Award Number 195
Docket Number CL-201

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

BOSTON AND MAINE RAILROAD

DISPUTE.—"Dispute existing over the proper interpretation of Rule 73, Sick Leave, of the agreement between the parties effective July 15, 1925, and claim for time lost account of personal illness of Raymond Thomas for February 19, 1934, of Louise Cull for April 6, 7, and 9, 1934, and for Thomas J. Donohoe for December 22, 1934."

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

The carrier and the employees involved in this dispute are respectively carrier and employees 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.

The parties to the said dispute were given due notice of the hearing thereon.

As a result of a deadlock, Wm. H. Spencer was called in as Referee to sit with this Division as a member thereof.

FURTHER FINDINGS.—These three claims are presented for the purpose of securing from the Third Division of the National Railroad Adjustment Board an interpretation of Rule 73 of the Agreement between the parties, effective July 15, 1925. This rule provides:

> "*Sick Leave.*—Pay will only be allowed on account of absence due to bona fide personal illness at the discretion of the Head of the Department when the length and character of the service and other facts surrounding the individual case warrant.
>
> "Where allowances are made on this account, clerks will be allowed annually, on calendar year basis, based on continuous service:
>
> "Two (2) years and less than five (5) years, not to exceed 6 days.
>
> "Five (5) years or over, not to exceed 12 days.
>
> "The foregoing is contingent upon work of clerk being kept up by other employes without cost to the Railroad."

For the purposes of this award, it will not be necessary to recite the three claims in detail; these general statements concerning them will suffice:

(1) The absences of the employees involved in this dispute were occasioned by "bona fide personal illness."

(2) Each of the employees involved had been in the service of the carrier for a period of two years or more at the time his or her claim originated.

(3) The work of these employees was kept up during their absence by their co-workers "without cost to the Railroad."

(4) A representative of the petitioner herein unsuccessfully sought to secure an adjustment of these claims by handling them with the proper official or officials of the carrier as required by the Railway Labor Act of June 21, 1934, before submitting them to this Division of the Adjustment Board.

(5) In declining the three claims, the representative of the carrier stated as to the first:

> "Our interpretation of Rule 73 is that allowance for personal illness is at the discretion of the Head of the Department, and cannot see my way clear to recognize the claim."

As to the second:

> "While the amount involved in this case is small, there is a very important principle involved as to the proper interpretation of Rule 73. I, therefore, have no alternative except to decline to allow the claim."

And as to the third:

> "In this case the Management is simply exercising the discretion allowed it under Rule 73."

(6) The carrier in its submission, raised a question as to whether the claim of Louise Cull was properly presented to the management. Although her absences from work occurred on April 6, 7, and 9, 1934, she did not present her claim until April 25, 1934. The carrier contended that under Rule 40 she should have presented her claim "within seven days of the cause of the complaint." Aside from the fact that the carrier did not raise this question in denying the claim originally, it is the opinion of the Referee that Rule 40 does not apply to claims for compensation due under the agreement.

In addition to this alleged irregularity in the presentation of one of the claims, the carrier also raised some questions concerning the merits of the various claims. The Referee, however, concludes that, whatever may now be said concerning the merits of the individual claims, the carrier denied them on the ground that it had the arbitrary right to do so under Rule 73.

RESPECTIVE POSITIONS OF THE PARTIES.—This dispute, therefore, presents the single and fundamental issue whether Rule 73, as urged by the petitioner, imposes upon the carrier a legal obligation to pay employees for sick leaves "when the length and character of the service and other facts surrounding the case warrant"; or whether, as urged by the carrier, the rule vests the determination of this question exclusively within the discretion of the carrier.

In support of its position, the petitioner directed the Division's attention to an award rendered in 1933 by a committee of arbitration established by the United States Board of Mediation under the provisions of the Railway Labor Act of 1926. The general issue before the committee at that time was the precise issue which is before this Division in the present dispute. In rendering an award in favor of the employees, the committee said in part:

> "It is conceded that both of the questions submitted to the Board for determination turn upon the proper construction of Rule 73. In the opinion of a majority of the Board, the purpose of this Rule 73 is not merely to suggest or offer the hope of discretionary favors or privileges, which may be granted or withheld at the will of the head of the Department, but is intended to provide and does create, sick leave benefits reasonably available to employes coming within its terms."

The carrier, however, contended that since the arbitration agreement of May 29, 1933, specifically provided that "in its award the Board shall confine itself strictly to decisions as to the questions so specifically submitted to it", the "decision of the majority of the Arbitration Board in that case is not controlling in any other case."

OPINION OF REFEREE.—The position of the employees in this dispute is essentially this: When the conditions set forth in Rule 73 concur, an employee is entitled as a matter of right to compensation for sick leaves in accordance with the schedules therein set forth. To sustain this position, the Division must perforce read out of the rule the phrase "at the discretion of the Head of the Department" as surplusage. This, the Division is reluctant to do.

If, however, the position of the carrier is sustained, Rule 73 is illusory. The Division is just as reluctant to adopt this construction as it is to adopt the construction urged by the petitioner. The adjustments made under this rule and the antecedent rule, and the conferences which took place between the parties in the revision of the rule in 1925 indicate that the parties, prior to the controversies which eventuated in the arbitration agreement of 1933, assumed that Rule 73 was intended to impose a positive obligation on the carrier with respect to compensation for sick leaves. To the Referee, it seems strange, indeed, that practical-minded men would sit down and negotiate or revise a rule designed to give one party arbitrary power to do as he pleased about the matter in controversy. If, as the carrier contended, it has always enjoyed the arbitrary power to give or withhold compensation for sick leaves, why was it so insistent

upon the revisions which were made in the rule in 1925? The Division, therefore, concludes that the rule in question does not give the carrier the arbitrary power with respect to compensation for sick leaves; that, on the contrary, it imposes upon the carrier a positive, if undefined, obligation.

What, then, is the scope of the obligation which this rule imposes upon the carrier? The answer to this question may in part be found in a quotation from a decision of the Supreme Court of the United States, submitted by the carrier in support of its position:

> "The term 'discretion' implies the absence of a hard and fast rule. The establishment of a clearly defined rule of action would be the end of discretion, and yet discretion should not be a word for arbitrary will or inconsiderate action."

The term "discretion", as used in the rule in question, negatives the idea that the carrier may do as it pleases about sick claims. The exercise of discretion positively requires the head of a department to weigh "the character of service and other facts surrounding an individual case" before denying a claim. The rule as thus interpreted obligates the carrier, when the fundamental conditions set forth in the rule concur, to make compensations for sick claims unless it can show good reasons in connection with an individual claim for denying it.

The Referee will not attempt here to specify all the reasons which would justify the carrier in denying a claim which otherwise meets the fundamental conditions of the rule. In his opinion, however, the reasons relied upon should relate to the merits of the individual claim. Neither the fact that the carrier does not compensate other classes of employees for sick leaves nor the fact that during the depression it is losing money is a sufficient reason within the meaning of this rule for denying a claim.

For the purpose of the present decision, it is sufficient to point out that the carrier offered no adequate reason for denying the claims involved in this dispute. It merely exercised its "arbitrary will."

AWARD

The claim is sustained in its entirety in terms of the interpretation placed by the Referee upon Rule 73 which he deems a proper interpretation.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON,
Secretary.

Dated at Chicago, Illinois, this 6th day of February 1936.