Award No. 1524
Docket No. CL-1308

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Paul W. Richards, Referee

PARTIES TO DISPUTE:

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

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY

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

"(1) The Carrier violated agreement rules when it failed and refused to fill short vacancies on assigned positions at St. Paul General Store or in lieu thereof to compensate employes under provisions of vacation and sick leave Rules 50 and 51, and that

"(2) The Carrier shall now be required to compensate absent employes for wage losses sustained as a result of said rules violation from December 21st, 1936."

EMPLOYES' STATEMENT OF FACTS: "At various times prior to December 21st, 1936, Employes at St. Paul General Store, through their Local Committee, attempted to procure enforcement of rules agreement as to filling of short vacancies on assigned positions at that point, and by waiving prosecution of current violations understood that this provision of the Rules Agreement would be adhered to in the future, but same was not done.

"On December 21st, 1936, General Chairman procured conference with District Storekeeper, Mr. J. P. Kimmel, and entered protest of improper assignments that date on a vacancy created by an employe being granted a thirty day leave of absence; at which conference Employes Position that short vacancies must be filled was also thoroughly explained. Storekeeper was advised that claims would be filed in the future if such vacancies were not filled or compensated for. See Affirmation of General Chairman, Exhibit A.

"On August 5th—6th and 7th, 1937, position of Sectional Stockman, General Store, Rate 59¢ per hour, was vacant due to illness of regular incumbent, Raynoll Swangstue, and was not filled or compensated for.

"Claim for sick leave allowance was filed by Mr. Swangstue account his position not filled, and neither Employe or Local Chairman could prevail upon Storekeeper Kimmel to accept service of the claim, his statement being 'This is not in order.' See Affirmation of General Chairman, Exhibit B.

OPINION OF BOARD: The carrier asks that the Board refuse to take jurisdiction of this dispute, and states as its reason that, allegedly, the claim has not been handled on the property in the manner required by the Railway Labor Act. Evidently there are some features in the procedure that are not ordinarily encountered. It is the opinion of the Board, however, that carrier may not now be heard to complain, one reason being that carrier should have anticipated irregularities, as they seem to have been in a measure forced on Employes and Petitioner as the consequence of a more or less obstructive attitude and manner of functioning by carrier's employing officer when employes presented claims and sought decisions. From the further showing in the docket the Board is also of the opinion that no prejudice has resulted to the carrier by reason of any procedural irregularities. It is averred by petitioner and not controverted that in final conference with the carrier's Executive Vice President the instant dispute was discussed and declined by the carrier on the merits only. There is also a showing that following this conference carrier requested petitioner to withhold making ex parte submission of the dispute as it was felt that agreement could be reached to dispose of the claims. A delay of several months ensued without further conferences. Under the facts and circumstances that obtained, it is the opinion of the Board that it should not refuse to entertain the dispute on account of irregularity of procedure.

