Award No. 11828
Docket No. CL-11744

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

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

THE LAKE TERMINAL RAILROAD COMPANY

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

1. Carrier violated the Clerks' Agreement when it arbitrarily changed a long-established practice of allowing salaried (monthly-rated) employes pay at their regular rates for time off account of sickness, thereby changing the working conditions attached to the position of Stores Clerk, Lorain, Ohio, occupied by Roger H. Rice, when on March 11, 12 and 13, 1959, Mr. Rice was required to suffer a loss in earnings in the amount of three (3) days at pro rata rate of his assigned positions, and

2. That the Carrier shall now reinstate the practice in effect prior to the effective date of the first working conditions agreement dated February 1, 1945, and

3. That Mr. Roger H. Rice be paid three (3) days' pay at pro rata rate of his position in accordance with past practice. (Claim #LT-8-59)

EMPLOYES' STATEMENT OF FACTS: In the early part of 1942, the Brotherhood of Railway Clerks was designated as the representative of the employes of the Class or Craft of Clerical, Office, Station or Storehouse employes on the Lake Terminal Railroad, Lorain, Ohio. Recognition was accorded by Mr. J. M. Morris, President, by a check of authorization cards. At that time, there was in effect a practice of granting to salaried or monthly-rated employes pay for time off account illness irrespective of whether or not position of employe off was filled. On February 14, 1942, a proposed agreement was submitted to Mr. Morris which contained Rule 17 (Sick Leave) reading as follows:

"Rule 17. The Company policy is to permit a reasonable amount of sick leave to employes in Group 1 without deduction from their pay. A fair measure of this allowance is the equivalent of one (1) day per month cumulative for the calendar year.

In another case the Fourth Division, with Referee Sidney St. F. Thaxter, denied a claim based on an alleged practice to pay sick leave. The opinion of the Board in Award No. 501 was as follows:

> "There is no rule of the Agreement covering the payment of sick benefits. Even so the carrier has over many years paid them. It now elects to discontinue that practice. What it was never under any obligation to do it may discontinue at its will. Numerous awards have been cited by the claimants which hold that a long continued practice is relevant in interpreting doubtful provisions of a contract. These awards are in accord with a well known principle of the common law; but they are not in point here. In this instance there is no ambiguous provision of the contract to interpret; for there is no provision touching the subject at all. If we should sustain this claim, we should be making a contract and this we have no right to do. Our function is to interpret and enforce agreements not to make them."

To make a finding that the past practice exists as contended by the Organization would in effect be writing a rule requiring the Carrier to pay a salaried employe with one day of service his full wages for a lifetime if he became disabled or injured for that period, whether or not such illness or injury was connected with his railroad service. The existence of such a practice has not, and cannot, be established.

For the foregoing reasons, it is respectfully submitted that this claim must be denied.

It is hereby affirmed that all data submitted in support of the Carrier's position have been submitted in substance to the employes or their duly authorized representatives and made a part of the particular case in dispute.

OPINION OF BOARD: The facts in the instant case are very much in dispute. The Organization claims that there has been a long established past practice whereby the Carrier has for many years allowed monthly rated employes pay at their regular rates for "time off account of sickness" while the Carrier maintains there has never been a consistent past practice in this regard. The Carrier states that there has never been a recognized and established practice to allow pay for absence due to illness; that consideration is first given to the employe's record for absenteeism, the bona fide and probable nature and extent of the illness; that its election over the years, in individual cases, to make no deductions for sick leave when in its judgment such action is reasonable and that where any practice of this nature has occurred it usually has been covered by fellow employes without the Carrier having to pay twice to get the work done.

There is agreement that no rule has ever been agreed to which establishes a clearly defined sick leave policy.

Petitioner states that in negotiations with the Carrier proposals have been made requesting the incorporation in the Agreement of a Rule which defines the Carrier's past practice in regard to sick leave. In 1944 the Carrier's then Superintendent stated that the Carrier would not write a rule on sick leave. He stated in part:

> "The past practice of the company with respect to lost time on account of sickness or for personal business will be continued in effect, but we will not agree to a rule on the matter."

He further stated that it was the company policy to pay for sickness or for personal business to monthly-rated employes only and they would continue to do so, but would not write a rule on it nor extend the practice.

From January 25, 1945 until March 1959 there were no disputes between the parties but the Petitioner claims that on the latter date the Carrier arbitrarily departed from its past practice on the theory that the position was filled while the employe was off sick.

In support of its contention the Organization offered as evidence the signed statements of ten employes (Exhibits "C" through "L" inclusive) that they were off sick for varying periods of time and, in accordance with its past practice, the Carrier paid these employes their regular pay as sick leave. These Exhibits were not challenged by the Carrier nor did the said Carrier offer any evidence to controvert that offered by the Petitioner. It seems clear that having at its finger tips full and complete information concerning its past practice regarding pay for sick leave it was incumbent on the Carrier to come forward with concrete evidence to offset that offered by the Organization. Instead of offering such evidence the Carrier has contented itself with vague generalizations and a conclusionary remark that the said Exhibits are of no probative value.

The Carrier takes the position that the burden of proving its contention was on the Petitioner. This is good law but it is only good as far as it goes. Once the Organization introduced certain employe statements in support of its position the burden of going forward with the Carrier's proof shifts to the said Carrier. When the Carrier made no effort to controvert the evidence introduced by the Petitioner, it must be said that the Petitioner has successfully maintained its burden of proof.

The Carrier also states that it is beyond the authority of this Board to add a rule to the Agreement. Additions, changes and modifications to an existing Agreement can only come about by negotiation and agreement of the parties. This too is good law but based on the facts in the instant dispute it is a two edged sword. This Board can neither add nor subtract from either the agreement of the parties or a long continued past practice of the parties. Attention is specifically called to the statement quoted supra: "The past practice of the company with respect to lost time on account of sickness or for personal business will be continued in effect, * * * *." It is submitted that a past practice stated as unequivocally as this statement, made by a responsible company official, could only be eliminated by the specific agreement of the parties.

It would have been simple for the Carrier to either state orally or draft a Memorandum explicitly discontinuing a practice that it had followed for many years. Not having done so, it would be palpably beyond the authority of this Board to subtract from the Agreement of the parties a statement and a past practice as clear as is indicated above. A contract is just as binding when oral as if reduced to writing and this is especially so when the Carrier has, without contradiction, stated that they have a past practice of allowing pay for time lost due to sickness which they will continue to observe although they will not write a rule on said practice.

The opinion of the Board in **Award No. 6011** is on all fours with the dispute in the instant case and is dispositive of the instant situation:

> "We conclude therefore that the specified practices are not superseded by subsequent agreements and they remain in force until

such time as they may be eliminated by negotiation, a field entirely foreign to the powers of this Board."

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 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 Carrier did violate its oral agreement.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1963.