Award Number 295
Docket Number CL-241

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA

DISPUTE.—

"Claim of L. O. Sullivan, Switching Clerk, Houston Freight Station, for compensation for time lost account sickness September 8, 1930."

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

The carrier and the employee 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.

The parties to said dispute were given due notice of hearing thereon.

As a result of a deadlock, Willard E. Hotchkiss was called in as Referee and, at the request of the carrier, a second hearing was had on July 9, 1936, in which representatives of the parties argued the case before the Division with the Referee sitting as a member thereof.

BASIS OF CLAIM.—L. O. Sullivan, Switching Clerk in the Houston Freight Yard, was absent from duty on account of sickness on September 8, 1930.

The Sick Rule of the Agreement reads as follows:

"SICK LEAVE. (NEW RULE) Where the work of an employee is kept up by other employees without cost to the carrier, by such other employees working overtime without pay as far as may be necessary to keep up the work, and avoid neglecting their own work, a clerk who has been in continuous service of the carrier one year and less than two years will not have deduction made from his pay for time absent on account of a bona-fide case of sickness until he has been absent six working days in the calendar year; a clerk who has been in continuous service two years and less than three years, nine working days; a clerk who has been in service three years or longer, twelve working days. Deductions will be made beyond time allowance specified above.

"The employing officer must be satisfied that the sickness is bona-fide and that no additional expense to the carrier in involved. 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.

"The carrier may extend the above limits of sick leave in individual meritorious cases where the management deems that such extension is justified.

"NOTE.—Employees will not be required to work overtime on positions of absent employees beyond the time limit provided in this rule without being paid for such overtime."

Carrier did not compensate Sullivan for the day he was absent, alleging that an extra clerk A. E. Sparks had to be called for duty on account of Sullivan's absence. Sparks was paid at the rate applicable to the position held by Sullivan.

On and prior to September 8, 1930, there were three regularly assigned Switching Clerks, J. E. Porche, R. B. Deason, and L. O. Sullivan, the rate of

each being $5.00 per day. On September 8, 1930, Porche and Deason were assigned to work in the Warehouse; extra clerk Sparks was assigned to the switching desk.

Petitioners claim that while an Extra Clerk was employed he was not employed because of Sullivan's absence but because the two other switching clerks were assigned to work in the warehouse and that the extra clerk did not do Sullivan's work.

Exhibits attached to Petitioner's original submission are as follows:

October 1, 1930, letter, Sullivan to Agent O. E. Boon, to wit:

> "The writer's check for the first half of September was short one day's pay account of being off sick on Sept. 8th.
>
> "Beg to advise that my work was not taken care of during my absence, and in view of this fact will ask that you allow me this day on my next check."

October 2, 1930, Boon to Sullivan, to wit:

> "Your letter Oct. 1st, claiming time for one day's pay, Sept. 8th on account of being absent due to alleged disability, sickness.
>
> "Please be advised that payroll records disclose the fact that extra clerk, A. E. Sparks, worked in your place, Position #236 Sept. 8th, the day you were absent, account sickness.
>
> "Further investigation develops that no overtime has been put in by the Switching Dept. on your account in order to bring your work up to date, which you state was not taken care of during your absence on account of sickness.
>
> "Your claim for one day's pay, Sept. 8th, 1930, is herewith respectfully declined."

October 6, 1930, E. L. Griffith, Division Chairman, to Boon, to wit:

> "Under date of October 1st clerk L. O. Sullivan filed claim for one day's pay, account mis-application of Sick Leave Rule of the Clerk's agreement. On October 2nd you advised that the claim had been declined. It is our position that under the interpretation of the Sick Leave Rule this claim should have been allowed and I would like to discuss this matter with you, informally, before appealing from your decision."

(This letter not included in Carrier exhibits.)

November 1, 1930, Griffith to K. C. Marshall, Supt. of Terminals, reciting that conference had been held with Boon and Boon had said that he would not allow the claim as it was his intention to have had the extra clerk called to do Sullivan's work if Sullivan had been present. The letter then outlined the basis of the claim in detail and asked Marshall to reverse Boon's decision. In case of failure to reverse, hearing was requested.

