

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

DELAWARE & HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: "Claim for time lost two (2) working days, November 1 and 2, 1940, amount \$19.94 for Train Dispatcher H. J. McMurray, on account of illness."

EMPLOYES' STATEMENT OF FACTS: "Train Dispatcher McMurray has been in the service of this carrier over twenty-five years.

"On the above dates it was necessary to relieve Dispatcher McMurray due to illness. The Carrier's final decision in this case is attached hereto as Exhibit TD-4 and shows that they have declined to pay the claim.

"This claim is based on a letter from the Chairman, Board of Disciplining Officers, dated June 25, 1940, (TD-1), which letter notified the American Train Dispatchers Association that under certain conditions this carrier had been allowing pay to its employees in dispatching service on sick leave and would continue to handle sick claims on the merits. The Carrier's letter of June 25, 1940, was the result of an Agreement between the parties during negotiations on the present Agreement, dated April 1, 1940. Employees' Exhibit TD-2 attached hereto, shows that the Carrier's letter was made a part of the present Agreement in effect between the parties on this property.

"The carrier under date of May 26, 1941, declined to join in submitting the claim to your Honorable Board. We, therefore, submit it ex parte."

POSITION OF EMPLOYES: "The train dispatchers on the Delaware & Hudson Railroad became organized in 1939 and our first conference with the Carrier was on September 27, 1939, at which time we satisfied the Carrier of our right to represent these employees. The Committee presented a proposal for a working agreement which contained the following rule:

"Time lost account personal sickness shall be paid for up to a reasonable amount of time."

"In subsequent conferences on the adoption of rules, the Carrier objected to putting into the agreement any rule providing for payment for time off sick. They admitted, however, that it had been the practice to pay the dispatchers while off sick, and the dispatchers said that the past practice had been satisfactory and asked that the Carrier give them assurance that past practice in this respect would be continued. The Carrier indicated that they intended to continue the past practice and asked if we would accept a letter in which it would be stated that the past practice was to be continued. We contended for a rule in the agreement but upon being given assurance that sick pay claims would be allowed, as in the past, we accepted, as a part of the agreement, the letter attached hereto and identified

of Railroad Telegraphers for this position. Position in question is that of cTc machine operator. This position, with two others of the same classification and one position of side wire man in the Albany Train Dispatchers' office, are at present filled by train dispatchers. These positions belong to the Order of Railroad Telegraphers and are included in their agreement, the only proviso being that so long as the present incumbents on these four positions remain there they may continue to hold them; however, when they leave these positions of their own volition, or through action of Management, they will be manned by employees subject to agreement with the Order of Railroad Telegraphers."

POSITION OF CARRIER: "The issue involved in this case is the same as that concerned in Case No. 3.40 TD which the Organization has appealed to the National Railroad Adjustment Board along with this case and one other. The Management submits the argument and evidence presented in Case No. 3.40 TD to sustain its position on the instant case."

OPINION OF BOARD: Train Dispatcher McMurray filed this claim for two working days, November 1 and 2, 1940, he being off duty on account of illness. His position was filled by an extra man who was allowed the rate carried in the agreement of the Order of Railroad Telegraphers for that position. The Train Dispatchers of the Delaware & Hudson Railroad Corporation entered into an agreement with the Carrier which became effective April 1, 1940 for a period of one year although it appears from the submission of this case that the current agreement was not signed until June 25, 1940. The current agreement contains no provision covering pay for time lost on account of sickness. However, on June 25, 1940, prior to the time the agreement was signed, there was delivered to the Vice President of the American Train Dispatchers' Association a letter signed by the Chairman, Board of Disciplining Officers, of the Carrier, which we quote:

Mr. J. B. Springer,
Vice President, A. T. D. A.,
Hotel Hampton,
Albany, N. Y.

"Albany, N. Y.
June 25, 1940.
012-32

Dear Sir:

As you have been informed, under certain conditions this railroad has been allowing pay to its employees in dispatching service on sick leave.

The Management will continue to handle each case which arises and decide it upon the merits.

Yours truly,

(Signed) F. L. Hanlon,
Chairman, Board of Disciplin-
ing Officers."

On the same day after receiving the above letter the Employees, through their duly authorized representative, acknowledged in writing the receipt of that letter. We quote their acknowledgment:

Mr. F. L. Hanlon,
Chairman, Board of Disciplining Officers,
Delaware & Hudson Railroad Corp.,
Albany, N. Y.

"Albany, N. Y.
June 25, 1940

Dear Sir:

This will acknowledge receipt of your letter of transmittal, dated today, your file 012.29, to which you have attached two copies of Memorandum of Understanding and six copies of Agreement prepared for our signatures.

You handed us today a letter covering sick leave pay which is also acknowledged as a matter of record.

These papers appear to be in order and in accordance with understanding reached in conference today. We are signing the Agreement and returning to you herewith three (3) copies, including the original, as requested.

This concludes negotiations except as further conferences may be necessary in accordance with the provisions of the Agreement and I now wish to thank you on behalf of myself and the Committee for your indulgence in working out a set of rules to which we could agree. Negotiations have been pleasant and it is my sincere hope that cordial relations will maintain between your Management and our Association.

