Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37348
Docket No. CL-37847
05-3-03-3-283

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(CSX Transportation, Inc. (former Seaboard Coast
(Line Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-12992) that:

(1) Carrier violated the Agreement, specifically Rule 18, when on May 25, 2002, it failed or refused to call Customer Service Representative J. Burley to work Position No. 4ECA-350, in lieu of allowing employee Y. F. Callahan to protect this position.

(2) Carrier shall now be required to compensate Clerk J. Burley, ID 520222, the rate of the position ($150.98) at the punitive rate of ($226.47), for the above violation."

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.

The Claimant held Position 4EGL-208 with assigned hours of 1500 to 2300 Wednesday through Sunday. At approximately 0640 on Friday, May 24, 2002, the Claimant marked off sick. The Claimant marked up again at 1900 on Saturday, May 25, which was midway through his/her regular shift hours. The Claimant received sick pay for both shifts missed. When overtime was called for a vacancy on the third shift (2300-0700) on Saturday, May 25, the Claimant was deemed to be unavailable for the overtime and a junior employee filled the vacancy. The Claimant and the Organization allege that the Claimant reported available for service two hours before the overtime was called and four hours before the overtime assignment began and, thus, should have received the overtime assignment notwithstanding receipt of sick pay for the regular shift immediately preceding the overtime.

The Carrier denied the claim on the grounds that the Claimant was unavailable per Rule 19, which defines a day as a 24-hour period beginning with the starting time of a regular position, and Rule 49, which provides for sick pay on a daily basis. In accordance with the Carrier's position, the Claimant was unavailable for 24 hours from 1500 on Saturday, May 25, 2002. The Carrier also supplied a copy of its April 11, 2001 notice to employees and the General Chairman, issued more than one year prior to the claim date, which reads, in pertinent part, as follows:

> "Effective immediately, if a person marks off SICK for any reason (SIC, FAM, SNP or FAS), they cannot work again for one day (24 hours) from the start time, of the start of their assignment."

Both parties included information and argument in their Submissions that was not raised during the development of the record on the property. Accordingly, as we must not, we have not considered such matters.

The record has other unusual features as well. For example, the claim asserts that Rules 18 and 42 are controlling. While Paragraph (d) of Rule 42 is stated in the body of the claim, no mention is ever made about which portion of Rule 18 is alleged to be controlling. Indeed, Rule 18 is never again made part of any contentions advanced by the Organization in the further development of the on-property record. Interestingly, in its June 12, 2003 appeal, the Organization asserts only that Rule 42 is controlling.

The record also presents the appearance of sharp practice. The parties discussed the claim in conference on October 10, 2002. The Carrier issued its written denial following conference on October 30, 2002. Up to that point, the Organization based its entire position on Rule 42(d) and the one mention of Rule 18 without any specificity. That remained the posture of the dispute for some seven and one-half months thereafter. On June 12, 2003, however, the Organization alleged support for its position based on the doctrine of past practice. The Organization's letter was received by the Carrier on June 17. The Carrier immediately notified the Organization that it disputed the contents of the Organization's June 12 letter and that it would respond by July 15, which would have been well within the nine-month appeal time limit. Nonetheless, the Organization filed its Notice of Intent to file an Ex-Parte Submission on June 20, 2003. When the Carrier did respond by July 15 as it said it would, the Organization took the position that the response was untimely because the record was closed.

Based on the record up until just before the Organization's June 12, 2003 appeal, we do not find the Organization to have satisfied its burden of proof to establish a violation. It is well settled that employers have the inherent right to promulgate reasonable rules and policies to govern their business operations that are not in conflict with the terms of a Collective Bargaining Agreement. On its face, the Carrier's April 11, 2001 notice is entirely consistent with the definition of "day" found in the parties' Agreement. It is also in harmony with Rule 49, which provides for payment of sick leave pay on a daily basis. There is no explicit conflict with Rule 42(d) cited by the Organization as controlling, because that Rule merely required the Claimant to report availability for service at least three hours prior to the start of the next regular work shift. Regarding Rule 18, the instant record simply fails to specify which of the several subdivisions of the Rule is the basis of the claim. On its

face, Rule 18 is entitled Use of Unassigned or Extra Board Employees. The Claimant was neither unassigned nor an extra board employee.

Claims, to be procedurally valid, must be sufficiently specific that neither the Carrier nor the Board is required to make assumptions or otherwise speculate about which Agreement language forms the basis of the claim. On this record, we find the claim to be defective in that regard.

Regarding the Organization's past practice contention, it is always necessary for the evidence of alleged past practice to sufficiently distinguish between a practice which becomes binding as an unwritten term of the Agreement and a practice which is merely an exercise of the employer's discretion and which can be changed, in the employer's discretion, upon proper notice. It was the Organization's burden of proof to establish the existence of a binding past practice. On this record, however, it has not satisfied that burden.

For the foregoing reasons, we do not find the instant record to establish that the Agreement was violated.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of January 2005.