Award No. 6537
Docket No. CL-6625

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

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

THE WHEELING AND LAKE ERIE DISTRICT OF THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Carrier violated the Wheeling and Lake Erie Clerks' Agreement:

1. When they refused to honor sick time claims for the following employes in violation of Rule 47 of the Wheeling and Lake Erie Clerks' General Agreement:

(a) Claim of O. D. Switzer, Clerk at Brewster (Ohio) Yards, with a service dating of May 31st, 1917, for time lost account of sickness February 15th, 16th, and 17th, 1951.

(b) Claim of E. C. Rieder, Chief Record Clerk at Brewster (Ohio) yards, with a seniority dating of August 29th, 1911, for time lost account of sickness January 22nd and 23rd, 1951.

(c) Claim of Charles C. Nichols, Chief Weighmaster at Brewster (Ohio) Yards, with a seniority dating of January 12th, 1907, for time lost account of sickness January 10th, 11th and 12th, 1951.

(d) Claim of Elmer F. Klein, Clerk at Brewster (Ohio) Yards, with a seniority dating of September 19th, 1937, for time lost account of sickness February 10th and 11th, 1951.

(e) Claim of Charles K. Fetters, Car Checker at Brewster (Ohio) Yards, with a seniority dating of October 19th, 1939, for time lost account of sickness February 17th, 1951.

(f) Claim of Calvert Bettilyon, Car Checker at Brewster (Ohio) Yards, with a seniority dating of August 2nd, 1933, for time lost account of sickness January 4th, 7th, 8th, 9th, 10th, 11th, and 14th, 1951.

(g) Claim of James M. Brown, Car Checker at Brewster (Ohio) Yards, with a seniority dating of June 4th, 1942, for time lost account of sickness December 28th, 29th, and 30th, 1950.

(h) Claim of William Schuck, Clerk at South Lorain, Ohio, with a seniority dating of September 11th, 1926 for time lost account of sickness March 21st, 24th, 25th and 26th, 1951.

(i) Claim of Elizabeth Sharick, Account Clerk at South Lorain, Ohio, with a seniority dating of August 8th, 1942, for time lost account of sickness April 14th to April 18th, 1951, inclusive.

2. That Carrier should now be required to apply the provisions of Rule 47 of the Wheeling and Lake Erie Agreement, as it was applied in the past years.

3. That Carrier be required to compensate these employes for wage losses suffered account of personal illness for the above enumerated dates.

EMPLOYES' STATEMENT OF FACTS: The application of Rule 42 of our May 1st, 1937 General Agreement and Rule 47 of our Revised General Agreement dated September 1st, 1949 between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes and the Wheeling and Lake Erie Railway Company was effective and operative on the entire Wheeling and Lake Erie Railway Company and Lorain and West Virginia Railway Company for many years, allowing monthly and daily rated employes a limited amount of sick leave without loss of pay.

Under date of September 1st, 1949, a joint circular (Employes' Exhibit No. 1) was issued by Mr. Geo. Durham, President of the Wheeling and Lake Erie Railway Company, and Mr. L. L. White, President of the New York, Chicago and St. Louis Railroad Company, addressed to all officers and employes, advising them that with the effective date of December 1st, 1949 (the date the Wheeling and Lake Erie Railway Company was leased to the New York, Chicago and St. Louis Railroad Company) that the aforesaid lines of the railroad, properties and rights, and the operation thereof will be integrated with those of the New York, Chicago and St. Louis Railroad Company and all operation of the Wheeling and Lake Erie Railway Company and the New York, Chicago and St. Louis Railroad Company will be performed by and in the name of the New York, Chicago and St. Louis Railroad Company (hereafter referred to as the Nickel Plate Road) so as to effect a coordination by integration and unification of the separate railroad facilities, operation and services of the two companies.

After many conferences between the General Committee and the Carrier to carry out the coordination requirement under the lease and under the Washington Job Protection Agreement; a Memorandum of Agreement was entered into, effective November 29th, 1949, (Employes' Exhibit No. 2) in which Memorandum of Agreement, Section 2 and Section 3 thereof, provided that after the effective date of the lease, and until terminated or changed, all separate agreements covering rates of pay, rules and working conditions between the Nickel Plate and its Employe Representatives, on the one hand, and the Wheeling and its Employe Representatives, on the other hand, will remain in effect and be applied respectively in such departments as shall not be rearranged as contemplated in Section 5 thereof. This agreement further provides that except those departments, sub-departments, offices and facilities that shall be coordinated, as provided for in Section 5, seniority rosters and

the opportunity for pay guaranteed to him in a month under normal conditions and whether loss of pay account sickness will work a hardship on such employe. The Carrier maintains that it may consider total and overtime earnings and any interlocking or mutual pay benefits which may accrue to other employes in filling vacancies caused by absence account sickness. For example, employe "A" may double or work on his rest day to fill the position of employe "B", absent account sickness. Assuming a rate of $12.00 per day, employe "A" will benefit to the extent of $18.00, the punitive rate, and his monthly earnings will be increased accordingly. Likewise, employe "B" may be benefited by similar circumstances involving employe "A". The Carrier may likewise fully consider seniority, faithful service, and other circumstances present in a particular case, but it has no obligation to consider one factor to the exclusion of all others.