November 20, 1930, letter, Griffith to Marshall, to wit:

> "Subject: Claim of L. O. Sullivan, Clerk Local Freight Station.
>
> "Please see my letter of November 1st, 1930, above subject.
>
> "Can you now advise?"

(This letter not included in Carrier's exhibits.)

November 22, 1930, Marshall to Griffith, to wit:

> "Yours of the 20th, above subject:
>
> "I wrote you November 10th, addressing the letter to 910½ Preston Avenue, as follows:
>
> "'Your letter of November 1st in regard to time claim of L. O. Sullivan, Clerk, Houston Freight Station.
>
> "'The position taken by Agent Boon in this case in declining the claim without basis is correct and is with my concurrence.'
>
> "Claim is therefore respectfully declined."

(This letter is dated Nov. 10, 1930, in Carrier's exhibits, Record p. 46.)

December 20, 1930, letter, General Chairman Harper to Assistant General Manager Torian, to wit:

> "Mr. K. C. Marshall, Superintendent, has declined the claim made by L. O. Sullivan for time lost account sickness.
>
> "We believe that there is proper basis for the claim as made, and would like to discuss the case with you on appeal at our next conference."

December 26, 1930, Torian to Harper, to wit:

"Your letter December 20th requesting conference in the above case.

"Will arrange to meet you at my office at 11 A. M. Tuesday, December 30, 1930."

December 28, 1930, General Secretary Treasurer Brandin to Torian saying that Harper was out of town and asking postponement.

December 29, 1930, Torian to Brandin suggesting Harper advise when he return.

January 16, 1931, Torain to Harper, to wit:

"Conference January 14th.

"When clerk Sullivan reported sick on the morning of September 6th, 1930, another clerk was called to work in place of Sullivan and was paid for the day.

"The claim that Sullivan should also be paid under the sick leave rule is without basis and is declined."

September 7, 1934, Harper to Torian, to wit:

"The above styled case is yet pending and unadjusted. In keeping with the provisions of the amended Railway Labor Act, we respectfully request that you meet our Committee in conference to discuss further and settle, if possible, the claim by agreement, so that the claim may be referred to the National Adjustment Board in the event settlement by agreement is not affected.

"It will be greatly appreciated if you will name conference date for purposes stated above."

September 8, 1934, Torain to Harper, to wit:

"Your letter September 7, 1934:

"This case was discussed with you and Mr. Brandin in conference by Mr. Nicholson on January 14, 1931, and you were given a decision in the case on January 16, 1931, and nothing further was heard from you. A situation in which no action has been taken since January 1931, cannot under any course of reasoning be considered as pending. It is therefore our position that this is not a pending case."

July 10, 1935, Harper to Torian, to wit:

"When we were unable to reach an agreement in the above case in our conference ending January 31st, 1935, it was my understanding that at a subsequent meeting to be arranged a joint statement of facts would be drawn in connection with the submission of the case to the National Railroad Adjustment Board.

"In our conference of July 9th you advised that it was the position of the Company that this case was not 'pending and unadjusted' and that you must therefore decline to join the organization in its submission to the Board. We do not subscribe to the position that you take, and this is your advice that we will submit the case to the Board ex parte."

Case submitted to Board, September 24, 1935.
Brief filed by petitioners, October 23, 1935.
Brief filed by carrier, October 19, 1935.
Hearing, February 17, 1936.
Hearing with Referee sitting, July 9, 1936.

Petitioners summarized substance of claim in their submission of October 23, 1935, in their concluding statement:

"It is the position of the employes that the carrier was put to no additional expense and that the service suffered no detriment because of Sullivan's absence on account of sickness on September 8, 1930, and that Sullivan is entitled to compensation for the day under the Sick Leave Rule of the Agreement."

Carrier's Brief, submitted October 19, 1935, set forth objection to Board taking jurisdiction of the case and, without waiving those objections, attacked the merits of the case.

