

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Paul W. Richards, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA
RAILWAY COMPANY**

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated agreement rules when it failed and refused to allow Raynoll A. Swangstue, Sectional Stockman, St. Paul General Store, sick leave compensation for August 5th, 6th and 7th, 1937, and

(2) That Carrier shall be required to reimburse Raynoll A. Swangstue for August 5th, 6th and 7th, 1937, at rate of 59¢ per hour, total \$14.16."

EMPLOYEES' STATEMENT OF FACTS: "Raynoll A. Swangstue, Sectional Stockman, General Store, St. Paul, shown on Class 2 Seniority Roster at that point with dating of July 29th, 1932, was absent account illness for three days, August 5th, 6th and 7th, 1937, and under the care of a physician.

"No employe was placed on his position during the period of his absence (position being blanked) to do his assigned work, and no authorized over-time compensation allowed other employees due to such absence.

"Sectional Stockmen being assigned by bulletin come within the provisions of Rule 62.

"Claim has been duly filed and appealed to the highest designated officer as set forth above in Statement of Claim.

"Carrier has declined Employees' suggestion of Joint Submission to this Honorable Board. See Exhibits A to D inclusive.

"Employees have designated this claim as BRC No. 9. See Exhibit E.

'RULE 51—Sick Leave—Employees will be granted time off on account sickness or for other good and sufficient reasons with pay, providing the work is kept up without additional expense to the Railway Company—the supervising officer to be the judge, as follows:

(a) Employees who on January 1st have been in the service one year and less than two years—one week or six working days.

(b) Employees who on January 1st have been in the service two years or more—two weeks or twelve working days.'

'RULE 62—Working Days. Nothing herein shall be construed to permit the reduction of days for the employees in Class 1 and Class 2

carry out the understanding and agreement entered into voluntarily by him at said conference and re-affirmed in his letter of February 18th, 1939, above quoted; otherwise, the agreement and letters would not have existed.

"It is the Carrier's position that your Board does not have jurisdiction in this case for the reasons as hereinbefore stated in the respondent's submission, and asks that the Board refuse to take jurisdiction in this case."

OPINION OF BOARD: Petitioner claims that Raynoll A. Swangstue, Sectional Stockman, St. Paul General Store, was entitled to time off with pay on account of sickness, on August 5, 6 and 7, 1937, by reason of Rule 51, and that the carrier's refusal to grant same was a violation of the Rule, and that this employe should be reimbursed for the three days. In the employes' statement is set out a state of facts that qualify claimant under the rule to receive a grant of time off with pay for the days mentioned, if the Rule applies to Class 2 Employes. The carrier on its part "denies the jurisdiction of this Board to hear and decide the above entitled claim," and we will proceed to a discussion of this defense. The showing on which carrier relies for its support is substantially as follows:

Prior to the date on which the instant dispute was referred to this Board, while it was in the ordinary process of appeal, there was a conference between the carrier's Executive Vice-President, Mr. Carl R. Gray, Jr., and the Brotherhood's General Chairman, Mr. C. J. Flynn. December 29, 1938, was the date of this conference. On January 3, 1939, Mr. Gray wrote Mr. Flynn a letter, for the evident purpose of confirming what transpired at the conference. Mr. Flynn replied by letter of February 18, 1939. These letters, set out in the docket in carrier's submission, are the foundation of aforementioned defense.