In addition to the fact that Rule 47 does not make it mandatory to pay claims, such as those in question in the instant case, no hardship nor loss of normal earnings is shown, and instead there were substantial overtime payments made ranging from a minimum of $19.90 to a maximum of $172.62 in the same month. For example, James Brown received $463.59 for the month of December, 1950, yet he asks for $36.06 additional in that month, account having been voluntarily absent three days during that month, which would increase his total earnings to $499.49, notwithstanding the fact that his normal monthly straight time earnings for the position as a clerk would be $264.44. Claimants Charles C. Nichols and Elmer Klein, benefited to the extent of approximately $56.68 and $63.60 in overtime because of the absence of other claimants and there were corresponding benefits to employes who were not claimants. Rule 47 of the Agreement now in effect was not intended to abridge the right of the Carrier to consider all of the facts and circumstances surrounding claims involving the payment of sick time nor as abridging its right to exercise its judgment in either approving or disapproving payment of such claims.

The Carrier takes exception to the claim of Elizabeth Sharick for the reasons already stated, namely; lack of compliance with the procedures of the Railway Labor Act and the further reason that the facts show that the claim is in error in that there was no absence account sickness on the dates claimed.

The Carrier, in addition to exceptions previously stated, further takes exception to that portion of the claim of William Schuck on March 25 and 26, 1951, on the grounds that he was an hourly rated employe on those dates and as such cannot progress a claim under Rule 47, the provisions of which apply to only monthly and daily rated employes.

The Carrier contends that full consideration has been given to each of the claims involved in this proceeding and that its declination to allow the payments requested was based on its sound judgment of all the circumstances as contemplated by Rule 47, all as stated above.

The Carrier submits that all rules have been fully complied with and obviously the claim is an attempt on the part of the Employes to secure a new rule, by procedures other than those prescribed under the Railway Labor Act, and which they were unable to secure by negotiations on the property.

All data submitted in support of Carrier's position have been presented to the other party and made a part of this particular question.

(Exhibits not reproduced).

OPINION OF BOARD: Rule 47 of the controlling Agreement reads as follows:

> "A limited amount of absence account of sickness without loss of pay may be granted monthly and daily rated employes. The

amount of sick time under pay which is granted in individual cases shall be subject to the approval of proper authority."

On August 9, 1951 Mr. Z. T. Komarek, Director of Personnel, wrote the Organization's General Chairman in part as follows:

"As to the eight claims listed in your letter of May 16, 1951, I have investigated and given each of these cases careful consideration, and under the particular circumstances have given my approval to the allowance of the amount of sick time under pay requested."

August 21, 1951 Komarek wrote to the same addresses as follows:

"Supplementing my letter of Aug. 9, 1951 regarding eight claims listed in your letter of May 16, 1951 under Rule 47, Wheeling and Lake Erie District Agreement.

I wish to advise you after review of the facts in these cases, it is our conclusion that these claims should not be allowed. Therefore please disregard my letter of August 9 and consider this as a formal declination of the eight claims involved."

In another letter, August 31, 1951, Komarek gave as his reasons for changing his mind—"necessity for filling the position, additional expense involved, length of service and record, length of illness, and nature of illness." It would appear that no more pertinent elements could be considered in the exercise of his discretion in passing on these claims.

Employes' position is that this action on the part of the Carrier was an abuse of discretion, arbitrary and capricious, and they seek to tie their reasoning to Referee Spencer's discourse in Award 195 on this Division, which is persuasive but hardly controlling in this case, in view of the reasons assigned by the Carrier in changing its position, as just indicated.

But I think we are on a sounder legal ground than attempting to pass on a question of honesty here, that sounder legal ground being that there was strict compliance with Rule 47.

The record discloses that before the present rule was adopted the Organization attempted to have the word "will" inserted into the Rule, instead of the word "may", but failed in that effort.

Employes next contend that it had long been the practice on this Carrier (Wheeling and Lake Erie) to pay claims such as these, and at the time of the negotiation of the present Agreement (effective September 1, 1949) there was an oral understanding that this practice would be continued. Even assuming there was such an understanding, this Board cannot permit that to override the Agreement, which specifically recites in Rule 52:

"Upon the effective date of this agreement, the agreement of May 1, 1937 (under which presumably the practice was allowed) and all subsequent agreements, rules and interpretations thereon (except those agreements, rules and interpretations set out in Addendum C hereof) are hereby cancelled."

Nothing is said in Addendum C on the matter.

In addition to this, we have an affidavit of the Assistant Auditor of the Nickel Plate (which absorbed the Wheeling and Lake Erie) in which he states that he was present during the negotiations and he knows of no oral or written understanding "whereby Rule 47 would be nullified, modified or considered other than the governing rule as set out therein."

Finally, the Carrier includes in the record a list showing—"that all sick leave claims, prior to the instant claim, were not approved, either prior to or after December 1, 1949.

Personnel Director Komarek was not very discreet in changing his mind as he did, but he did not violate Rule 47 in doing it.

We have not overlooked the Employes' argument that the action of the parent Carrier (The Nickel Plate) was a veiled attempt to substitute Rule 33 of that Road for Rule 47 of the Wheeling and Lake Erie Agreement, under which these employes were working, but in view of what we have already said, the argument is without merit. Our conclusion, therefore, is that the claim must be denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties to this dispute waived oral hearing thereon;

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 July 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the current Agreement as contended by the General Committee of the Brotherhood.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of March, 1954.