Carrier's objections to Board's taking jurisdiction are in the main as follows:

1. Case was not "pending and unadjusted" within the meaning of that phrase in the amended Railway Labor Act.

2. Petitioners are estopped from action by their silence of three years.

3. Petitioners have not furnished respondent with data they intend to use as required by rules of Board.

Carrier's argument on the merits of the case are substantially as follows:

Referring to the sick leave rule the carrier uses this language:

> "Attention is directed to the fact that the foregoing rule requires payment to the employee off on account of sickness only where each of the following elements, among others, are present and concurring:
>
> "1. The work of the absent employee must be kept up by other regularly employed employees;
>
> 2. Keeping up of the work of the absent employee must not involve any cost to the carrier; and
>
> 3. The other employees who keep up the work of the absent employee must do so by working overtime without pay so far as may be necessary to keep up the work and avoid neglecting their own work.
>
> None of the foregoing essential elements are present in this case."

The Carrier laid considerable stress on the pay roll record (Exhibit I), which it is argued shows that Sparks was employed in place of Sullivan.

Both jurisdictional arguments and arguments on the merits of the case were developed at great length and with a ponderous array of technical legal contentions.

HEARING BEFORE REFEREE.—At the oral hearing before the Board with the Referee sitting as a member thereof, each side assailed a substantial part of the factual and interpretational material submitted by the other side. Petitioners took particular exception to the pay roll argument of carrier which they say shows nothing except that Sparks was recorded therein as being a substitute for Sullivan without throwing any light on the question whether he was such in fact.

The hearing did not contribute materially toward clarifying any of the issues.

OPINION OF THE REFEREE.—Three other cases to which the Clerks' organization is a party came before the Board from this property concurrently with this case. In each of these cases the carrier raised the jurisdictional issue and supported its contentions by arguments similar but not identical in every respect to the arguments used in this case. In each of these cases the alleged violation of the agreement began several years ago and in each case there had been prolonged interruption of activity on the part of petitioners in pressing the claim. The carrier contended strongly in each of the three cases that the prolonged silence of petitioners was tantamount to acquiescence in the status quo and that for that reason, among others, the claims were outlawed. Referee Spencer, referring to an earlier case from this property used this language. The record (of those controversies was) "voluminous, the issues multifarious and the arguments finely spun" (Award 137, CL–128). Mr. Spencer's comment applies equally to the four current cases.

In each of the three other current cases (CL–238, 239, and 240) the carrier's contentions as to jurisdiction have been overruled. The reasons for doing this took account of past conditions on the property, especially of the difficulty encountered by petitioners in establishing regular relations of conference prior to the effective date of the amended Railway Labor Act. Decision in those cases was rendered with a view likewise to what the Referee conceived to be the meaning, letter, and spirit of the rules, legal requirements, and proper procedure governing the respective issues. In essence, the Carrier was overruled on the jurisdictional issue in all those cases because in all the circumstances such action appeared to the Referee to be legal, equitable, sensible, and constructive.

An important influence on the mind of the Referee in those cases was the fact that each case had to do with alleged violation of rules which pertained to the time at which the claims began to run, which continuingly pertained to the intervening time, and which pertained to the time when, failing settlement on the property, the respective cases were brought to this Board. As to current violations, if any, the right and the duty of the Board to take jurisdiction under

proper procedures was clear. In each of the three cases any current violations had their inception in the past and the acts complained of had continued substantially without interruption from the time of their inception to the time complaint was filed; the acts of the past, of the present, and of all the intervening time were inextricably interwoven. It would have been impracticable, except arbitrarily, to fix any date back of which jurisdiction would not be permitted to run. To have denied jurisdiction altogether would have thrown the cases out of court indiscriminately without hearing on the merits, and the effect would have been to place a stamp of approval upon continuing and highly contested ex parte interpretation of the rules. This would have been tantamount to permitting the carrier to change the agreement by violating it, in case an actual violation had occurred (CF Award 137, CL–128).

Extended comment has been made on the three other cases which came to this Board from this property concurrently with the instant case because all of those cases were basically different from this case in one particular. In sharp distinction to the other three cases, this one has to do with a single act which was complete when the carrier finally declined payment to Clerk Sullivan for September 8, 1930, on which day he did not work on account of sickness. In other words, the issue in this case is the right to five dollars for one day's pay September 8, 1930.

Petitioners have expressed indignation at the personal injustice suffered by the claimant. It is possible that we should find this indignation justified if we were able to go back six years and recreate all the circumstances, but obviously this would be impossible even if the record were more nearly perfect than it is. In any case, if the circumstances in which the claimant found himself on September 8, 1930, made the loss of a day's pay a matter of exceptional hardship, it is now far too late suitably to redress the injury. The case coming up at this time, years after the event, can only be considered objectively in the light of governing rules and of legal and procedural requirements.