In stating its reasons for the request that the Board refuse to take jurisdiction, the carrier "also refers to Rules 23, 24, 25, and 26 of the Agreement * * * effective July 16, 1926, and by such reference is made a part hereof." Slight, if any, discussion by carrier of the application it would make of these rules to the facts in this case has been found in the docket. But if carrier's theory is that these rules have of necessity cut off and barred the claim, it is a theory the Board can not so summarily adopt. In Third Division Award 292, in considering a rule known as No. 27, which was similar to the rules here under discussion in limiting the time for requesting a hearing, The Board recognized and stated that the **purpose** of such a **public agency** as this **Board** is to **remove causes of stress,** and that in cases of doubt it is safe to take a middle ground between throwing down the bars to indiscriminate charges arising from circumstances long past and undue nicety in drawing a line between cases which are dead and not dead. The Board's conclusion was, "As the Referee interprets Rule 27, and the rules of this Board, and the past precedents in respect to those rules, they do not estop the Board from hearing this case on its merits." The general principle stated in Award 292 rests on no unstable foundation. For it is a fact recognized by this Board that collective bargaining agreements have a distinct attribute that is not incident to contracts entered into in the ordinary walks of life, in that, in the Railway Labor Act as Amended, such agreements were provided for and intended by Congress as important instrumentalities for accomplishment of the purposes of the Act. So it was logical that in Award 292, instead of proceeding to make a decision as if Rule 27 had been an Agreement between two ordinary business men, the Board paused for reflection upon the purpose for which the Act created the Board, namely the removing of causes of stress, and for reflection upon results that would follow strict application of the rule, namely, the making of the rule unworkable and improperly defeating redress for violations. And, in the opinion of the Board, the adoption of the middle ground in Award 292 reflected a consciousness that an instrumentality such as a collective bargaining agreement can not be rightly evaluated apart from the purposes for which it was favored by Congress, and exists, and should not be implemented for thwarting those purposes. In Award 1060 the Board held that the cut-off rule there involved was without application. The claim was for pay. Inter alia the opinion states, "It was as if in a given instance the agreement provided for a daily wage of five dollars, but in relation thereto the carrier mistakenly paid, and the employe unwittingly received, only four dollars a day. Reasonably, the error should be corrected for the period it obtained, not simply from the time the employe awakened to his rights." In the vigorous dissent to Award 1060 more discussion is

directed to other features of the opinion than to whether, in view of the origin, nature and purposes of collective bargaining agreements, there was in the making of Award 1060, room for the rule of reason in application of the rule, that seems to inhere in the opinion. Award 1403 adopted and followed Award 1060, and in Award 1403 it is noted that there are conflicting awards. In Award 1411 it was held that a limitation of ten days in which to file a claim was void for unreasonableness, and also to this award a dissent was filed. In passing it may be said that in the instant case the rule fixes the period at seven days. Illustrative of other elements, quite outside the written rules, that this Board has deemed controlling in making awards in discipline cases in which the carrier has violated time-limitation rules, see Third Division Award 1497. In the instant case it is not theoretical but evident that strict application of Rule 26 would profit the carrier for an obstructive attitude and conduct of its employing officer. The claim is for pay. There is no denial of carrier's liability, except for the special defenses noted. In the opinion of the Board, under the showing in the docket, and not inconsistently with prior awards this Board has made, the employes' rights to pay were not cut off or barred by Rules 23 to 26, inclusive.

Turning to the merits, and taking up first the portion of the claim to the effect that the carrier violated the agreement rules when it failed and refused to fill short vacancies on assigned positions at St. Paul General Store, the Board finds that several recent awards are in support of the carrier's contention that the agreements in evidence do not impose an obligation on carrier to fill short vacancies on assigned positions. Among these authorities are Third Division Awards 934, 1216, 1293, and 1412. Accordingly this contention of carrier the Board sustains.

With respect to the alternative proposition in first part of Statement of Claim and in (2) of the Statement, that is, the claim that the carrier compensate absent employes under provisions of vacation and sick leave rules 50 and 51 for wage losses sustained as a result of the rules' violation from December 21, 1936, the carrier takes the position that these rules were not intended to apply, and never have been applied to Groups 2 and 3.

In the rules themselves, however, there can be found no such limiting. The language in part, of Rule 50 is, "**Employes** who on January 1st, have been in the service of the company one year or more, will be granted the following annual vacations with pay, provided" etc. The language, in part, of Rule 51 is "**Employes** will be granted time off on account of sickness * * * with pay, providing" etc. (Emphasis, the writer's.) It may be noted that in Rule 62 of the same schedule of agreements, there is a distinction made between classes to which that rule is applicable. Not so in Rules 50 and 51. In the opinion of the Board Rules 50 and 51 are agreements that are in terms inclusive of employes that are under the scope of the Clerks' Agreement regardless of class, and nothing in the docket warrants adoption of any other intendment, in the opinion of the Board.

