Award No. 1589
Docket No. TE-1569

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers, Atchison, Topeka and Santa Fe Lines, that Telegraphers A. S. Metz and H. W. Wilson, shall be granted extension of their respective leaves of absence for such a period as each may continue to be incapacitated for duty by illness."

EMPLOYES' STATEMENT OF FACTS: "An Agreement bearing effective date of December 1, 1938, is in effect between the parties to this dispute; copies thereof are on file with the National Railroad Adjustment Board.

"Mr. H. W. Wilson entered telegraph service of this carrier on its Western Lines September 6, 1918 and thereafter continued in said service until about 1933, (exact date not available to the organization), at which time, because of illness, he requested and was granted leave of absence. He resumed duty for approximately five months during 1935 and has since been on leave of absence as the result of said illness. Wilson's name has been currently shown on the seniority roster each year up to 1941. In letter December 2, 1940, Mr. Wilson was denied a further leave of absence.

"Mr. A. S. Metz entered telegraph service of this carrier on its Eastern Lines August 9, 1937. Because of illness, effective May 29, 1938, he requested and was granted leave of absence. The Carrier declined to extend said leave of absence beyond August 1940."

POSITION OF EMPLOYES: "The Telegraphers' Agreement, Article XVIII (a), reads:

> 'Employes may be granted leave of absence when they can be spared without interference to the service, but not to exceed ninety (90) days except in cases of sickness, or of employes on local or general committees representing other employes covered by this schedule, or who are selected as grand lodge representatives of the Organization of such employes or Associations of which it is a member, or employes promoted to supervisory or official positions with the railway Associations or who are temporarily loaned to the latter. In any case, such leave of absence must be covered by written permission of the ranking officer of the department in which employed.'

which can only mean that employes have the inherent right, one firmly fixed, to protect their health and seniority rights, etc., by requesting, and being granted leaves of absence because of illness. The word 'may,' which appears to be the carrier's defense of its action cannot, and must not, mean the

ule, or who are selected as grand lodge representatives of the Organization of such employes or Associations of which it is a member, or employes promoted to supervisory or official positions with the railway Associations or who are temporarily loaned to the latter. In any case, such leave of absence must be covered by written permission of the ranking officer of the department in which employed.'

"The limits of the Carrier's obligation to grant leave of absence to its employes covered by the Telegraphers' Schedule are found in their entirety in Article XVIII-(a) of that Schedule.

"The Carrier's rules of June 21, 1929 (Carrier's Exhibit 'C') and of November 1, 1932 (Carrier's Exhibit 'B') are admittedly not matters of contract with the Carrier's employes represented by The Order of Railroad Telegraphers or with that Organization.

"Article XVIII-(a) of the Telegraphers' Schedule effective December 1, 1938 is evidence of agreement between the parties thereto that leave of absence for any reason is dependent upon the Carrier granting same.

"The Carrier has not, in any event, acted arbitrarily or capriciously even where the Carrier's rules subject to concurrence of The Order of Railroad Telegraphers or of the Carrier's employes represented by that Organization."

POSITION OF CARRIER: "The Carrier protests the consideration by the Board of this alleged claim, because it is so obviously an attempt to **compel** the Carrier to grant leaves of absence and thus perpetuate the employment relationship of those whose physical condition is such that they cannot hope to re-enter the active service of the Carrier. The issuance of leaves of absence has always been a prerogative of management, limited only by the obligations in that regard assumed by the Carrier in its employe-agreements. Article XVIII-(a), quoted in the Statement of Facts, clearly does not place upon the Carrier any **obligation** to issue a leave of absence to any one for any length of time; it **permits** the Carrier to issue such leaves if it cares to do so, and for such periods of time as are fair and equitable. That it has discharged the obligation of fairness in this instance is evidenced by the fact that it has granted such leaves to this claimant for more than ten of the twenty-four years which have elapsed since he entered its service May 9, 1917.

"That the Carrier's feeling that the employes are attempting to **compel** the issuance of leaves of absence not required by the governing agreement has a solid foundation is evidenced by Carrier's Exhibit 'D', being letter from the General Chairman January 6, 1941 to the chief operating officer of the Carrier, in which letter the following statement is made:

> 'We hope to find some way whereby leaves of absence * * * will be granted for the duration of said illness.'

Evidently, the 'some way' the employes are seeking is a sustaining Award of this Board, which sustaining award cannot be based on any rule in the agreement negotiated by this Carrier and to which it is a party.

"Article XVIII-(a) of the Telegraphers' Schedule does not detract from the right of the Carrier to refuse further extension of leave of absence to H. W. Wilson; on the contrary, that Article supports the Carrier's action. The claim of the Organization is without support in the Telegraphers' Schedule effective December 1, 1938, the sole agreement between the parties on which an action before this Board may be brought, and such claim should be denied on that account."

OPINION OF BOARD: Article XVIII (a) reads as follows:

> "Employes may be granted leave of absence when they can be spared without interference to the service, but not to exceed ninety

(90) days except in cases of sickness, or of employes on local or general committees representing other employes covered by this schedule, or who are selected as grand lodge representatives of the Organization of such employes or Associations of which it is a member, or employes promoted to supervisory or official positions with the railway Associations or who are temporarily loaned to the latter. In any case, such leave of absence must be covered by written permission of the ranking officer of the department in which employed."

The substance of the employes' contention is that under this rule the carrier is obligated to extend leaves of absence for sickness indefinitely.

In Award 676 of this Division, which dealt with a similar rule, we held that the object was "to protect the seniority of employes who are able and willing to work continuously against an employer that might be tempted to grant indefinite leaves to employes who are unable or unwilling to work continuously. . . . The rule grants the carrier full discretion in granting and extending sick leaves. In the opinion of the Division, however, the language of the rule does not impose upon the carrier a positive duty to extend sick leaves."

We think that the same conclusion must be reached in this case.

It is true that in Award 676 the right of the carrier to decline to grant indefinite leaves was emphasized by a provision that the arbitrary refusal of a reasonable amount of leave to employes when they could be spared, or the "failure to handle promptly cases involving sickness," would constitute an improper practice. In other words, if the carrier was not arbitrary in its administration of the rule or dilatory in handling cases of sickness, its discretion would be absolute. There is no similar clause in the Rule now before us, but we do not think that this omission alters the conclusion, partly because a requirement of reasonableness may well be implied; partly because the general purpose of the Rule appears to be the same as that in Award 676; and partly because the language of the Rule here in question, which begins with the statement that leaves "may" be granted and ends with a requirement of written permission by the carrier, is inconsistent with the idea that the carrier is obligated to extend sick leaves indefinitely.

If a requirement of reasonableness is to be read into the Rule, we do not think that under the circumstances of the two cases involved in this claim, the facts of which we have carefully reviewed, the carrier's exercise of discretion could be set aside as arbitrary or in bad faith.

Since the Rule was adopted the Railroad Retirement Act has been passed. Under that Act an employe with thirty years of service, who is granted an annuity because of total and permanent disability, is not required to surrender his right to return to active service up to the time he reaches 65, at which time he must either surrender his right to return or his annuity. In accordance with this policy of the Act, the carrier agreed with the employes that an annuitant would automatically be considered on leave of absence until age 65 (or until his earlier loss of the annuity through removal of his disability and return to work).

Whether or not the same extended leave of absence should as a matter of equity and sound policy be automatically granted to a permanently disabled employe with less than thirty years of service is a question which should be determined by agreement of the parties. The function of this Board is limited to interpreting and applying the Rules agreed upon by the parties.

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 there has been no violation of Article XVIII (a).

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 13th day of November, 1941.