Award No. 4349
Docket No. CL-4322

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

ATLANTIC COAST LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

1. That the Carrier violated past practice of many years standing and understanding reached with the committee representing the Brotherhood of Railway Clerks and certain parts of the Railway Labor Act as amended when on July 1, 1947, they cancelled the existing practice of paying sick leave allowance without complying with certain sections of the Railway Labor Act, as amended, and have refused to pay employes at stations and offices whose employes had been receiving salary allowance while off sick for a long period of years.

2. That W. R. Page, employed as clerk in Auditor of Freight Receipts office, Wilmington, N. C. shall be paid the sum of $19.40 for time lost on July 21 and 25, 1947. That A. C. Blythe, Jr. shall be paid the sum of $58.68 covering 7 days, August 2 to 10 inclusive, time lost on account of sickness, Waycross, Georgia Stores Department. That L. C. Westberry, Sr. Waycross, Ga. Mechanical Department, shall be paid a sum of $199.28 covering time lost on account of sickness August 28, 1947, to September 24, 1947 inclusive, which is the difference between the total amount of salary for that period and the amount received from the Relief Department. That L. F. Gore, claim clerk, Wilmington, N. C. Agency, shall be paid the sum of $30.88 which is the difference between the amount his position paid and the amount he received from the relief department for four working days during the first period of July 1947.

3. That all other clerical employes not mentioned in item 2 of this claim who have been in service one year or more and who lost time on account of sickness between July 1, 1947, and December 3, 1947, shall be paid for the lost time in accordance with the practice and understanding existing prior to July 1, 1947, and which had been in effect for more than 30 years.

STATEMENT OF FACTS: The first rules to cover the employes outlined in this claim was Supplement No. 7 to General Order No. 27 issued by the Railroad Administration during World War 1. The next contract or working Agreement was the so-called National Agreement effective January 1, 1920 which was completed during Federal control of railroads. After federal control and the Atlantic Coast Line Railroad Company had been returned by the government to its original owners on March 1, 1920, attempts were made to make an agreement between the employes represented by the Brotherhood

be considered an established practice—which the Carrier does not admit—it is quite clear that the practice was limited to a very small number of clerical employes, and as such, a change is not prohibited by section 2, seventh. It seems plain that the Carrier has not violated the Railway Labor Act in effecting a change in its voluntary salary allowance plan. Indeed, it was never necessary to give the Organization notice of its intention in this respect. Such notice was extended as a courtesy, and to avoid any possible suggestion that it had not proceeded according to law in discontinuing the salary allowance.

The Company would also like to point out that the Organization has rejected the adoption of a rule which would have complied substantially with past practice, and which would have made it a matter of contract. See Carrier's Exhibit "D". It was the Organization and not the Company which declined to agree to the rule. The report of the Emergency Board in 1945 sustains the Company's position that the proposal of the Company was substantially in line with the so-called past practice, for the Emergency Board found that the Company's offer—

> "generalizes existing practice so as to relieve inequities, and establishes a contractual right to what has previously been only a privilege."

Yet the Organization is here before this Board seeking to enforce as a "working condition" substantially the same proposal which they have twice refused to include in the Agreement. The Carrier respectfully submits that the Railway Labor Act was never intended to accomplish any such inequitable result.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier for many years, approximately fifty, has maintained a practice of affording sick leave payments to employes covered by the Clerks' Agreement at certain of its offices and stations. The practice is not universal in the sense that it applies at all points on Carrier's line but it is uniformly applied to clerical employes at such points where the payments are made.

The record reveals that over the last twenty-five years the Employes have been attempting to get a sick leave rule written into their Agreement which would apply to all employes covered by the Agreement wheresoever employed. At the time of filing of this claim no such rule has been written or negotiated. The controversy over the sick leave practice had been the subject of proceedings before the U. S. Railway Labor Board which resulted in a decision awarding a sick leave rule which had become fairly standardized on other carriers at that time. This rule the Carrier refused to put into effect. At another time negotiations on this question proceeded to a hearing before an Emergency Panel in April, 1945, but the panel recommendations were not effectuated. Carrier, however, continued to apply the practice as it had in the past. The controversy over sick leave again flared up in May of 1947 when Carrier served the following notice on the Employes:

> "Wilmington, N. C.
> May 22, 1947.
>
> Mr. L. L. Wooten, General Chairman
> Brotherhood of Railway & Steamship Clerks,
> Freight Handlers, Express & Station Employes,
> Box 33, Wilmington, N. C.
>
> Dear Sir:
>
> Pursuant to provisions of Railway Labor Act, as amended, notice is hereby extended of our intention to discontinue, effective July 1, 1947, the granting of salary allowance to clerical employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers,

Express and Station Employes, who heretofore have been granted such salary allowance when absent account of sickness. This action is being taken because of the provisions of the Railway Unemployment Insurance Act, which act provides for the payment of sickness benefits for sickness periods after June 30, 1947.

