Award No. 6011
Docket No. CL-6024

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

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

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY

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

(a) The Carrier violated the Clerks' Agreement effective September 24, 1926, amended September 1, 1949, when, without negotiation and agreement, it cancelled on or about March 28, 1951, the long-established practice of making no deduction in pay of employes who are absent because of illness or for any other reason, and

(b) That Clerk Audrey E. Hickman, Mechanical Department, Augusta Shops, Augusta, Georgia, shall be paid for all wages lost at her pro rata rate of pay on March 28, 29, 30, 1951 and April 2, 3, 4, 5 and 6, 1951, or a total of eight days' compensation, and

(c) That the long-established practice of making no salary or wage deductions in the absence of employes for any reason shall now be restored to all employes who have heretofore been accorded this right in the Mechanical Department, and

(d) That the past practice of making no salary deduction for absences be restored in all other departments of this Carrier where such practice has been in existence prior and subsequent to the execution of the Clerks' current Agreement.

EMPLOYES' STATEMENT OF FACTS: For many years prior and subsequent to April, 1943, when the Brotherhood became the duly accredited representative of the craft or class of clerical and related employes on this property, it is a well-known fact that there has been a past practice in existence, whereby the Carrier made no deduction from the wages and salaries of any of the clerical employes in the Mechanical Department at Augusta, Georgia Shops when the employes were absent from duty account of the illness of themselves or their families, or for any other reason. The first time such a custom was departed from, according to our information, was on or about March 28, 1951.

On March 28, 29, 30, Claimant Hickman was absent from duty account of the death of her mother and on April 2, 3, 4, 5 and 6, 1951, she was absent because she was ill with influenza. She was paid for March 28, 29 and 30 and it was charged to her vacation without her knowledge. When she

The Carrier requests the Board to deny the claim of the employes for the reason that it is not based on any provision of the current agreement, nor is it supported by an existing practice on the property.

The respondent carrier reserves the right, if and when it is furnished with the ex parte petition filed by the petitioner in this case, which it has not seen, to make such further answer and defense as it may deem necessary and proper in relation to all allegations and claims as may have been advanced by the petitioner in such petition and which have not been answered in this, its initial answer.

Data in support of the carrier's position have been presented to the employes' representative.

(Exhibits not reproduced.)

OPINION OF BOARD: The current agreement between the parties was negotiated and executed by a Committee representing the clerical employes. It became effective September 24, 1926, and remained in force and effect after the Brotherhood of Railway Clerks was certified by the National Mediation Board in April, 1943, as the legally constituted representative of the craft and class of the clerical employes here involved. The agreement was amended September 1, 1949, in order to put into effect the 40-hour work week agreement.

The record discloses that Miss Audrey E. Hickman was employed by the Carrier in December, 1944. At the time this dispute arose she held the position of a junior accountant in the Mechanical Department, Augusta, Georgia. March 28 to 30, 1951, she was absent from work on account of the death of her mother, and also absent from work April 2 to 6 on account of personal illness. The Carrier paid her for the three days' absence in March, and charged the amount to her vacation. When she returned to work she protested to the chief clerk. The three days' pay was then deducted on the first payroll in April. The Carrier also docked her for the five days she was ill on the same payroll period. Claim was filed, progressed through the proper channels, and denied.

The current agreement effective between the parties makes no provision for payment of wages to employes absent from work on account of sickness. The agreement makes no reference to past practice.

Petitioner requests that the past practice of making no salary deductions for absences be restored in all departments of this Carrier where such practice has been in existence prior and subsequent to the Clerks' current agreement. This past practice has been in existence for many years prior and subsequent to April, 1943, when the Brotherhood became the duly accredited representative of the craft or class of the clerical and related employes of this property. It was well known there has been a past practice in existence, where the Carrier made no deductions from wages and salaries of any of the clerical employes in the Mechanical Department at Augusta, Georgia, shops when the employes were absent from duty on account of illness of themselves and families, or for any other reason. The first departure from this practice was on March 28, 1951.

