

Award No. 12176
Docket No. CL-11886

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Michael J. Stack, Jr., Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly the past practice whereby salaried clerical employees were allowed pay for time lost due to personal disability, when it failed to allow C. W. Ropa, Power Clerk, Fort Wayne, Indiana, Northwestern Region, wages for all time lost due to sickness.

(b) The Claimant, C. W. Ropa, should be allowed eight hours pay a day for April 10, 11, 12 and 13, 1956, and for May 3, 1956, and all subsequent dates lost until he returns to duty. (Docket 277)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representative of the class or craft of employees in which the Claimant in this case held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employees between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The Claimant in this case, C. W. Ropa, was the incumbent of a regular first trick clerical position of Power Clerk, in the Movement Office, Fort Wayne, Indiana, Monday through Friday, rest days Saturday and Sunday.

For the foregoing reasons the Carrier respectfully submits that if your Honorable Board does not dismiss the claim on the valid grounds previously indicated herein, it should deny the claim in its entirety.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreements and to decide the present dispute in accordance therewith.

The Railway Labor Act in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out "of grievances or out of the interpretations or application of Agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreements between the parties thereto. To grant the claim of the Employees in this case would require the Board to disregard the Agreements between the parties and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has established conclusively that no rule or agreed-upon understanding has been entered into by the parties hereto that would require payment of the compensation here claimed; that its application of a policy in these matters over the years has not resulted in an established practice having any binding or obligatory effect; and that even if such a practice somehow were deemed to exist, the Claimant has not and cannot establish thereunder his entitlement to the wage allowances requested. It follows, therefore, that no violation of the Clerks' Rules Agreement or any other obligation binding upon the Carrier has occurred, and your Honorable Board is respectfully requested to deny the Employees' claim in its entirety.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimant, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a record of all of the same.

All data contained herein have been presented to the employee involved or to his duly authorized representative.

(Exhibits not reproduced.)

OPINION OF BOARD: Does a sick pay practice which is long continued, which Carrier commenced as a "gratuity" which during its history is changed from time to time without prior consultation with the Organization and which is twice the subject of unsuccessful proposals to make it the subject of a rule nevertheless because of its longevity have the force and effect of a rule such as to give rise to a valid claim for breach of the agreement when it is not followed.

We hold it does not.

In 1956 the Claimant was stricken with a serious illness which subsequently forced his retirement from the Carrier's service at age sixty-six. At that time the Claimant had been continuously in the service of the Carrier from age eighteen or a period of forty eight years. The Claimant for a long period before this claim arose had never availed himself of the sick time available to him under the practice in force. After granting fifteen days with pay as sick leave, the Carrier refused to allow any further time, although the Claimant's illness continued for a lengthy period thereafter.

Pointing to a Carrer practice of long standing wherein by a graduated scale based on years of service sick leave was made available to employes up to a maximum of four months for employes with over forty years service as its authority, the Organization on behalf of the Claimant asserted that when the Carrier by memorandum dated June 28, 1938, imposed a provision "those over 65 years of age not be allowed more than 2 weeks (sick pay) without authority of the General Manager" it violated the agreement.

With this position we cannot agree. Our opinion is based upon the following facts culled from the record. In 1922, a uniform policy for sick allowances was promulgated by Carrier which established the forerunner of the graduated scale referred to above. It in part provided "... the foregoing suggestions ... shall not confer any right upon any employe to demand or receive wages during disability ...". The memorandum of 1938 contained a similar provision. The specifics implementing this policy incorporated in the 1922 policy statement were unilaterally amended from time to time without prior consultation with the Organization.

Finally in 1941 for a second time, a proposal by the Organization to reduce the prior practice to a rule was rejected and the proposal was withdrawn.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of February 1964.