General Chairman H. J. Williams will now take full charge as spokesman for the System Committee representing train dispatchers except as he may request the assistance of a National Officer.

Yours very truly,

(Sgd.) J. B. Springer

Copy: Mr. C. L. Darling,
President, A. T. D. A.,
Chicago.

Mr. H. J. Williams,
General Chairman,
Albany."

This claim is based on the letter from the Chairman of the Board of Disciplining Officers, the Employees contending that, throughout the period of the negotiations leading up to the agreement, the question of time lost on account of personal sickness was discussed at these conferences; that the Employees presented a proposal for a rule to be put into the working agreement which was as follows:

"Time lost account personal sickness shall be paid up to a reasonable amount of time."

The Employees say that in subsequent conferences on the adoption of rules the Carrier objected to putting into the agreement any rule providing for payment for time lost due to sickness.

Employees contend they were given assurance that sick pay claims would be allowed as in the past and accepted as part of the agreement the letter from Mr. Hanlon to Vice President Springer, dated June 25, 1940.

The Carrier contends that the letter of June 25, 1940 is clear and subject to no misunderstanding; that under certain conditions it had allowed to employees in dispatching service on sick leave pay allowances when it could be granted without creating any extra expense; that the letter of Mr. Hanlon cannot, nor was it intended to be construed as an agreement. Carrier states that it simply sets forth the policy of Management to handle each case as it arises and to decide it upon its merits; that it is handling individual cases as they occur strictly in accordance with paragraph 2 of Mr. Hanlon's letter; that there is no agreement either verbal or written that compels Management to pay for services not performed.

In the recent Award, Number 1614, with which we agree, Judge Thaxter stated:

"There is no good reason why the parties may not modify the agreement by a writing which is not actually incorporated within it."

The first question that confronts us is whether the letter of Mr. Hanlon of June 25, 1940 is to be considered as a part of the agreement which became effective from April 1, 1940 between the Employees and the Carrier involved in this case. There can be no question that during the conferences that led up to the agreement the question of time lost for personal sickness was discussed between negotiators for both parties. The Employees submitted a rule which they wanted inserted. The Carrier argued against inserting the rule giving various reasons, among them being that if it were in the rules it might be abused.

As an outcome of these negotiations Carrier wrote and delivered the letter of Mr. Hanlon of June 25, 1940. The Employees in writing acknowledged this letter. It was after the writing of the June 25, 1940 letter and its acceptance by the Employees that the agreement was signed. There can be no question but that under this record the letter of Mr. Hanlon of June 25, 1940 is a part of the agreement just as much as if it had been inserted in the agreement.

What did the letter of June 25, 1940 mean? The Employees contend that in accepting this letter they had the definite understanding that all legitimate sick pay claims would be allowed. The Carrier contends that the letter simply states the policy of Management and that it had a right to decide upon the merits of each individual case as it occurred, and that it was not compelled to pay any claim unless in the judgment of the Carrier it should be paid. The letter states:

"The Management will continue to handle each case which arises and decide it upon the merits."

Deciding a case upon its merits must have included one thing, that is, was the employe actually sick and unable to work during the period for which claim is made. It is not an arbitrary matter or one in which the Carrier has discretion. "On the merits" means a fair and just decision on the facts involved in each case.

The letter states:

"... under certain conditions this Railroad has been allowing pay to its employes in dispatching service on sick leave."

The Employees contend that this means that all legitimate sick pay claims would be allowed. The Carrier contends that this means that only sick claims would be allowed where the Carrier was put to no additional expense. Carrier admits that in the past it has been paying dispatchers for time lost on account of personal sickness where the Carrier was put to no additional expense; that when a dispatcher was sick other employes doubled or performed his work and that on that account the Carrier was put to no added expense.

"Under certain conditions" can mean to this Board only one thing, that is, that under past practices the Carrier has been handling claims for time lost on account of personal sickness in a certain manner; when the Carrier inserted in its letter the words "Under certain conditions" it meant that it would continue to pay sick claims as it had in the past. And this Board holds that under the Hanlon letter Carrier has bound itself to pay for time lost by dispatchers for personal sickness in the same manner as it was paying prior to the time the agreement was entered into. There is a material dispute between the parties as to just exactly what was the manner in which payments were made for time lost due to personal sickness prior to the signing of the agreement.

What were the past practices of this carrier? Employees say all time lost for personal sickness was paid. The Carrier contends that they paid only when there was no added expense.

The record is not clear and all this Board can do is to remand this case for development of specific facts concerning the past practices of the Carrier in regard to the payment of time lost on account of personal sickness. The Board is without sufficient evidence to determine past practices and consequently the case must be remanded for conference, with the right, in case of failure to agree, to the petitioner to return the matter to the Board with such evidence as may be developed by the conference.

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 employe involved in this dispute are respectively carrier and employe 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 the case be remanded for development of the specific facts set out in the opinion.

AWARD

Case remanded for conference and adjustment as indicated by the Opinion and Findings, with the right, in case of failure to agree, to the petitioner to return this matter to this Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 15th day of January, 1942.