader and encompassed claims such as the one present in the instant case. Carrier did not address the release in its submission and did not argue that the claim was moot. If the release was intended to encompass the instant claim, we would have expected Carrier to have argued that in its submission. Accordingly, we are unable to say that the instant claim is moot and will address the merits.

It is well established that where Carrier has made an erroneous payment to an employee, it may recoup the payment through withholding from future payments. See SBA No. 570, Award No. 860; Second Division Award No. 11072; Third Division Award No. 21472. In each of those cases, however, the board determined that the employee owed carrier the money.

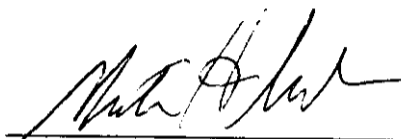
In the instant case, the Organization contends that Claimant did not owe Carrier any money because his debt to the Railroad Retirement Board had been discharged in bankruptcy. In keeping with the awards cited above, it might be argued that we must adjudicate Claimant's contention that any debt to the Railroad Retirement Board was discharged. However, upon further reflection, we conclude that we lack authority to adjudicate that issue.

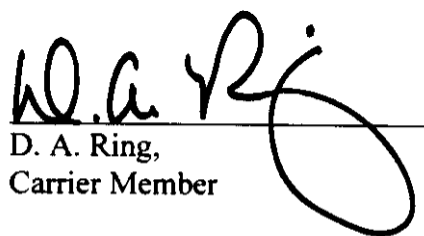
In the cases cited above, the board adjudicated the question whether Carrier's claim of overpayment was proper under the relevant agreement. In contrast, the Organization is arguing that Carrier's claim of overpayment violates the Bankruptcy Code and the order of the bankruptcy court discharging Claimant's debts. In other words, the claim pressed by the Organization arises not under the Agreement, but under the Bankruptcy Code. This Board's authority, however, is limited to adjudicating claims arising under the Agreement.

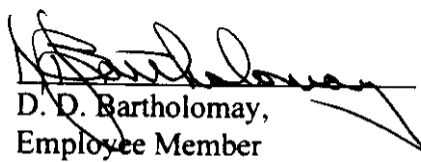
We express no opinion as to whether Claimant has a claim under the Bankruptcy Code. However, if Claimant wishes to pursue such a claim, he must do so in the proper forum.

AWARD

Claim denied.



Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, March 12, 2002.