Award No. 2649
Docket No. CL-2598

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

THE OGDEN UNION STOCKYARDS COMPANY

STATEMENT OF CLAIM: Claim of the system committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that the Ogden Union Stockyards Company violated the terms of the existing agreement between the parties:

(1) (a) In its failure to compensate Mr. W. C. Smith for time lost account sickness on March 13, 14, 15, and 16, 1943 in accordance with Rule 27; and

(b) The Ogden Union Stockyards Company shall be required to compensate Mr. Smith at the rate of $6.00 per day, the agreed and established rate of his assigned position, for each of the above mentioned days.

(2) (a) In its failure to compensate Mr. V. B. Montierth, Maintenance Man or Carpenter, and Mr. J. H. Wilson, Water Service Man or Plumber, for time lost account illness in accordance with Rule 27; and

(b) The Ogden Union Stockyards Company shall be required to compensate Mr. V. B. Montierth for twelve days' pay at the rate of 75 cents per hour, or $6.00 per day for 12 days subsequent to March 15, 1943; and the company shall be required to compensate Mr. J. H. Wilson for three days' pay account illness on March 16, 17, and 18, 1943 at the rate of 72½ cents per hour or $5.80 per day.

EMPLOYES' STATEMENT OF FACTS: Mr. W. C. Smith, seniority date 9-1-23, is regularly assigned to the position of Chute Clerk for the Ogden Union Stockyards Company at Ogden, Utah.

On March 13, 14, 15 and 16, 1943 Mr. Smith was absent from duty account illness; during this period Mr. Smith reported to the company doctor for treatment, Dr. E. R. Dumke.

During the absence of Mr. Smith from work, no additional help, nor extra employes, were employed by the stockyards company to fill the position of Mr. Smith or others, instead his position was left blank at times to be worked by whatever employe was qualified and available at the time work must necessarily be done, or forces were re-arranged in such a manner as was necessary to perform the work, in some instances a laborer was taken from his position to handle the work, but this of course did not occur commonly.

Mr. Smith is employed as Chute House Clerk in the Chute House some distance from the Exchange Building, where the general offices of the Company are located. His duties consist of answering the telephone, writing up bulletins, handling in and out movements with the railroad, ordering feed and other such duties. It is absolutely necessary that the position be filled. We were notified by telephone that he would not be able to report just prior to his reporting time on March 13th. We did not know when he would again be available for work. The assumption was that he might report later that day or the following day. It was impossible for his work to be kept up by other employes without cost to the Company. On March 13th his work was handled by the General Foreman, a higher-rated man, whose regular work of overseeing the Yard was neglected 100%. The next day, March 14th, his work was handled by J. H. Mitchell, a relief foreman, from 7:00 A. M. to 9:00 A. M., and by Enard Thedell, the Sheep Barn Foreman, both 93½¢ men. Work in the Sheep Barn, which would normally be done by Mr. Thedell, was not done. From 9:00 A. M. to 3:00 P. M. the job was handled by Reed Sessions, who would normally have been cleaning and sanding cars, hauling, feeding, storing hay, watering livestock, etc. In each of these, we are paid on a basis of the work performed and if it is not done, pay is not received for the services. On March 15, the work was performed by various men as they were available, which resulted in neglect of their work or in work not being done. On March 16 the job was handled by the General Foreman from 7:00 A. M. to 9:00 A. M. and from 9:00 A. M. to 3:00 P. M. by another employe who regularly yards cattle and sheep from the hog scales, does yard cleaning and generally assists in loading and unloading and sands cars during his spare time. As with the others, his work was not kept up by other employes without cost to the carrier and it is not a case where no additional expense to the carrier is involved.

This is a matter of extreme importance to this Company because of the precedent involved. We feel the language of the rule is clear cut and that it does not mean what Mr. Murdock contends. We know that the understanding of the rule with the Brotherhood representatives who negotiated it is absolutely opposite to the contention of Mr. Murdock. If the precedent he seeks is established, assuming an employe can obtain a doctor's certificate, which is usually possible in the case of minor colds, we will have instances where we have as many as 15 or 20 men absent during periods of bad weather and make claims for payment thereof because we can not go out on short notice and replace them. Because of the importance of this decision to the Company, an oral hearing is desired or oral argument before the Board is requested.

OPINION OF BOARD: The proper disposition of this claim, which is plural in character, will turn upon the interpretation and application of Rule 27 of the current Agreement between the parties. The rule is quoted in the submissions and need not be repeated. There are no substantial disputes as to the facts which we deem controlling.

The history of Rule 27 reveals that it was embodied in an antecedent agreement between the petitioner and the Denver Stock Yards Company and subsequently extended and made applicable to this so-called carrier by written memorandum. While the express coverage of the rule is not altogether unique, such provisions are usually restricted in terms to clerical employes. This was the case in a rule, otherwise identical, which was embodied in a contract between the petitioner and the Colorado and Southern Railway Company. The carrier now before us says that it was mutually understood by the parties to the Denver agreement that they were adopting the precise Colorado and Southern rule; that this understanding has uniformly prevailed at Denver, with the result that no non-clerical employe there has ever asserted a claim under Rule 27; and that this construction of said rule was automatically carried forward, without discussion, into the Agreement here involved.