We therefore hold that employes qualified under the provisions and conditions of Rules 50 and 51 to receive pay shall be compensated by the carrier, such employes and the amounts to which entitled to be ascertained by a joint check on the property of the timerolls and payrolls and any other material records, with leave to re-submit, with further showing of facts, joint or ex parte, any further controversies in this dispute that can not be adjusted on the property by said joint checking.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 for violations of Rules 50 and 51 by the carrier the employes who were qualified under these rules are entitled to be compensated from December 21, 1936.

AWARD

Claim sustained as stated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of July, 1941.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 1524
DOCKET CL-1308

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: Chicago, St. Paul, Minneapolis & Omaha Railway Company

Upon joint application of the Carrier and the representatives of the Employes involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The parties in their joint request of March 6, 1943, proposed three questions for answer as hereinafter stated.

Question 1: Must Employes for whom claims have been entered for payment under terms of Award 1524 submit reasons at this time for each absence in order to qualify and be compensated on such claims under provisions of Sick Leave Rule 51?

The answer is Yes.

The record makes it evident that the Carrier and the Employes are in accord that, under Rule 51, the Carrier under ordinary circumstances could have exacted from an Employe a showing of the reasons for each period of time off for which compensation might be claimed. The disagreement is whether, at this time, the Carrier can do so. The Employes are of the opinion that the Carrier can not.

In support of that opinion Employes say that, While Carrier may have exacted the execution of Form AD-254 by an Employe at the proper time, showing specific reasons for each absence, Carrier did not do so and this Board is controlled by what the Carrier actually did, not what it might have done. Employes cite interpretation No. 1 to Award No. 1539, Serial No. 29, and awards and interpretations referred to therein. If what Employes say is sound, it must be because the Carrier has lost a privilege or right it once had under Rule 51. This privilege or right (so called for convenience) allegedly lost, has to do with the procedure in the progressing of each claim. In exercising it the Carrier ordinarily requires that the Employe carry the burden of submitting reasons that come within the purview of Rule 51, as the cause of the absence from his position. To hold that such right or privilege is now lost to the Carrier is tantamount to saying that Employes, in the instant case, claiming compensation under the Sick Leave Rule, have in some way been relieved of the burden of proof that concededly was resting on them at the outset, and to saying that they need not show that they were sick, or absent for other good and sufficient reasons. The query arises, how did the alleged loss come about.

It would be futile to attempt to find language in Rule 51 susceptible of being construed as an agreement that Employes be granted time off with pay without any determining of the factual question whether the cause of the absence came within the Rule. Nor is there in the Rule any agreement that in case of the claim being filed belatedly the absence is presumably on account of some cause coming within the rule, casting on Carrier the burden of negating the presumption.

What is suggested by Employes as bringing about the loss of the privilege or right, is that in this dispute the Carrier should be penalized by being made liable for compensation under the Sick Leave Rule, though the Employe shall show nothing more than the fact of absence from his position. If such penalty is to be imposed, the justification would be the Employes' complaint that at "this late date" they are less able to show the actual causes of the absences.

The "more or less obstructive attitude and manner of functioning of the Carrier's employing officer when Employes presented claims and sought decisions," was given consideration by the Board in Award 1524 in holding that the Board should not refuse to entertain the dispute on account of irregularity of procedure, or on account of the cut-off rules found in the schedules. But the reasons for holding that this obstructive attitude has relieved the Employes from submitting at this time the reason for each absence and has cast the burden on Carrier, to show that such reasons did not exist, are less cogent than the several reasons for the holdings above mentioned, as stated in following paragraph of this opinion.