Yours very truly,

/s/ W. S. Baker
Chief of Personnel"

The Employes objected to the discontinuance of the practice, and conferences were held on the property at which no agreement was reached. The Employes appealed to the National Mediation Board which docketed the dispute. November 3, 1947 the Mediation Board notified both parties to the dispute that its mediatory efforts had failed.

The contention of the Employes is adequately set forth in the record and because of its brevity it is here below set forth in full:

"It is the contention of the employes that the Carrier could not and had no leagl right to make a change in this working condition until the provisions of the Railway Labor Act, as amended, in connection with disputes and the way they should be handled had been complied with, and 30 days after the National Mediation Board had closed its files, and for that reason the claims covered in this dispute are for time lost between July 1, 1947 and December 3, 1947, inclusive."

Carrier's contention is that there is no prohibition against change in a purely voluntary allowance made by the Carrier which has not been the subject of agreement with the Organization and cites the U. S. Supreme Court Decision of Williams vs. Jacksonville Terminal Company, 315 U. S. 386, as authority for the proposition that the Railway Labor Act does not prevent a carrier from arranging its business relations with its employes as it sees fit where the matters arranged are not covered by collective bargaining agreements.

Thus the issue presented for this Board's determination is whether these sick leave payments were pure gratuities on the part of the Carrier subject to withdrawal by it unilaterally or were, in effect, contractural rights which could only be removed by compliance with the Railway Labor Act. If we should find that they were the former we shall be impelled to dismiss the case for then there would be no agreement for us to interpret. The issue is essentially one of fact.

Previous awards of this Board have held that where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforcible to the same extent as the provisions of the contract itself. (See Award 2436 and Awards cited therein.) At least three collective bargaining agreements have been negotiated since this practice has been in effect and all are silent on the question of sick leave. It cannot, therefore, be said that the practice has, in any way, been abrogated by said agreements. To some extent, Carrier recognizes the doctrine of the Awards above cited for they say in their submission "While in a proper case, a long existing practice might support a claim where no change had been made in the practice, certainly such a claim cannot be advanced here where the practice, if it ever existed, was cancelled by notice duly given to the Organization. The holding in the Williams Case, above quoted, is conclusive on this point."

The pertinent language of the Williams Case cited by the Carrier in support of its position reads as follows:

"The institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibitions of Sec-

tion 6 against changes of wages or conditions pending bargaining and those of Section 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agreements. Arangements made after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose." (References are to the Railway Labor Act.)

In the instant case the existence of a practice is abundantly proven not only by the Employes' assertions but also by the Carrier's for the Carrier in oral argument asserts:

"If they mean that the Company notified them that the practice would be continued, and **that they understood that it would be continued**, then the statement is correct." (Emphasis supplied.)

Now then, if a long-existing practice can support a claim it must have more substance than a mere gratuity. Under the principle enunciated in Award 2436 of the Board and others, such a practice is enforcible to the same extent as the Agreement itself. In the instant case, moreover, there is something more than just a practice standing alone, to wit: a practice and understanding that the practice would be continued. Thus, there was an element of mutuality in the continuity of the practice. In our opinion this is sufficient to warrant a holding that either (1) an agreement was made to continue the practice, or (2) that Carrier by its conduct is estopped from denying that such Agreement was made.

The fact that the Employes tried to obtain a change in the practice (which they were given to understand would be continued despite their attempts to negotiate a change) does not alter the basic understanding. There is no requirement that such understanding must be reduced to a formal writing in order to constitute an Agreement. Accordingly, we would do no violence to the doctrine of the Williams Case were we to hold that the sick leave practice could not be changed except in the manner contended for by the Employes in the language quoted in the earlier part of this decision. We so hold. Further support is given to our holding in this respect by the wording of Carrier's notice to the Employes. If as Carrier contends, such notice was given as a mere courtesy and not because of the recognition of any obligation under the Act, why was the wording "Pursuant to provisions of the Railway Labor Act" used? It appears to us that in that language there is the implication that Carrier recognizes a responsibility under Section 6 of the Act.

It has been argued that item 3 should be excluded from consideration by the Board for the reason that it includes unnamed claimants and fails to disclose date or location, and that it is just too indefinite to permit Carrier's making an adequate answer thereto. We cannot agree that said argument applies to the facts in this particular case. The sick leave practice at stations where applied is definite, the employes affected are easily capable of ascertainment, and on the property the entire principle was the subject of discussion. Such facts were not present in Awards where the Board has refused to consider claims of other employes who were not before it.

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 a long established practice of allowing sick leave pay on its property which was not abrogated by any written Collective Bargaining Agreements and which remained in force until December 3, 1947, as set forth in the statement of claim.

AWARD

Claims (1), (2) and (3) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 22nd day of March, 1949.