The carrier's contention overlooks certain fundamental concepts with respect to written contracts. One of these is that where the instrument is lawful, complete and couched in terms that are clear and free from ambiguity there is no occasion to resort to rules of construction or to extraneous evidence to ascertain its meaning. Another pertinent principle is that all preliminary negotiations and understandings leading up to the execution of such a contract are presumed to have been merged therein. These doctrines were recognized by this Board in Award 2467, where it was said:

> "It is not our function to determine actual intentions. We are limited to a consideration of the intention made manifest by the written agreement. To reform the agreement so as to bring it into accord with the actual intention of its makers, is beyond our competency. In the absence of ambiguity, we have no other office to perform than to desire to declare the meaning the words of the agreement make plain."

The apparent object of the rule before us is entirely lawful. Its provisions, as to scope, are sufficiently definite to identify the parties affected. The use of the word "employe" therein—instead of that of "clerk" as in the Colorado and Southern agreement from which Rule 27 was admittedly borrowed—not once, but three times, indicates deliberation and dispels any thought of inadvertence. We hold, therefore, that the claimants are within the scope of the rule upon which they rely.

The remaining question is whether the work to which the claimants were regularly assigned during their absence on account of sickness was "kept up by other employes, without cost to the carrier," within the meaning of the first paragraph of Rule 27; or, to state the issue another way, whether "additional expense to the carrier (was) involved," to the satisfaction of the employing officer, as provided in paragraph 2 of said rule. The clause last quoted contemplates the exercise of a sound discretion on the part of such employing officer, an abuse of which is reviewable by this Board. Award 195.

It stands undisputed that on the days when the claimants were absent on account of illness the carrier did not employ any extra or additional men to perform the regularly assigned work; that the carrier's payroll for said days was actually reduced in the amount that otherwise would have been paid to the claimants, if they had worked; and that the claimants' duties on said days were performed by their fellow employes, or went undone. There was a further showing on behalf of the carrier that it was ultimately required to bear the expense of paying for the work that went undone by reason of claimants' absence and for other work ordinarily performed by the other employes which likewise went undone, on account of the fact that said employes neglected their own duties to absorb those of the claimants. The expense to which the carrier claims to have been so put was incurred several months after the claimants' absence and after they had returned to work. This fact was established by a showing of increased annual operating and maintenance costs of the departments to which the claimants were accredited.

As applied to the above facts, the carrier says there can be no valid claim under Rule 27 when (1) the position of the sick employe is not filled and the work thereof goes undone or is not kept up, or (2) when such work, though apparently kept up by associate employes, results in the work of such employes going undone and, as a consequence, there is, subsequently, an actual or demonstrable expense to the carrier. Under the carrier's interpretation of the rule, a valid claim for sick leave pay may only be asserted when the work of the sick employe is kept up gratis by associate employes, without detriment to the work of their own positions.

The answer to the confronting problem would seem to turn upon what the parties to the Agreement had in mind when they embodied therein the phrases, "without cost to the Carrier," and at "no expense to the Carrier." If the quoted words mean protection against ultimate expense, however remote in

point of time, so long as it is susceptible of some measure of calculation and proof, the carrier's position would appear to be well taken. On the other hand, if the cost and expense contemplated is that directly associated with and proximate to the sick employe's absence, the claimants herein should prevail. The precedents support the latter view. In a case involving the same principle, but not the same rule, the United States Railroad Labor Board in its Decision No. 3828, tersely sustained a similar claim upon the ground that no "additional **pay roll expense** was entailed on account of the absence of" the sick employe. (Our emphasis.) And in Award 399 this Division decided, without the intervention of a referee, that a carrier under an identical rule could not sustain a contention of additional cost or expense by showing that it could and would otherwise have enforced a lay-off of the employes who performed the claimants' work during their absence on account of sickness, with a consequent saving equal to their claims. This Board concluded that "no additional expense to the carrier was involved," within the meaning of the rule, which was tantamount to saying that the cost or expense claimed by the carrier could not be regarded as proximate to the sick employes' absence, since it was not reflected by an increased pay-roll account. To the same general effect is Interpretation No. 1 (Serial No. 43) to Award 1524.

Very sound reasons of practical necessity support the conclusion reached. If the door is once opened to inquiries involving questions of ultimate and remote costs and expenses to the carrier, as distinguished from those that are immediate, direct and proximate to the employe's absence, the rights and liabilities of the parties will be laid open to confusion and doubt. This danger was noted in Award 1511 where it was observed that, "To substitute, for a showing of actual or demonstrable 'additional expense' or expenditures, a theory or assumption that eventually there may have been caused some undisclosed detriment to the carrier . . . would be, in the opinion of the Board, unwarranted by anything we find expressed or fairly implied in the rule." The elements entering into ultimate or eventual costs and expenses are so innumerable and undefined, if not indefinable, as to afford no safe guide as to rights and liabilities in a case of this character. It will be better for all concerned to direct the parties down the path that has already been blazed, than to turn them loose in a wilderness of uncertainty. If they do not like the destination to which that path leads they are free to remap their future course by timely negotiation.

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 carrier violated the Agreement as contended by the petitioner.

AWARD

Claim 1 (a) and (b), and 2 (a) and (b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 2nd day of August, 1944.