

Award No. 5695
Docket No. CL-5801

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees:

(a) That Carrier violated rules of the Clerks' Agreement by refusal to allow Walter Frentz, employed as General Clerk in the Burr Oak Office at Blue Island, Illinois, compensation while absent from duty account personal injury;

(b) That Mr. Frentz be allowed pay amounting to six (6) days (December 2, 5, 6, 7, 8 and 9, 1950), rate \$267.17 per month attached to his regular assigned position.

EMPLOYEES' STATEMENT OF FACTS: Mr. Frentz is a General Clerk, rate \$267.17 per month, in the Burr Oak Office of the Carrier at Blue Island, Illinois. His service date with the Carrier dates from January 8, 1917.

On December 1, 1950, while enroute to the office from his home after the mid-day lunch hour, he slipped on the ice, suffering a sprained ankle and a broken blood vessel. He proceeded to the office and worked the afternoon of December 1. He was unable to report for duty on December 2, 3 and 4. On the latter date he contacted a physician, X-rays were taken, and his ankle was placed in a cast. He did not report for work on December 6, 7, 8 and 9, account weather conditions preventing his going to the office with safety. He reported for work on December 10.

December 16, 1950, Mr. Frentz filed formal claim with Carrier's Superintendent for six (6) days' pay at rate attached to his regular position, namely, \$267.17 per month, as evidenced by his letter to Superintendent Wheeler, Employees' Exhibit No. 1. December 19, 1950, Mr. Wheeler declined Mr. Frentz's claim, as evidenced by his letter of that date. Employees' Exhibit No. 2. This was again confirmed by Mr. Wheeler in a letter, February 27, 1951, to Division Chairman Witherspoon. Employees' Exhibit No. 3.

March 9, 1951, claim was appealed to Manager of Personnel, Mr. Mallory. Employees' Exhibit No. 4. March 23, 1951, Mr. Mallory declined the claim on

General Chairman expresses that the employes must arrange to handle the work of the absent employe before the rule can be effective. In the event the rule in question did apply in the instant case, which we deny, this condition has not been met as the carrier paid time and one-half to another employe to perform the Claimant's work during his absence. Certainly it cannot be held that the carrier must be penalized twice by a rule that does not specify that it pay wage loss due to injury. To sustain this claim, the Board must twice penalize the carrier for an act of its employe over which it had no control. In view of the facts presented, we respectfully petition the Board to deny the claim.

It is hereby affirmed that all data herein contained is known to the employes' representative and is hereby made a part of this dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The claimant herein has seniority dating back some thirty-five years.

At, and prior to December 1, 1950, claimant was performing the duties of a general clerk in the Burr Oak Yard Office, Blue Island, Illinois.

On the date in question, namely December 1, 1950 claimant suffered an injury to his ankle while returning to his work at the conclusion of his lunch period.

The aforementioned injury resulted in claimant's incapacity and inability to report for and perform his assigned duties on December 2 through December 9, inclusive. Upon failure of the Respondent to compensate the claimant for time so lost, a claim for same was duly filed and handled on the property, being finally denied by the Respondent on March 23, 1951. (Organization's Exhibit No. 5)

The basis of this claim is the alleged violation was Rule 76 of the Supplemental Agreement dated August 11, 1950, and the purported established custom and practice of the Carrier in allowing compensation under like circumstances to other employes covered by the Agreement.

Rule 76 reads as follows:

"The present practice of allowing time to employes off account sickness will remain in effect, and where conditions justify the practice will be extended.

In compliance with the provisions of the March 19, 1949 forty hour week agreement, sick time allowances shall be reduced by one-sixth (1/6)."

Employes in their submission and rebuttal statement contended that the Employer has in the past voluntarily paid for time lost due to accidental injury suffered off of the property at many locations on the system, citing some fourteen such instances (pp. 25, 26). In addition, an instance was cited when pay was voluntarily paid to an employe at the Burr Oak Freight Station.

Third Division Award 520 is cited by the Employes as controlling.

Respondent asserts that Rule 76 while providing for payment for time lost because of sickness, makes no provision for like payment when the condition is produced by an off duty accident and that this Rule can not be construed or interpreted as contractually obligating the Carrier to pay for time lost because of injury suffered while off duty.

It is further contended by the Carrier that while admittedly it has, in some instances, compensated employees for time lost by virtue of off duty accidental injury, such practice is not universal but rather is restricted and confined to individual localities and stations.

The respondent further averred Award 520 was a misinterpretation and application of the verbiage of Rule 76.

There are no contradictory facts existent in the record, the differences of the parties revolving around (1) the proper interpretation and application of Rule 76 to those facts present here, and (2) the applicability of existing custom and practice in relation to prior voluntary payment by the Respondent at some locations for time lost, due to off duty accidental injury.

Disease, physical deficiencies and traumatic disability may, and often do, bring into being a condition, which may, as it did in the instant case, result in complete, if only temporary, incapacity, in so far as mobility is concerned. The overall result is identical.

The Respondent admittedly has, on occasions, voluntarily paid for time lost due to off duty, accidental injury. While this custom and practice were in no wise universal, it had, on at least one occasion (payment of time lost to Employee Mooney) extended the practice to the Burr Oak Freight Station, Blue Island.

"Incapacity, resulting from injury," has, by the Carrier's act at the Burr Oak Freight Station, been interpreted by them as coming within the meaning of "sickness" as used in Rule 76 of the Agreement.

The apparent geographical proximity of the Burr Oak Freight Station to the Burr Oak Yard Office lends weight and plausibility to the claimant's contention of an existing applicable custom and practice and renders of negligible value the Carrier's assertion that the above named facilities are in truth and fact different stations.

A preponderance of material facts existent here were likewise present and the subject of dispute in Award No. 520 of this Division, involving the parties hereto.

The following excerpt from Award No. 520 is properly adoptable herein:

"Insofar as the rule refers specifically to 'sickness,' your referee submits that sickness, or injury occurring while an employee was on or off duty, would have the same effect. In either event the employee is disabled and incapacitated, and in the broad and reasonable interpretation of the rule disability by injury and disability by sickness would have an equivalent meaning in so far as they are applied to the conditions of this claim."

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 Employees involved in this dispute are respectively Carrier and Employees 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

A careful examination of the full record in this particular case indicates the propriety of a sustaining award.

AWARD

Claims (a) and (b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of March, 1952.