Award No. 6341
Docket No. TD-6333

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

BANGOR AND AROOSTOOK RAILROAD COMPANY

STATEMENT OF CLAIM: (1) Claim of the American Train Dispatchers Association that the Bangor & Aroostook Railroad Company disregarded the understanding reached with the committee representing the American Train Dispatchers Associaton and certain parts of the Railway Labor Act as amended, when the Carrier failed to comply with past practice of many years standing in declining to compensate Train Dispatchers E. V. Curtis and H. P. Lee for certain days on which they were absent from duty because of personal illness.

(2) The Carrier shall be required to pay to E. V. Curtis the straight-time daily rate of his assignment for four (4) days, namely, February 19, 20, 21 and 22, 1952, during which days Claimant Curtis was absent from duty because of personal illness, and pay to H. P. Lee the straight-time daily rate of his assignment for five (5) days between March 17 and 24, 1952, during which days Claimant Lee was absent from duty because of personal illness, above claimants being employed as train dispatchers in the Houlton, Maine, office of the Carrier.

EMPLOYES' STATEMENT OF FACTS: On November 30, 1950, representatives of the Bangor and Aroostook Railroad Company consummated an agreement with the general committee of the American Train Dispatchers Association on that property, governing rates of pay and working conditions of assistant chief train dispatchers, trick train dispatchers relief train dispatchers and extra train dispatchers. Copy of that Agreement is on file with your Honorable Board and, by this reference, is made a part of this submission as though fully incorporated herein. It will, hereafter, be referred to simply as the Agreement.

The Agreement, effective December 1, 1950, is the first collectively bargained agreement between the parties. It contains no rule covering the payment of sick leave to the train dispatchers covered by its scope.

For many years prior to the execution of the Agreement the Carrier had reimbursed its train dispatchers when they were absent from duty because of personal illness and, in the proposal of the employes, a rule was included which, if agreed to would have continued the practice as a matter of right under the Agreement but the employes did not insist upon the inclusion of such a rule after some discussion with the Carrier representatives, during which these representatives made certain statements to the representatives of the employes which statements indicated to the employes that

No statements were made at any time to the committee representing the Train Dispatchers that could be construed as an understanding that pay for sick leave would be granted after the employes should become ineligible to receive such payments by reason of changes in their pay basis or working conditions.

Conferences were resumed several months later and the agreement with the American Train Dispatchers Association was completed and signed in December, 1950. It provided for a completely new basis of pay for Train Dispatchers by granting punitive overtime pay on the minute basis for time worked after 8 hours, and a 40-hour week with pay at time and one half for service on rest days.

POSITION OF CARRIER: The Company's long established practice for paying sick leave to its Officials, which in its application included the Train Dispatchers, restricted the payments to cases where:

(1) The individual was not entitled to overtime pay, and

(2) To cases where no extra expense was involved.

The overtime provisions of the new working agreement automatically disqualify the Train Dispatchers for sick leave pay under the established plan.

In addition to the overtime basis for disqualification there was an additional basis in the cases of the present claims. The absence of Dispatchers Curtis and Lee for nine days required that additional days be worked by other dispatchers at time and one half in order to keep up with the work.

The Company contends that its sick leave plan is solely a gratuity and no group or individual can demand it as a right.

The Train Dispatchers, by negotiating and accepting a working agreement that rigidly defined their basis of pay and hours of service, made themselves ineligible for sick leave pay under the established requirements of the sick leave plan, thus changing and abrogating the practice of paying them sick leave.

OPINION OF BOARD: Claim is made by the Dispatchers' Organization for sick leave pay for two employes, covering claims for loss of time due to sickness during February and March, 1952.

The Agreement between the parties became effective December 1, 1950. Prior to December 1, 1950, no agreement had been in effect between the parties at any time. Carrier had a practice prior to the Agreement to allow Train Dispatchers, who were considered as officials, to allow time for which they were off duty on account of sickness, and they were paid on a basis of their monthly salary. Carrier had allowed such sick leave claims because such employes worked on a salary and were not entitled to overtime pay.

Before the Agreement became effective the Organization made an effort to include a sick leave rule, which was declined by Carrier. When the Agreement became effective December 1, 1950, Dispatchers were no longer working on a monthly salary basis, but were under the provisions of the Agreement, including the Hours of Service rule, Article II of the Agreement, Article III covering Rest Days, all brought about by granting the forty-hour week, which eliminated the monthly salary basis and provided for overtime allowances where, prior to the Agreement, Dispatchers received no such allowances. Since the Organization through negotiation attempted to include a rule covering sick leave in the new Agreement and were not successful, it is not within the province of this Board to make an award which could have the effect of writing a rule into the Agreement and which the Organization through negotiation failed to have included.

It is the opinion of the Board the practice of allowing sick leave claims by Carrier was abrogated when the Agreement became effective, and the Organization had complete knowledge such claims would be eliminated since the employes were no longer on a monthly salary basis without overtime pay, but were employes governed by the Hours of Service and basis of pay rules provided in the Agreement.

We cannot consider the allowance of one isolated claim by Carrier, as a basis for setting a precedent and practice to sustain the claim before us. The claim was paid by Carrier as a gratuity to avoid hardship for an employe who had no record of sick leave for over a period of twenty years, prior to two sick leaves of two weeks duration during 1946 and 1950. The record does not indicate the Carrier allowed pay for the two illness periods above stated.

The Organization has cited awards in support of their contention, but a reference to them in practically all cases shows the awards were made where Agreements were in effect many years and claims were sustained on the theory of custom and practice. In the claim before us such awards do not apply, since by negotiation the Organization failing to secure a sick leave rule knew the conditions that Carrier had allowed claims in the past and that all employes under the Agreement are subject to the overtime provisions and therefore could not qualify as proper claimants under the past practice of Carrier in allowing sick leave claims to dispatchers, classified as officials, and not subject to overtime allowances. This Board has stated—

> "* * * We can only interpret the contract as it is and treat that as reserved to the Carrier which is not granted to the employes by the Agreement." Award 2491.

Since the Agreement before us contains no sick leave rule, and past practice of Carrier in previous claims has been abrogated by the Agreement and negotiation on the property for such a rule was declined by Carrier, we are of the opinion the claim has no merit.

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 should be denied for reasons stated in the Opinion.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 18th day of September, 1953.