

Award No. 14158

Docket No. CL-15429

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

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

STATEMENT OF CLAIM: Claim in behalf of Clerk James W. Roberts, for eight (8) hours pay at the rate of his position GT-409, for March 7, 1964, on which day he was absent from work due to illness and the Carrier failed to compensate him therefor.

(Brotherhood's Case J-1339 — Carrier's Case LC-58-64)

CARRIER'S STATEMENT OF FACTS: The regularly assigned rest days of position GT-409 were Thursday and Friday. On Saturday, March 7, 1964, claimant marked off sick from his assignment; he returned to work on Sunday, March 8, 1964. Two weeks later, under date of March 4, 1964, Claimant submitted a claim for eight hour's compensation for time absent account allegedly sick on March 7, 1964. (Carrier's Exhibit "A"). Claimant's supervising officer, Agent G. C. Bernlehr (who supervises an agency force of approximately 150 clerical employees) was not satisfied that the alleged sickness was bona fide. His suspicions were based on an unusual amount of absenteeism during January and February 1964. Accordingly, as provided in Rule 56 of the applicable agreement, in a letter dated March 25, 1964, he directed Claimant (as he had done with several other employees) to furnish satisfactory evidence as to his sickness in the form of a certificate from a reputable physician (Carrier's Exhibit "B"). Claimant Roberts took no steps to do so; accordingly, his claim was denied.

On April 14, 1964, the Organization progressed Mr. Robert's claim to the Superintendent of the Gary Division (Carrier's Exhibit "C").

In a letter dated April 16, 1964, the Superintendent pointed out to the Organization that Claimant had not presented a doctor's certificate as directed by his supervising officer to satisfy the supervising officer's doubt that the sickness was bona fide; and declined the claim assigning case Number LC-58-64 (Carrier's Exhibit "D").

On May 16, 1964, the Organization appealed its claim to the next designated appeal level, the office of the Carrier's General Superintendent, contending that the provisions of Rule 56 entitled claimant to sick pay for March 7, 1964, ipso facto, regardless of the circumstances and the fact the man's supervisor doubted the sickness to be bona fide (Carrier's Exhibit "E").

Even though no reason had ever been given by any Carrier officer as to why they doubted the illness of the claimant, the Brotherhood in a sincere effort to resolve the instant dispute, secured and submitted to the Carrier druggists' statements (Employees' Exhibit "C") substantiating the filling of two prescriptions on the date of the employee's illness, agreeing to accept Carrier's offer of settlement contained in their letter of February 3, 1965, with the understanding that the payment of this claim would be without prejudice to the position of either party. However, the Carrier capriciously retracted its proposal of settlement, as evidenced by its letter of March 4, 1965. (Employees' Exhibit "D").

In view of the fact that the Brotherhood had at no time given the slightest indication that it would accept the Carrier's offer on other than a non-precedent basis, the Carrier's action cannot be construed as being conducive to good labor relations, but to the contrary, it demonstrates perfidiousness and a complete lack of integrity on the part of the Carrier. Certainly, the Brotherhood accepted the Carrier's offer of settlement in good faith, only to be rebuked when it failed to give the Carrier full discretionary power for further violations of a similar nature.

Your particular attention is directed to the first paragraph of Mr. Verd's letter of March 4, 1965 reading as follows:

"This acknowledges receipt of your letter dated February 17, 1965 concerning Carrier Case LC-58-64, your Organization's Case J-1339 (J. W. Roberts) which included two (2) statements indicating that prescriptions were filled on March 7, 1964, but not to whom the medicine was specifically prescribed for."

Before being able to ascertain what the Carrier meant by the above quoted paragraph in light of the druggists' statements (Employees' Exhibit "C"), Carrier immediately under date of March 5, 1965 filed notice of intent to file an ex parte submission of this dispute with your Honorable Board.

It is the Employees' position that Carrier's action in denying claimant pay for March 7, 1964 was arbitrary and capricious — that the language of Rule 56 contemplates a reasonable application and a certificate from a reputable physician would only be required in case of doubt. As Carrier has invoked doubt for its benefit, it is a matter of defense which the Carrier must plead and prove. See Third Division Awards 8148, 5457, 5136 and 4538. Thus, the burden of proof is on the Carrier.

On the basis the Carrier has failed to meet this burden of proof, and, further, acted arbitrarily and capriciously when claimant was denied compensation for March 7, 1964, the Employees respectfully request a sustaining award.

(Exhibits not reproduced.)

OPINION OF BOARD: This is an appeal to this Board by the Carrier which involves the interpretation of Rule 56 of the agreement arising out of a dispute between this Carrier and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and station Employees concerning a claim filed in behalf of Clerk James W. Roberts as set forth in the Statement of Claim.