From the standpoint of public policy and sound procedure it must always be remembered that this Board is a great national agency of adjustment, the dignity, repute, and effectiveness of which is a matter of concern to every citizen. The standing of the Board is likely to be enhanced rather than jeopardized by interpreting its jurisdiction as liberally and broadly as can rightly be done in respect to continuing acts alleged by one side or the other to be in violation of agreements, even though those acts had their inception some time in the past. In many cases, as in the three previously discussed, the total situation out of which claims arise can be judged fairly only by running current or recent issues back to their inception.

Isolated occurrences from the past which are linked to the present by no chain of intervening events must stand in a considerably different light. The respect in which this Board is held and its consequent effectiveness are sure to suffer if it throws down the bars unduly to back claims based on isolated and relatively trivial incidents. For this reason, the Referee is disposed to scrutinize even the jurisdictional aspects of this case with considerable care.

As above noted, the Carrier has denied the jurisdiction of the Board on three main grounds, to wit:

1. Case is not pending and unadjusted.
2. Long silence estops petitioners from pressing claim.
3. Petitioners have not furnished carrier with data as required by rules of the Board.

The Referee is not disposed to give much weight to the third of these reasons. Reasons one and two are essentially the same since the failure of petitioners to persist in pressing the claim between January 1931 and September 1931 is the circumstance which might divest it of the quality of a "pending and unadjusted claim."

The logic in support of reviving an isolated claim for a day's pay after it has slept for three and one-half years is much less convincing than the logic back of a renewed effort to correct, from the time of its inception, a continuing misapplication of a rule by which an employee is being penalized day in and day out. This fact and the jeopardy to the standing and effectiveness of the Board that might come from throwing down the bars to old claims based on isolated occurrences, strongly inclines the Referee, even under the circumstances which obtained upon this property prior to June 1934, when the amended Railway Labor Act became operative, to hold that within the purview of that act this is not a "pending and unadjusted case."

However, notwithstanding the distinction above noted between this case and CL–238, 239, and 240, in all of which the Board assumed jurisdiction, the background of those cases and this one are fundamentally similar. Although the Referee considers the distinction between those cases and this one of great importance, it can do no harm to pass over the jurisdictional issue for the moment and explore the record for the light it may throw on the merits of the claim.

Reference has been made to the paucity of clarifying discussion at the oral hearing. Even under normal circumstances this would not have been strange in view of the long lapse of time between the events discussed and the effort to interpret them. The Referee was strongly of the opinion, as he listened to the General Chairman and the Attorney for the carrier, that except for the state of mind which appears to exist between the parties, the instant case would almost certainly have been settled out of court without prejudice to any of the principles involved. In the judgment of the Referee this is what should have happened.

To be sure interpretation of a significant rule like the sick leave rule is a matter of importance, but the selection of a suitable and timely case through which to channel such interpretation is no less important, and the instant case does not impress the Referee as meeting the requirements. There are of course certain facts of record which can be verified but the interpretation to be placed upon these verifiable facts is sharply contested. Even if every witness should do his utmost to recall accurately every circumstance which might throw light on the point at issue, the treachery of human memory would make the task impossible. As above implied, the Referee believes that a sane attitude of reciprocal cooperation would have prevented this case from reaching the Board. Since it is evident that a somewhat different attitude from this obtained on the property both in September 1930 when the occasion for the claim arose and in September 1934 when the case was brought, and since the prevailing attitude was obviously mutual the Referee regrets that any decision must operate technically in favor of one of the parties However, the amount involved is so small that this is not serious.

For the reasons above outlined, the Referee finds that even if this case should be adjudged pending and unadjusted on jurisdictional grounds, essential governing facts and circumstances have been too much obscured by time to permit of any confident decision on the merits of the case.

AWARD

A. *On Jurisdiction.*—Jurisdiction dubious.

B. *On Merits.*—Case not proven because of obscurity concerning essential facts and interpretations.

C. *Status of Claim.*—Disallowance because of dubious jurisdiction and insufficient evidence.

D *Sick Leave Rule.*—Referee declined to channel any interpretation of Rule through this case.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 17th day of September 1936.