

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee.

PARTIES TO DISPUTE:

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

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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

(a) Carrier violated the rules of the Schedule for Clerks effective April 1, 1943, when it refused to pay Myrtle B. Wells, Record Clerk, Office Superintendent Car Service Kansas City, Missouri, for twelve (12) days time lost account personal illness, during period June 22, 1946 to September 4, 1946, and

(b) That the Carrier shall now be required to make such payment to Myrtle B. Wells by reason of such bona fide illness.

EMPLOYEES' STATEMENT OF FACTS: Myrtle B. Wells reported sick on June 22, 1946. On June 26, 1946, she was ordered to enter St. Mary's Hospital by Dr. W. P. Miller, Chief Surgeon of the KCS Employees' Hospital Association, and was under his personal care. She was released from the hospital on July 23, 1946 and was confined to her home under Dr. Miller's orders until September 4, 1946.

The Carrier failed and refused to pay her wages for twelve working days as provided in rules of the Agreement.

POSITION OF EMPLOYEES: Rules cited in claim read as follows:

RULE I.

These rules shall govern the hours of service and working conditions of all that class of clerical, office, station and storehouse employees of The Kansas City Southern Railway Company of which the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees is the duly authorized representative, grouped as follows:

GROUP I.

Clerical workers: Employees who regularly devote not less than four (4) hours per day for the majority of the working days of the month to the writing and calculating incident to making and keeping records and accounts, rendition of bills, vouchers, reports and statements, handling of correspondence and similar work, whether such work is done by machine or by hand, including Ticket Clerks, Station, Stores and Freight House Foremen, Checkers and Tallymen (Check Clerks) and

SUMMARIZING:

(1) Overtime to amount of \$73.56 was worked by other clerks in keeping up work of Mrs. Wells' job during June, 1946.

(2) Due to fact that Mrs. Wells was in the hospital and it was uncertain as to when she would be able to resume duty, it was necessary to fill her job.

(3) Her position was filled July 1, 1946.

(4) During the period July 1 to September 2nd various other employes took their vacations (although some were paid allowances in lieu of vacations not granted due to our inability to relieve them); however, Mrs. Wells was not qualified to fill these positions (for example—she could not fill stenographer's position), hence absence from those positions had no bearing on her absence nor upon any allowance due or not due her; as her job was filled during that time.

(5) There also were one or two who were absent account illness during the period, but they were paid for time off under sick leave rule. This has no bearing on her absence.

(6) Claim is for 12 days, while General Chairman asked for only 10 days, and sick leave allowance was made to Mrs. Wells on 2 dates subsequent to her return to work on September 4, 1946, making a total of 3 days sick allowance which was paid.

Claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was employed as Record Clerk (Position 23) in the office of the Superintendent of Car Service at Kansas City, Missouri. She was off duty because of sickness from June 22 to September 4, 1946. She claims that she is entitled to paid twelve days' sick leave under the provisions of Rule 51, current Agreement, which provides:

"(a) Where the work of an employe is kept up by other employes without cost to the Carrier, a clerk who has been in continuous service of the carrier one year and less than two years, will not have deductions made from his pay for time absent on account of bona fide case of sickness until he has been absent six working days in the calendar year; a clerk who has been in continuous service two years and less than three years, nine working days; a clerk who has been in continuous service three years or longer, twelve working days. Deductions will be made beyond the time allowance specified above.

(b) The employing officer must be satisfied that the sickness is bona fide, and that no additional expense to the Carrier is involved. Satisfactory evidence as to sickness in the form of a certificate from a reputable physician, preferably a company physician, will be required in case of doubt. The above limits of sick leave may be extended in individual meritorious cases and under the conditions specified, but only by agreement of the representatives of the Carrier and the employes."

That Claimant was ill during the period alleged is not disputed. Nor is it questioned that she qualifies for twelve days' sick leave if the conditions of Rule 51 are met. The issue here is whether her work was kept up by other employes without expense to the Carrier.

The record is clear that from June 22 to July 1, overtime was paid in the amount of \$73.56 in securing the performance of the work in this office. This is \$16.58 more than Claimant would have been paid for filling her position during that period. She does not qualify for any sick leave during this period.

The Carrier contends that the absence of Claimant required the employing of a new employe to perform Claimant's work from July 1st forward. The record shows that a position of Record Clerk-Interchange (Position 53) was added on July 1st. The need for this position arose prior to Claimant's illness and as a result of a previous reduction of force and the taking of vacations by experienced employes. This being true, it cannot be said that the employment of the occupant of the new position had the effect, of itself, of depriving Claimant of her sick leave pay. Such action had the effect of increasing the normal payroll of the office, it having been bulletined as a permanent position.

The position of Claimant (Position 23) was not rebulletined. It was filled by other employes in the office. This does not preclude a recovery of sick leave pay unless the payroll in the office showed an increase over the amount it would have been if Claimant had been working. It is evident that the payroll was less, which the Carrier accounts for by stating that many employes were on vacation whose positions were not filled. This would, of course, result in a reduction of payroll expense. But it is not a defense. If the Carrier was able to carry on the work of the office without added payroll cost, Claimant is entitled to sick leave as provided in Rule 51. See Awards 399, 1511, 2649, 2981. While it is true that Rule 51 purports to give the Carrier some discretion in the matter of allowing sick leave pay, it does not permit of arbitrary action. There must be a basis in fact for the exercise of any discretion permitted by Rule 51. Award 3580. We think the record strongly indicates that there was no payroll increase in this office during July and August that resulted from the absence of this Claimant on account of sickness. If there was, it would have been a simple matter for the Carrier to have established it.

The record shows that Claimant has been paid for three days' sick leave in the calendar year of 1946. The claim will therefore be sustained for nine days.

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 Claimant is entitled to nine days' sick leave under Rule 51.

AWARD

Claim sustained per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 5th day of August, 1949.