The pertinent portions of Rule 56 with which we are concerned here are, as follows:

"RULE 56

SICK LEAVE

* * * a clerk, who has been in continuous service as such one year or more, will be allowed compensation for time absent account bona fide sickness on the following basis:

* * * * *

Supervising officer must be satisfied that the sickness is bona fide, and that no additional expense is incurred by the Railway Company. 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." (Emphasis ours.)

The facts, substantially are, as follows: The Claimant marked off sick from his assignment on Saturday, March 7, 1964. Under date of March 24, 1964, he submitted a Claim for eight hours compensation for the time absent on account of his alleged sickness on March 7, 1964, a workday of his work-week. On March 25, 1964, he received a declination of his claim from his immediate supervisor, the Agent, which contained the following language:

"I am not satisfied the sickness referred to in your claim was bona fide. In view of my doubt in this case, you are herewith directed to furnish me with satisfactory evidence as to your sickness in the form of a certificate from a reputable physician. Upon receipt of such certificate, sick pay will be allowed for March 7, 1964, on Position GT 409.

Your claim for sick pay for March 7, 1964, as presented, is respectfully declined."

This claim was progressed successively to Carrier's highest designated officer's level, the Vice President of Personnel, who on September 21, 1964, declined the claim on the ground that Claimant had failed to furnish a "certificate from a reputable physician" as requested: On September 29, 1964 the General Chairman requested a conference which was held on October 16, 1964, and the Vice-President of Personnel reaffirmed his final declination of September 21, 1964. Up to this time the Claimant had furnished no doctor's certificate as requested. On February 2, 1965, another conference was held and it wasn't until this time that Claimant offered any explanation as to why he had not furnished a doctor's certificate as provided for in Rule 56 (c) of the Agreement and after his claim had received its final handling at the Carrier's highest designated officer's level designated under the Railway Labor Act.

It is the contention of the Claimant that the Carrier arbitrarily and capriciously denied Clerk Roberts sick leave pay accruing to him under the Agreement by virtue of his employment; that before a supervisory officer can require the furnishing of a doctor's certificate as provided for in Rule 56, the Carrier has the burden of establishing that he had sufficient grounds to cultivate his suspicion, that the burden is on the Carrier to establish that the alleged sickness of the Claimant was not bona fide.

To the contrary, it is the contention of the Carrier under Rule 56 (c) the reason for Carrier's doubt of a bona fide illness, in any case is personal, and

is purely a Management decision, as contemplated by the provisions of the Agreement; that the employee's recourse is to furnish a "certificate from a reputable physician" that his illness was bona fide and when a verifying certificate is furnished it is sufficient to erase the supervisor's doubt.

It is elemental that in any contract of employment, where the payment of wages is on a day or hours basis, the right to compensate for time lost for absence from work due to illness is not inherent to the contract itself. If it is to be allowed there must be a specific provision for such allowance in the contract. There is such a provision for such compensation in the Agreement with which we are concerned.

What the intention of the parties was with regard to this, as contained in Rule 56 of the Agreement, must be gathered from the language of the Agreement itself. Let us then direct our attention to the Agreement.

Primarily, it provides that under certain employment conditions an employee "will be allowed compensation for time absent account bona fide sickness". Most certainly under this provision, if questioned, the Claimant would have the burden of proving his illness was bona fide.

In Rule 56 (c) it states — "Supervising officer must be satisfied that the sickness is bona fide" and "satisfactory evidence as to sickness in form of certificate from a reputable physician * * * will be required in case of doubt". There is not the slightest equivocation in this language—it is entirely clear. There is nothing in the language of the provision that requires the supervisor to explain to the employee why a doubt exists in his mind. However, the requirement is not burdensome to the employee for if the employee furnishes the certificate in compliance with the Rule, that will overcome the alleged doubt of the supervisory officer and Carrier would be obliged to pay any loss due to sickness.

The Organization, basically, always has the right to question the acts of the Carrier if it has abused its right of decision under any Agreement and has acted arbitrarily and capriciously; however, in such event the one making such a contention would have the burden of proving it by a fair preponderance of evidence.

The Board is convinced that Carrier was acting in the instant case within the rights conferred upon it by Rule 56 in requiring a certificate from a reputable physician and was under no obligation to pay the Claim as Claimant Roberts had at no time up to the time of the final declination of the Claim on the property furnished any explanation as to why he had failed to furnish a doctor's certificate as requested by his supervising officer and as provided for in the Agreement. We cannot find that the Carrier violated the Agreement. On February 2, 1965, when an explanation was offered, Carrier offered a settlement if certain conditions were complied with.

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 the Agreement was not violated.

AWARD

The Claim will be remanded to the property with direction to the parties to adjust the Claim financially in the manner suggested as the result of a conference held between the parties on February 2, 1965.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of February 1966.