

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the name of O. P. Mackay, Maintenance of Way welder-blacksmith, who has been absent from the service of the railroad approximately two years without appropriate leave of absence during which time he has been engaged in the service of an outside industry, be removed from the Southern District welder-blacksmith seniority roster.

EMPLOYEES' STATEMENT OF FACTS: O. P. Mackay, Maintenance of Way welder-blacksmith, Southern District, was granted leave of absence in conformity with the Schedule Rules from April 1st to October 1st, 1942. Just prior to the expiration of that leave of absence October 1, 1942 Mr. Mackay requested 90 days' extension from the officer of the railroad and requested concurrence of such extension of his leave of absence from the Local Chairman of the Brotherhood. Having learned that Mackay was engaged in employment in outside industry while on leave of absence, other welder-blacksmiths employed on the Southern District objected to extending Mackay's leave of absence. Thus concurrence to extension of leave of absence for O. P. Mackay was withheld by representatives of the Brotherhood. Yet, even though Mackay had not been granted proper leave of absence, the Carrier has recognized him as an employe and listed his name on the Southern District welder-blacksmith seniority roster with uninterrupted and up-to-date seniority rights.

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rule 5 of Agreement in effect between the Carrier and the Brotherhood which governs granting of leave of absence reads:

"RULE 5. (a) When the requirements of the service will permit, an employe, upon request, may be granted leave of absence for periods of not to exceed ninety (90) days. Leaves of absence of periods for ten (10) days or less to employes may be granted the employes by their direct supervisor, and need not be in writing. Leaves of absence for periods in excess of ten (10) days, but not to exceed ninety (90) days, may be granted by division engineer or other supervisory officer of equal or higher rank, shall be in writing, appropriate record maintained and copy of such written notices will be furnished the employe granted the leave and the local chairman.

(b) Leaves of absence in excess of ninety (90) days shall not be granted unless by agreement between the officer granting such leave and the representatives (local or general chairman) of the employes.

This was further supplemented with advice to the Railroad Retirement Board on September 13, 1938, all having to do with our practices respecting employee's relationship during periods of absence account injury or sickness. (See Carrier's exhibit No. 6.)

On November 30, 1940 the Railroad Retirement Board issued a document dealing with employment relation established rules and practices as of August 29, 1935 on Missouri Pacific System. (See Carrier's exhibit No. 7.)

Specific attention is called to this order under the caption "C—Absence on Account of Sickness or Disability not covered by Leave of Absence." It is our understanding that this release of the Railroad Retirement Board was made to not only the employer but to the various labor organizations as well, and we have no knowledge of the Maintenance of Way Brotherhood protesting or disagreeing with the advice contained in this release of the Railroad Retirement Board that governs the handling of matters connected with application of the Railroad Retirement Act. This evidence is submitted to support the Carrier's contention that

- (a) Rule No. 5 of the working agreement between the Brotherhood and the Carrier dated July 1, 1938 is not applicable to the instant case as alleged by the Complainant Organization;
- (b) The granting of a leave of absence to Mr. Mackey account sickness is not, as alleged by the Employees, a violation of any rule of the working agreement with the Employees but, to the contrary, the granting of the leave is not subject to any rule of an agreement but an established practice of the Carrier, of which the organization has full knowledge.

The Carrier feels the Employees' request should be denied.

OPINION OF BOARD: Petitioner contends that O. P. Mackay, a maintenance of way welder-blacksmith, should be removed from the Southern District welder-blacksmith seniority roster because for approximately two years he has been engaged in the service of an outside industry without an appropriate leave of absence. On the other hand, the Carrier contends that Mackay was ill and physically unable to perform the work of a welder-blacksmith.

From the record, there can be no doubt that Mackay is now engaged as an instructor at the Oxweld Railroad Service Company in Texas. Also, the record shows that Mackay has been in ill health and has been suffering from a duodenal ulcer. Two physicians have made written statements which declare that Mackay was not at that time able to perform the work of a welder-blacksmith.

This Board is unable to determine if Mackay is now unable to perform physical work required of welder-blacksmiths or if that work is more strenuous than an instructor.

On April 13, 1943, the Carrier made the General Chairman the following offer, to wit: "We are agreeable, however, if there be any doubt as to Mr. Mackay's status to requiring of him the submission of satisfactory evidence of his existing physical disabilities that would justify continuation of his absence from work on a sick leave." The Board is of the opinion that this is a reasonable offer.

Therefore, the Board rules that this claim be remanded and suggests that Mackay be required to submit to a physical examination by a physician selected by the Petitioner, and, also, an examination by a physician selected by the Carrier, and if they agree in the finding, then those findings shall be final on the issue of whether Mackay is physically able to perform the work of a welder-blacksmith; but if these two physicians so selected disagree as to his ability, then a disinterested physician will be agreed upon and his examina-

tion and conclusions as to Mackay's physical ability to determine whether he shall be given a sick leave. Since Mackay contends that he is entitled to a sick leave, the burden of proof is upon him and if he refuses to submit to the above examinations within sixty days from the effective date of this award, then he should be removed from the seniority roster.

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 employes involved in this dispute are respectively carrier and employes 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 claim be remanded and the claim be disposed of in conformity with this opinion.

AWARD

Claim remanded and to be disposed of in conformity with this opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of December, 1944.