

**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**

SOUTHERN PACIFIC COMPANY—PACIFIC LINES

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

(a) The Carrier has violated and continues to violate Rule 66 of Clerks' Current Agreement when it declined and continues to decline to accord additional sick leave allowance to employe W. E. Ashley, Sacramento, California, under the meritorious provision as set forth in last paragraph of Rule 66 of Clerks' Current Agreement.

(b) Mr. W. E. Ashley now be compensated at the rate of his position less that already received for each working day that he was absent from duty account illness, November 27th through December 29th, 1943.

EMPLOYEES' STATEMENT OF FACTS: An Agreement bearing date of October 1, 1940, as to rules and working conditions, is in effect between the parties to this dispute. The employe involved in this claim is covered by that Agreement.

W. E. Ashley is employed as Head Timekeeper in District Timekeeping Office at Sacramento, California; his seniority date with the Carrier is April 29, 1919.

During the year 1944, preceding the dates set forth in Item (b) of our Statement of Claim, supra, Mr. Ashley had been absent a period of six and one-half days due to personal illness; he was again absent from duty account personal illness during the period November 27 through December 29, 1944, for which he was allowed compensation for five and one-half days, making a total of twelve working days allowed account illness, as provided for in Rule 66 infra, of our current agreement, but without regard to the meritorious extension provision of that rule.

This instant claim was instituted in a letter, under date of May 24, 1944, written to the Division Superintendent by our Division Chairman, and reading as follows:

"May 24, 1944

Mr. W. L. Hack, Superintendent
Southern Pacific Company
Sacramento, California

Dear Sir:

This letter is in connection with our brief verbal discussion of February 4, 1944 relative to the case of Mr. Warren E. Ashley, Head

time I advised you that the request for the extended sick leave allowance was declined."

POSITION OF CARRIER: The statement of claim in this docket alleges that "The carrier has violated and continues to violate Rule 66 of Clerks' Current Agreement when it declined and continues to decline to accord additional sick leave allowance to employe W. E. Ashley, Sacramento, California, under the meritorious provisions as set forth in last paragraph of Rule 66 of Clerks' Current Agreement."

The last paragraph of Rule 66 is as follows:

"The above limits of sick leave may be extended in individual meritorious cases and under the conditions specified, but only by agreement of the representatives of the carrier and of the employes."

In taking the position that the carrier violated the above-quoted agreement provision when it denied the petitioner's request that the claimant be compensated for the full period that he was absent due to illness during the calendar year 1943, namely, 31½ days, the petitioner is in fact contending that the carrier was obligated under the last paragraph of Rule 66 to grant such allowance. In taking this position, the petitioner fails entirely to consider the specific language of the said last paragraph of Rule 66. Examination thereof can produce only the conclusion that said provision does not in any way create a mandatory obligation upon the carrier to extend sick leave allowance beyond the limits specifically set forth in the first paragraph of Rule 66, but definitely leaves the matter of whether an extension will be made within the discretion of the carrier.

In other words, an employee covered by Rule 66 has an affirmative right to the sick leave allowances provided for in the first paragraph of the Rule, under the specific circumstances outlined therein, but is without right to require that the limits of such sick leave allowances, as set forth in the said first paragraph, be extended by the carrier. If the carrier does extend such sick leave allowances, such action is not taken by reason of any agreement obligation but merely in the exercise of its discretion, as specifically provided for in the last paragraph of Rule 66.

Such being the case, the petitioner is entirely in error when it alleges that the carrier violated Rule 66 when it declined to extend to the claimant a sick leave allowance in excess of twelve (12) days during the calendar year 1943.

The carrier had by virtue of the specific language of the last paragraph of Rule 66 the discretion of extending or not extending the limits of the sick leave allowance that the claimant was entitled to during the year 1943, and in exercising such discretion and declining to extend such limits the carrier was in no way in violation of any provision of the current agreement but was merely doing that which the petitioner in agreeing to Rule 66 specifically recognized it had a right to do.

CONCLUSION

The carrier submits that it has established that the claim in this docket is entirely without basis or merit and, therefore, respectfully submits that it should be declined.

OPINION OF BOARD: During the year 1943, Claimant was absent on account of illness a total of 31½ working days. He was allowed compensation for twelve days as provided for in Rule 66 of the current Agreement. Claimant contends that he is entitled to compensation for extended sick leave in accordance with the meritorious extension provision of Rule 66. The part of Rule 66 bearing upon the present dispute is as follows:

"The above limits of sick leave may be extended in individual meritorious cases and under the conditions specified but only by agreement of the representatives of the Carrier and of the employes."

The rule above quoted is not a mandatory provision. Clearly, by its terms, either the Carrier or the Organization can prevent the payment of compensation for extended sick leave without giving any reason at all. Certainly, it is not the province of this Board to construe a plain advisory provision of an agreement so as to make it mandatory upon the parties. Such deviations into the field of contract writing have consistently been condemned by our decisions as being outside the powers of this Board. Awards 2839, 2622.

This is not a case where the Carrier is required to exercise reasonable judgment in carrying out the provisions of the rule. If it were, this Board could protect against arbitrary and capricious action. The rule before us is conditioned upon the voluntary assent of the Carrier and the Organization to a consideration of compensation for extended sick leave before an employee can benefit from it. If that assent is lacking, a basis for an affirmative award does not exist.

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 parties waived oral hearing thereon ;

That the Carrier and the Employees involved in this dispute are respectively carrier and employees 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 26th day of July, 1946.