Award No. 2483
Docket No. CL-2520

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerks' Agreement when it failed and refuses to restore established working conditions and practice of affording sick pay allowance to clerical employes in accordance with the provisions of the Clerks' Agreement, and

1. That the Carrier violated Rule 56 (b) of current agreement when it arbitrarily cancelled the established working condition and practice of allowing thirty (30) working days' sick leave allowance with pay for each twelve (12) month period.

2. That the Carrier shall be required to restore said established working condition and practice.

3. That the Carrier shall be required to compensate all employes who suffered wage loss arising out of the cancellation of such working condition and practice.

EMPLOYES' STATEMENT OF FACTS: As a result of request filed by the Association of Lehigh Valley Railroad Clerks during the year 1926 for wage increases and vacation and sick leave working conditions, an understanding was reached through which a vacation and sick leave working condition or practice was established granting clerical employes a vacation and sick leave allowance with pay. The establishment of this working condition was effected by a Memorandum of Agreement dated March 24, 1926, reading as follows:

> **Rule 46:** "Clerks over one year and less than two years service with the company will be entitled to six working days vacation: Clerks with two and less than five years service with the company will be granted nine working days vacation; Clerks with over five years service with the company will be granted twelve working days vacation without loss of pay during the balance of calendar year provided it does not cause undue impairment of the service, or additional cost to the Company. The time that a clerk is absent account of sickness or other good cause will not be charged to the vacation allowance. A limited amount of sick leave without loss of pay may be granted monthly paid employes subject to the approval of the Superintendent or corresponding officer in other departments. Vacation period to run from January 1st to December 31st. This rule shall not apply to Storehouse and Oilhouse Attendants."

discussions they asked that a fixed amount of allowance be agreed to; however, never in these discussions did they ask for an allowance as great as thirty days in each year, but did suggest that we make a fixed allowance of fifteen days. This, we declined to do, and advised them that we could not go further on sick allowances than as provided by the rule agreed upon and accepted by them, which left the question of sick allowances to the discretion of the Management.

It is true the extent of the allowances and the conditions under which any allowance was made have varied through the years; during the time there was no agreement and rule to cover, and during the time the present rule has been in effect, the question of allowances always being one properly for decision by Management.

The undersigned negotiated the rules of the agreement of March 1, 1939, and made very clear to the Clerks in those negotiations that we would not agree to the rule submitted by them because we were not willing, nor did we believe they were entitled to a rule giving them preferred consideration over other employes working under the same general conditions and just as deserving as they, and the only rule we would give them was one leaving the question to the discretion of the Management, as it is with all employes, and it was on this basis the present rule was included in the agreement.

The facts, therefore, clearly indicate they are submitting this case to your Board in an effort to get a decision that will give them a more favorable rule than the Management was willing to give them when negotiating the agreement, and which they could not obtain by appeal since the agreement was executed. We beg to submit that this is not a proper procedure, and as there has been no violation of the rule, we ask that the claim be denied.

OPINION OF BOARD: The question in this case is the correct interpretation to be given to Rule 56 (b) of the current agreement which is as follows:

> "A limited amount of sick leave without loss of pay may be granted monthly rated employes, subject to approval of the officer in charge of the seniority district. Time absent account of sickness or other good cause will not be charged to vacation allowances."

The record shows that sick leave amounting to as much as thirty (30) days annually has, previous to the events leading to this dispute, been allowed by the carrier. It is the contention of employes that the allowance of sick leave up to thirty (30) days constitutes a practice which the carrier is obligated to respect. There are certain letters and statements in the record indicating the purpose of the carrier to limit the amount of sick leave without loss of pay to a period of less than thirty (30) days. By this claim, employes request that the carrier be required to restore the practice.

It is argued by the carrier that the rule leaves the amount of sick leave to be allowed without loss of pay to the absolute discretion of the carrier. The rule will not sustain such an interpretation. The rule requires the allowance of sick leave with pay when the conditions of the rule are met, including the exercise of a reasonable discretion by the officer in charge of the seniority district in approving or disapproving the claim. If an absolute discretion on the part of the carrier had been intended, there would have been no reason for the rule.

We think the cited portion of the agreement places a positive obligation on the carrier to compensate for sick leaves within the limits prescribed by the rule. In the first place, only a limited amount of sick leave without loss of pay is to be allowed. A limited amount does not mean thirty days, fifteen days, or any other fixed amount. It means that in each case, the carrier in the exercise of a reasonable discretion as distinguished from an arbitrary one, will determine from all the facts and circumstances, the amount of sick leave which constitutes a limited amount. The use of the term "limited amount" implies a conservative rather than a liberal allowance. Such allowance is also subject

to approval by the officer in charge of the seniority district. This implies the exercise of honest judgment in determining the amount of sick leave without loss of pay to which each claimant is entitled. There are indications in the record that sick leave without loss of pay is to be allowed by the carrier only when it involves no additional expense to the carrier. The rule makes no such exception and it is not a valid defense to a claim under the rule. When an employe is aggrieved by the decision of the carrier regarding a sick leave allowance, he can bring it to this Board for a review the same as any other dispute. But the rights which an employe has under this rule are dependent upon the facts and circumstances of each case. Consequently, the record must contain the evidence necessary to show that the carrier was unreasonable and unfair in disapproving the claim made under this rule.

As we have said, the quoted rule imposes a positive liability upon the carrier. In fulfilling its obligation under that rule, the carrier has allowed sick leave without loss of pay for periods as great as thirty days annually. This cannot be said to constitute a practice which the employes can properly demand to be enforced as such. While in a proper case, the past conduct of the carrier in making sick leave allowances may be some evidence as to what was meant by the words "limited amount" as they were used in the rule, still the allowances made by the carrier resulted from a contractual liability and not because of the existence of any practice as it is understood in the railroad industry. Allowances made as the result of a contractual liability cannot constitute the basis for the establishment of a practice.

The letters and statements written by the managing officers of the carrier relative to the administration of the sick leave rule are, of course, unilateral in character and do not have the effect of modifying the agreement. There has been, therefore, no effective cancellation of Rule 56 (b) and the liability imposed by it.

We necessarily conclude that no working condition or practice of allowing thirty days sick leave allowance annually with pay exists and that no compensatory losses for sick leave can be allowed unless the evidence in each case is before the Board for review in accordance with the views herein expressed.

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 the claim states no basis for an affirmative award.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 29th day of February, 1944.