

Award No. 11529

Docket No. CL-11340

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

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

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS**

STATEMENT OF CLAIM: Claim of the System Board of Adjustment:

1. That Carrier violated rules of the parties' agreement in denying I. J. Malter, Receiving Clerk, St. Louis Freight House, compensation while absent from work on sick leave July 23, 24, and 25, 1958.

2. That Malter be allowed pay representing the difference or saving accrued to the Carrier in payroll expense resulting from Malter's absence and what it would have otherwise been, i.e., three 8 hour days, or 24 hours at \$2.12 per hour, amount \$50.88.

EMPLOYEES' STATEMENT OF FACTS: Mr. Malter, an employee of Carrier since January 22, 1919, and currently located at the St. Louis Freight Station, entered the employees' hospital at Denison, Texas on July 21, 1958 for treatment of small anal ulcer. He was discharged from the hospital on July 23, 1958, and returned to his home point at St. Louis. He resumed his regular assignment effective Monday, July 28, 1958. Mr. Malter was off on his designated rest days, Saturday and Sunday, July 19 and 20, 1958. Monday and Tuesday, July 21 and 22 were part of his vacation period. Wednesday, Thursday and Friday, July 23, 24 and 25, 1958 were work days for which Mr. Malter applied for sick leave pay, under Sick Leave Rule Addendum 3, dated December 1, 1951, reproduced on pages 43 and 44 of the parties' revised agreement dated December 1, 1951.

During Mr. Malter's absence, at least on the claimed dates in this case, Carrier advanced W. L. Bird, freight house laborer, to fill the vacancy of Receiving Clerk caused by Malter's absence and blanked Bird's assignment.

Formal claim on behalf of Mr. Malter was filed with Carrier's General Agent August 12, 1958 and denied by him on September 3, 1958. Appeal was taken to the Superintendent on October 21, 1958 and he also declined the claim on November 11, 1958. December 3, 1958, claim was appealed to Vice President Winkel, subsequently discussed in conference but not composed as evidence by Employees' Exhibits 1, 2, 3 and 4.

sick leave pay for July 23, 24 and 25, 1958, and the claim is wholly without merit and agreement support. Carrier respectfully requests the Third Division to deny the claim.

* * * * *

All data submitted in support of the Carrier's position have been heretofore submitted to the Employees or their duly accredited representatives.

The Carriers request ample time and opportunity to reply to any and all allegations contained in Employees' and Organization's submission and pleadings.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, deny each and every, all and singular, the allegations of the Organization and Employees in alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, respectfully request the Third Division, National Railroad Adjustment Board, deny said claim and grant said Railroad Companies, and each of them, such other relief to which they may be entitled.

(Exhibits not Reproduced)

OPINION OF BOARD: Claimant occupied position No. 1477, Receiving Clerk at the St. Louis Freight Station. He was absent from work because of illness on July 21 to 25, 1958 inclusive. July 21 and 22 were part of his vacation period for which time he was paid. He was not paid for July 23, 24 and 25, 1958. Claimant was an employe in Group 1.

During Claimant's absence, W. L. Bird, a part-time employe in Group 3, and an extra in Group 1, was assigned to fill Claimant's position. Mr. Bird was a "Picker" in Group 3 and was paid the rate for freight house laborer. During the three days from July 23 to 25, 1958 inclusive, Mr. Bird was paid the higher rate of Receiving Clerk. No one worked the laborer's position in Group 3 on those three days.

Claimant asks for three days sick leave compensation based upon "the difference or saving accrued to the Carrier in payroll expense resulting from Malter's absence and what it would have otherwise been, i.e., three 8 hour days, or 24 hours at \$2.12 per hour, amount \$50.88."

On the merits of the claim, Employees contend that Carrier violated Addendum No. 3 dated December 1, 1951, which reads as follows:

"Where the work of an employe in Group 1 is kept up by other employes without cost to the carrier, a clerk who has been in continuous service of the carrier one (1) year and less than two (2) years will not have deducted from his pay for time absent, account of bona fide case of sickness until he shall have been absent five (5) work days in twelve (12) consecutive months. For service of two (2) or less than three (3) years, seven and one-half (7½) working days in twelve (12) consecutive months.

For service of three (3) years or longer ten (10) working days in twelve (12) consecutive months.

Deductions will be made for days in excess of those stipulated in the three periods.

The employing officer must be satisfied that the sickness is bona fide, and that no additional expense to the carrier 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."

Since Mr. Bird's position in Group 3 was blanked for the three days, Employees argue, the claim should be sustained because Bird worked Claimant's position with "no additional expense to the carrier involved."

Carrier contends (1) that Addendum No. 3 has been interpreted on the property to mean that absence because of illness will not be deducted from an employee's pay when the employee who is sick "is a Group 1 employee, and his work is kept up by other Group 1 employees without cost to Carrier," (2) that "Carrier is never required to pay sick leave if such pay would result in an additional expense," that the Employees have the burden of proving that there was no additional expense to the Carrier, and (3) that Mr. Bird would in all probability not have worked July 23, 24 and 25.

The Employees have the burden of proving (1) that Claimant was absent because of a "bona fide case of sickness," and (2) that his work was "kept up by other employees without cost to the carrier".

There is no question that Claimant's absence on July 23, 24 and 25 was because of a "bona fide case of sickness". Carrier has never questioned this fact.

Whether or not Claimant's work was "kept up by other employees without cost to carrier" is questionable. Mr. Bird was a part-time employee in Group 3. He was not a regularly assigned employee to any position in Group 3. He worked only at such times as the Carrier needed his services and his seniority entitled him to the position where he was needed. The record shows that "Mr. Bird worked only twelve of the twenty-two working days during the month of July, 1958, i.e., July 1, 2, 3, 5, 12, 15, 16, 17, 18, 29, 30 and 31." He did not work as a "Picker five days prior to the dates of this claim and three days thereafter." There is no presumption that he would have worked as a "Picker" or worked at all on July 23, 24, and 25 had Claimant not been absent because of sickness. Certainly, there is no presumption and no affirmative evidence that the laborer's position of "Picker" was blanked on these three days because Mr. Bird filled Claimant's position. The laborer's position of "Picker" in Group 3 may not have been filled on July 23, 24 and 25 had Claimant worked his position. This is supported by Mr. Bird's work record for July, 1958.

Claimant has presented no evidence to support his contention that Mr. "Bird's Group 3 position was not filled" to the extent that Carrier benefited by the blanking of that position. Lacking this affirmative evidence, we cannot find that Claimant's work was "kept up by other employees without cost to carrier."

Mr. Bird was paid the rate of Claimant's position for the three days in question. This was a cost to the Carrier. In the absence of proof that Carrier otherwise benefited so that Mr. Bird's assignment to Claimant's position did not increase the Carrier's costs, we are obliged to hold that there is no basis for the claim.

Since we are deciding this claim on the merits, there is no reason to consider the several procedural questions raised by the Carrier.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

That Carrier did not violate the Agreement.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty

Executive Secretary

Dated at Chicago, Illinois, this 14th day of June, 1963.