In the letters are mentioned two dockets that were then pending before this Division, being CL-786 and CL-787. In Docket CL-786 the claim was (1) that the carrier violated agreement rules when it failed and refused to promote and assign D. McConnell to vacancy on position of Store Helper due to absence of J. Pinger on January 31, 1938, and (2) that carrier be required to reimburse D. McConnell and E. Popelka for wage losses sustained as result of said violation. Upon the dispute in Docket CL-786 an award was made on March 22, 1939. This award, being No. 829, stated: "The claim is denied in accordance with the special finding." The special finding was: "That the carrier under the rules of the agreement was not required to call a regularly assigned employe to fill the temporary vacancy involved in this dispute." Claimant D. McConnell was a regularly assigned employe, and patently the denial of the claim was grounded on that fact. For in the opinion that accompanied the award the Board states that the dispute presented two major issues, (1) whether the carrier, under the current agreement, must fill temporary vacancies of thirty days or less, and (2) whether, if it is required to fill such temporary vacancies, it should have called claimant McConnell, in the circumstances of this dispute. To aforementioned issue (1) the Board gave extended consideration and concluded that it felt impelled to reaffirm the position taken in Awards Nos. 413-416, in which the Board held there was an obligation to fill such temporary vacancies. Parenthetically, it may here be stated that in Docket CL-787 the dispute and issues are the same as in Docket CL-786, and that in Award 830 made on Docket CL-787 the award, special finding, opinion of Board, and statement of issues are the same as in Award 829, excepting, of course, names of claimants and absentees, and positions and dates. This sameness will be assumed in the following part of this opinion without further mentioning.

Reverting now to the letters. Mr. Gray did not write, for instance, "from now on the claim shall stand as an approved claim, to be paid," nor did Mr. Flynn say anything to the effect that "from now on the claim shall be

considered denied and withdrawn." That is, the writing of the letters did not ipso facto determine the dispute either way. The most that can be said is that these gentlemen contemplated doing something in the future. What was that something is a material question. Carrier's answer thereto is indicated by its statement that it "made its offer in good faith, and had Awards 829 and 830 sustained the claims instead of denying them, the carrier would have paid the claim." Carrier in its reply says further, "The offer made by Mr. Carl R. Gray, Jr., Executive Vice President, and as set out in his letter of January 3, 1939, was a direct and plain offer that if the Awards rendered in Dockets 786 and 787 sustained the claim in those two dockets, the carrier would pay the Swangstue claim; and if the Awards in those two dockets denied the claims, then the claims were to be withdrawn." The emphasis in the quotation is the Carrier's. So it may safely be said that, according to carrier, irrespective of all else, the something to be done was to pay the instant claim if the words of the awards in Dockets CL-786 and 787 should be "Claim sustained," and to withdraw the claim if the words of the awards should be "Claim denied." But in the opinion of the Board the record fails to sustain this proposition. Mr. Gray did not couch his letter in the phraseology that has been chosen by carrier in the above quotation. Something he did say was that he was willing to settle the case on the basis of the award rendered in the two pending dockets, and his question to Mr. Flynn was whether the latter agreed "to applying the award that will be rendered in those two dockets." (Emphasis the writer's.) To the Board it seems clear that this was what was contemplated as the thing to be done—Mr. Gray and Mr. Flynn would apply the awards to the instant case and settle it on that basis. Assuming that their goal was a right and fair adjustment of this dispute, it would be a rather amazing thought that these two representatives would contemplate anything else, particularly what carrier now affirms.

Applying Awards Nos. 829 and 830 to the instant case, no basis is discoverable on which this dispute could have been settled. What has been stated as to the issues in fact decided in those awards makes it clear that in neither award was there anything decided upon the question of granting time off with pay to employes absent on account of sickness. What Mr. Gray and Mr. Flynn contemplated as the something to be done could not be done, as Awards Nos. 829 and 830 turned out. After that became evident, neither was estopped from progressing the case. In the opinion of the Board, its power and duty to hear and decide this dispute was not abridged by reason of the two letters.

In argument carrier has stated that Rule 51 has never been extended beyond Class 1 employes. In the rule itself there is no such limiting. The language is "Employes will be granted time off" in the manner provided in the rule. In Rule 62 of the same schedule of agreement, there is a distinction made between classes to which it applies. Not so in Rule 51. In the opinion of the Board it is an agreement that is in terms inclusive of Class 2 employes, and nothing in the docket warrants adoption of any other intentment.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the refusal to grant claimant time off on account of sickness with pay on the dates in question was violative of Rule 51.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of July, 1941.