

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32145
Docket No. CL-32813
97-3-96-3-121**

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

**(Transportation Communications International Union
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (AMTRAK)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11204) that:

(a) The Carrier violated the Amtrak-Northeast Corridor Clerks' Rules Agreement particularly Rule 4-I-1 and other rules when it failed to allow Claimant Deletha Jenkins' request for sick leave allowance for the dates May 26 and June 5, 1994.

(b) Claimant Deletha Jenkins now be allowed eight hours pay at the appropriate pro-rata rate for each date, May 26 and June 25, 1994 and that Ms. Jenkins' sick pay allowance bank reflect that the Claimant has eight sick days remaining to be used in the future on account of this violation.

(c) Claim is further progressed that Rule 7-B-1 was violated when no first level response was received.

(d) This claim has been presented in accordance with Rule 7-B-1 and should be allowed."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

At the time this dispute arose, Claimant was assigned to the position of Crew Assignment Clerk at Carrier's Washington, D.C. Crew Base and, as such, was subject to the provision of the parties' Northeast Corridor Clerical Agreement.

From the whole of the record evidence presented, the subject claim was filed by the Organization's District Chairman, K. J. O'Connell with Carrier's Superintendent, Commuter Operations, Mr. A. A. Scala, on July 22, 1994. Carrier asserts that by Certified Letter dated July 29, 1994, Scala responded, apprising O'Connell that Claimant did not hold a position in his office on the claim dates in question identified in the July 22 filing as May 25, 1994 and June 5, 1994 but, identified in the Statement of Claim hereinabove variously as, May 26, 1994, June 5, 1994 and June 25, 1994. As such, Scala advised O'Connell that the claim should be directed to Claimant's previous employing department, explaining Claimant had not assumed her then present position as Clerk-Steno until June 27, 1994. Notwithstanding his advice to O'Connell to redirect the claim to the proper Carrier official, Scala, upon not receiving any response from O'Connell or from anyone else in the Organization, to his July 29 letter, denied the claim in writing on September 20, 1994, the 60th day from the date the initial claim was filed. However, unbeknownst to Scala, newly elected Division Chairman A. C. Desmond had appealed the subject claim to Ms. B. J. Blair, Carrier's Division Manager, Labor Relations. By letter dated December 2, 1994 directed to Desmond, Blair asserted that notwithstanding the Organization's position it never received Scala's September 20 denial letter, nevertheless, Scala's denial of the claim was timely pursuant to Rule 7-B-1 of the controlling Agreement, which requires first level responses to claims to be filed within 60 days of receipt of the claim. Additionally, Blair maintained, Carrier's records showed that up until March 16, 1994, Claimant worked as a Crew Management Representative (CMR) and that while in this position, she was governed by the Amtrak Management Sick Leave Policy and not by Rule 4-I-1(a) of the TCU (NEC) Agreement which reads in pertinent part as follows:

"Employees ... will qualify for sick leave allowance of 5, 7 1/2 or 10 days on January 1 of each year in the following manner."

Blair asserted that since Claimant was not covered by Rule 4-I-1 on January 1, 1994, she was not entitled to either the sick leave pay for the claim dates in question or to the creditation of the sick leave allowance of eight days as requested in the claim.

Carrier further argues the subject claim should be dismissed because the claim itself references conflicting claim dates. Carrier asserts that at every level of appeal on the property, the Organization held that the claim dates at issue were May 25, 1994 and June 5, 1994; yet, in paragraph (b) of the claim, the Organization references the claim dates as May 26, 1994 and June 25, 1994. Carrier submits that such a procedural defect present in other cases between the Parties has been ruled to constitute significant enough grounds upon which to predicate a dismissal finding. In support of this latter point, Carrier cites Third Division Awards 10873 and 15334 as but two examples among numerous other cases.

As for the Organization's charge that the subject claim was not timely responded to at the first level, Carrier denies the validity of the charge, noting that Scala denied the claim within the required 60 day time limit pursuant to Rule 7-B-1 and noting too, that the Organization improperly appealed the claim by a premature submission to the Division Manager of Labor Relations. Given the Organization's documented mishandling in the progression of the claim, Carrier asserts this procedural argument should be dismissed without discussion.