Docket CL-1308 indicates that Employes were not without knowledge that the merits of their respective claims under Rule 51 were to be determined at some time subsequent to a decision on that Docket. Denial by the Board of the claim made in that Docket, based on certain of the grounds relied on by Carrier, would have amounted to an adjudication against claims of Employes individually. A part of the claim in Docket CL-1308 was that the Carrier be required to compensate Employes from December 21, 1936. It does not appear that Carrier held out that it would not require showings of causes of absences, since December 21, 1936, nor does it appear that Employes have been taken by surprise. The existence of claims from December 21, 1936, as stated in said Docket, carries an inference that facts bringing the claims within Rule 51 existed. If Employes have lost records or proofs of causes of absences, by reason of some unfortunate casualty, they have submitted no showings there was such casualty. In fact, as we understand Employes' position, it is that an Employe, absent on account of sickness, would on his return have been given a form to record the cause of his absence, but that no such record was made because of the obstructive attitude of the employing officer. The Employes contend that except in instances easily recallable to memory individual Employes are not in a position at this time to explain the need of being absent at various times particularly when for periods of an hour or less. Only as it may be by inference from the references to recollection, is there any showing that Employes are dependent solely on recollection and kept no records of their own time and causes of absences. The Carrier on the other hand states it believes that most daily or hourly rated Employes keep a record of their time and when and why they are absent from the job. Carrier also says it is difficult to conceive of an Employe not maintaining a record of alleged amounts due him and reasons therefor if he was entertaining any real thought of qualifying and claiming compensation under Sick Leave Rule 51. However that may be, it does not appear that Carrier stood in the way of Employes making and preserving records of their own. In that respect Carrier's conduct was not productive of a situation beyond the power of the Employes to easily remedy.

Viewing the record in its entirety, the Board is not convinced that it indicates that the penalty should be imposed.

Employes also point out that in the hearing on Docket CL-1308 Carrier failed to set up as a defense the absence of Form AD-254 as a reason for denying the claim, and urge that Carrier can not assert such defense at this late date. The Board is unable to adopt this theory because Docket CL-1308 presented the generalized question whether the rules imposed a liability to compensate Employes. The merits of no individual claims were presented for consideration. The procedural question now involved in the presentation of the claims individually had not arisen.

Question 2: Was work kept up without additional expense to the Railway Company, within the meaning of Vacation Rule 50 and Sick Leave Rule 51—

(a) When absent employe was relieved by a lower-rated employe who was not in turn relieved;

(b) When absent employe was relieved by a lower-rated employe with one or more lower-rated employes successively moved up in turn to higher-rated positions and the lowest-rated employe not in turn relieved; and

(c) When absent employe was relieved by a lower-rated employe with one or more lower-rated employes successively moved up in turn to higher-rated positions and lowest-rated force (laborers) increased, subsequent to such absence, within the same month.

Answer: (a) Yes.

As there would be no additional payroll expense, the work was kept up without additional expense to the Railway Company, within the meaning of Rules 50 and 51. Authorities, Third Division Award, No. 520, U. S. R.R. L. B. Decisions Nos. 3804, 3828.

Answer: (b) Yes.

In the amount the lowest-rated Employe would have been paid if left on his position there was no additional payroll expense, and in that amount the work was kept up without expense to the Railway Company within the meaning of Rules 50 and 51. Authorities, those above cited and U. S. R.R. L. B. Decision No. 3949.

Answer: (c) Yes.

Question 3: Should absent employe be compensated under provisions of Vacation Rule 50 and Sick Leave Rule 51 when force was increased subsequent to such absence and within the same month in which it occurred?

The answer is Yes.

In Questions Three and Two (c) there is included the assumption that subsequent to the Employe's absence the force was increased. Carrier's contention is that the nature of the work at St. Paul Shops Store is such that when a regular laborer is moved into a higher-rated position, to fill a vacancy caused by absence of a higher-rated Employe, the laborer's work accumulates and when it has sufficiently accumulated by aforementioned use of regular laborers or by the "peaks and valleys" incident to stores operation, extra laborers are employed to perform the work thus accumulated or delayed and the force resultantly increased. There is nothing in Rules 50 and 51 making their application conditional upon events subsequent to the period of the absence, whether the period be the same month, or some other period. The Board feels that it would be writing into the rules a condition the parties had not agreed upon were Questions Three and Two (c) to be answered in the negative. In any event no one could safely assume that an increase in the force during the same month of an absence was caused by the moving up of a regular laborer or was caused by some other incident inherent in railway transportation. Authority Third Division Award 399.

Referee Paul W. Richards, who sat with the Division as a member when Award No. 1524 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 29th day of June, 1943.