The Carrier's position is that during the latter part of 1950, it came to the attention of Management in a department where there were never more than three employes assigned. It was found one of the Carrier's supervisors, without authority and without knowledge or consent of Management, permitted an insignificant number of employes in the office of the Superintendent of Motive Power to be paid their full salary when due to illness they were absent from their assigned positions. Directions were immediately given by Management to discontinue such unauthorized payments. On January 2, 1951, the chief clerk verbally informed each and every one of the clerical employes in this particular office, including Miss

Hickman, that effective from that time on they would be paid for days actually worked, as provided for in the current agreement. At the time of this occurrence there were only two clerical positions subject to the agreement, including Miss Hickman, in this office. That the foregoing notice made it abundantly clear to the employes concerned that even though they had at times, through error, been paid compensation for time not worked, beginning immediately no such payment would thereafter be made.

The Carrier asserts that for many years the employes have been trying to negotiate a rule that would provide for sick leave allowance. They served written notice on the Carrier April 5, 1944, proposing a general revision of the effective agreement in which change in many of the rules, as well as negotiation of some new rules including a rule governing sick allowance. The parties were unable to agree on the property with respect to the sick leave rule, with the result that no changes were made. The employes requested the services of the National Mediation Board in connection with four major rules, including the sick leave rule. Mediation failed. The Carrier declined to enter into an agreement to arbitrate the issues. Subsequently the National Railway Labor Panel appointed an Emergency Board to consider the four major rule changes in question, including the sick leave rule. The Carrier points out that in the course of the testimony before the Emergency Board the General Chairman of the Brotherhood representing the clerical employes on this Carrier and the same General Chairman that progressed the claim in the instant case, testified several times throughout the record to the effect that there had been no past practice, with reference to sick leave on this Carrier's property. There was also discussion with reference to what is referred to as the Crosser Law, which need not be related here. The Emergency Board recommended that no further rule governing sickness compensation be made at this time, but recommended that the parties explore the possibilities of arriving at an understanding as to a suitable practice.

The Carrier's contention is that the foregoing sustains its position that no past practice existed on its property, as contended for by the Employes, and the matter of a sick leave rule is still a subject for negotiation between the parties. In this case the employes are endeavoring to obtain a sick leave rule they were unable to obtain by negotiation. In the instant case, the payments were made through error and mistake.

There are exhibits in the record in the form of statements; one from Ruth S. Smith employed by the Carrier in 1920, wherein she stated as far back as she could remember she had never been docked for time lost, and had never abused the privilege. There is also a statement from the Claimant stating she was employed by the Carrier in December, 1944, and from that date up to February of this year (1951), all clerks in this office were paid for any time lost from work for any reason. "At the time it was changed, we were informed that in the future we would be docked for all time lost, that we could get off only if it was convenient for the Company, and that no overtime could be made to catch up the work. We have been docked for time lost since the time they changed the practice."

We believe the testimony of the General Chairman before the Emergency Board was the truth, to the best of his knowledge at that time. It is not conclusive if he should have later discovered or believed past practice for the payment of wages for sick leave at a particular point on the Carrier's system existed.

We believe, from the evidence adduced in the record, that past practice of paying an employe's wages when such employe was absent from assignment on account of illness has existed on this Carrier's system for more than 30 years in the Mechanical Department shop in which this Claimant was employed, Augusta, Georgia, of which the Carrier must have been well aware.

As stated in Award 2436: "The conduct of the parties to a contract is often just as expressive of intention as the written word and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made.

"We conclude therefore that the specified practices are not superseded by subsequent agreements and that they remain in force until such time as they may be eliminated by negotiation, a field entirely foreign to the powers of this Board." All such practices have been in force at the two points mentioned.

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 enforceable to the same extent as the provisions of the contract itself. See Award 4349, and Awards 507, 1257, 1397, 3338, and 5167. The principles announced in the fore-cited awards are pertinent to a decision in the instant case.

The claim is too broad under the evidence. We conclude the past practice, as heretofore indicated, applies only to sick leave in the particular office as designated in the claim. We so hold.

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 claim is sustained as provided for in the Opinion.

AWARD

Claim sustained as provided for in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 25th day of November, 1952.