As to the substance of the claim, Carrier notes that on January 1, 1994, Claimant was subject to the benefits of Carrier's Management Sick Leave Plan and that it was only after she was disqualified from her Crew Management Representative position in March of 1994, that she attempted to utilize sick days which are the subject of this dispute. Absent proof as to any Rule violation of the Agreement, but particularly Rule 4-I-1 as alleged here, Carrier requests the Board to deny the subject claim. The Organization submits that while Carrier is correct that Claimant was covered by Carrier's Management Sick Leave Policy while working as a CMR, nevertheless, this fact does not bar her from the sick leave entitlements existing under the Clerical Agreement as when she left the CMR position and returned to a Clerk-Steno position, she carried with her, her accrued seniority as a Clerk (seniority date of October 12,

1988) and therefore she was entitled to sick day accrual as provided for by Rule 4-I-1. The Organization contends that although additional benefits flowed to Claimant while in a promoted position (CMR), this fact did not cancel the sick allowance benefits as established by the Clerical Agreement while Claimant was in the higher-rated category because she was in the continuous service of Carrier. Said sick allowance benefit became available to Claimant upon her return to work under the Clerical Craft. In support of its position on this point, the Organization cites Third Division Award 30416 and 16591, as well as Public Law Board No. 2263, Award 19 and Special Board of Adjustment No. 1011, Award 25. The Organization requests the Board to sustain the claim as presented.

We are persuaded that the discrepancy in the claim dates identified is not a function of substantive confusion regarding the proper dates at issue, but rather the discrepancy is due to the mundane occurrence of errors in word processing known to all as "typos." Except for the reference to the dates of May 26 and June 25, 1994 in paragraph (b) as the claim dates at issue, this record is consistent throughout that the claim dates in question are those identified in paragraph (a) of the claim, specifically, May 26, 1994 and June 5, 1994. Even Carrier acknowledged this as being the case when, in its Submission, it averred that the Parties throughout the handling of the claim on the property agreed and understood the claim dates in question were May 26, 1994 and June 5, 1994, not June 25, 1994. It appears that the source of the error with regard to the typo of June 25, 1994 stems from the July 11, 1994 letter Claimant directed to the Organization apprising of the nature of her claim by stating, among other things, she was paid for only one sick day and that was May 25, 1994. In so finding, we do not concur in Carrier's position that the discrepancy in the dates set forth in the Statement of Claim constitutes a procedural flaw so defective in nature as to be grounds upon which the subject claim should be dismissed.

As to the Organization's charge that Carrier was untimely in responding to the subject claim at the first level of handling on the property, we are persuaded by the record evidence that this charge is not valid in consideration of all the surrounding facts and circumstances. Even though the subject claim was denied on the 60th day and therefore was not in the hands of the Organization on said day, which was the very last day the denial of the claim could have been made, nevertheless, it was issued by an improper Carrier official as a result of the Organization's misfiling of the claim to the wrong Carrier official in the first instance. Thus, such a denial response cannot be considered to have been untimely. Additionally, we concur in Carrier's position that,

if anything, the Organization committed procedural faux pas by not only misfiling the claim to the wrong Carrier official initially, but it did so again when it prematurely appealed the claim to the Division Manager, Labor Relations. In so finding we rule to dismiss the procedural charge of timeliness in the handling of the subject claim by the Carrier at the first level.

As to the substance of the claim, the Board concurs, given what we consider to be the peculiar circumstances of this instant case, and this case alone, that Claimant should be paid sick leave benefits under the Clerical Agreement for the two claim dates in question. Accordingly, we rule to sustain the claim in part.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 13th day of August 1997.

CORRECTED
LABOR MEMBER'S CONCURRENCE AND DISSENT
AWARD 32145, DOCKET CL-32813
(REFEREE G. E. LARNEY)

The subject Award requires concurrence and dissent. We first concur that the Neutral correctly concluded that the Claimant was entitled to be paid sick leave benefits for the two claim dates in dispute.

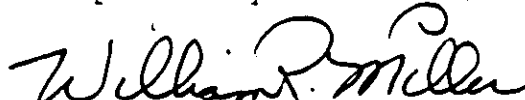
Our dissent does not detract from the soundness of the Award regarding the sick leave issue which it resolved. The dissent instead is offered to advise the Carrier that the Majority did not agree with its assertion which the Neutral capsulized on page three of the Award as follows:

"...only after she was disqualified from her Crew
Management Representative position in March of 1994,..."

The Majority clearly ruled there is nothing in the record to indicate that Claimant has ever been disqualified from any position. The record produced on the property involving this dispute never alleged disqualification, but instead stated that Claimant worked as a Crew Management Representative until March 16, 1994, after which she returned to the craft.

The Concurrence and Dissent is to be attached to Award 32145 and made part of such so as to correct the Carrier's mistaken assertion. The record shall reflect that the Claimant was not disqualified as a Crew Management Representative.

Respectfully submitted,



William R. Miller
TCU, Labor Member, NRAB
October 10, 1997