Award No. 13665
Docket No. CL-13640

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

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

BROOKLYN EASTERN DISTRICT TERMINAL

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5256) that:

1. The Carrier violated the provisions of the Clerks' Agreement particularly the Scope Rule and Rules 36 and 50 among others, when it arbitrarily and with discrimination refuses to grant to employes who are covered by all the Rules of the Clerks' Agreement the benefits that should be accorded them as follows: R. Griffith, J. Wanders, C. Warren, J. Guastello, F. Macri, W. Kaczenski, M. J. Donlon, J. Connelly, J. Mulcahey, A. Randle, F. Brown, T. Brown, G. Gimmler, J. Jones, W. Pimble, A. Kirshner, A. Long, Jr., C. Levenas, H. Rivers, J. Dempsey, L. Davis, C. Graham, S. Wright, A. Boyd, Z. Ellison, E. Griffin, C. Sullivan, J. Lingard, J. Mancz, J. Vilpisauskas, F. Rodriques, P. Whitehead, V. Andrusenko, C. Leds, E. Quiones, M. Orlikowski, O. Mole, J. Gruz, R. Griffin, A. Ott, F. Krysiak, G. Perez, E. Pagan, J. Vega, F. Martinez, G. Overton, M. Calo, A. Gartner, L. Grassotti, B. Piazza, J. Jackson, J. Viviano, N. Giunta, and all other Employes who are covered by the Clerks' Agreement and are so discriminated against.

2. The Carrier shall now be required to pay the Employes listed in part (1) of Statement of Claim any compensation due them from July 16, 1961, and each day thereafter, that they are denied the benefits due them under the provisions of Rule 36 of the Clerks' Agreement.

EMPLOYES' STATEMENT OF FACTS: There is in effect a Rules Agreement effective April 1, 1938 and revisions of September 1, 1949 and July 7, 1955, and the National Agreements signed at Chicago, Ill., on August 21, 1954 and August 19, 1960 covering Clerks, Chauffeurs, Watchmen, Freight Handlers, etc. between this Carrier and this Brotherhood. The Rules Agreement shall be considered a part of this statement of facts. Various Rules and Memorandum may be referred to from time to time without quoting in full.

This dispute involves the question of whether or not Employes covered by the Scope of the Clerks' Agreement and subject to all the Rules can be dis-

These principles are firmly rooted in law: See Shipley v. Pittsburgh & L.E. R.R. Co., 68 F Supp. 395, 400, (W. D. Penn. 1946), wherein the Court held:

> "We reiterate, each of the plaintiffs have a common and equal interest in the problem as to whether or not, under the terms and provisions of their contract, a right to recovery exists, which is a question of law, **but they certainly do not have a common and undivided interest to any particular fund since one of the plaintiffs may be entitled to recovery and another may not, depending upon the ability of each plaintiff to establish and prove that certain services were performed, the time of performance and that payment has not been made to that employe for said services and this is clearly a factual question.**" (Emphasis ours.)

The Carrier submits that the Board for the reasons stated is in no better position to substitute its judgment for that of the Carrier in making a determination as to whether the provisions of Rule 36 should apply in a given case.

The Burden of Proof is on the Petitioner and he has failed to show:

1. That Rule 36 applies to claimants.

2. That the past practice has been other than as Carrier has asserted.

3. Assuming arguendo that claimants had fulfilled the requirements on Points 1 and 2, they failed to allege facts which would bring them within the provisions of Rule 36.

Based upon the foregoing, your Honorable Board is requested to deny this claim.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute involves issue as to the entitlement of the fifty-three named Claimants to the benefits of paid sick leave, etc., under Rule 36 of the Agreement. The Claimants are all in Group 3 of the Scope Rule of the Agreement. As a result of a representation election in 1954 they were added to the coverage of the Agreement on July 7, 1955. Before that they were represented by the International Longshoremen's Association.

The Rule as to such paid leaves has been in the Agreement without verbal change ever since it first became effective on April 1, 1938. It provides as follows:

"RULE 36.

SICKNESS & PERSONAL BUSINESS

Employes may be allowed a reasonable amount of time off account of sickness or for the purpose of attending to their personal business, which cannot be attended to outside of their assigned hours, without loss of pay, subject to the judgment of the head of the depart-

ment, and it is mutually understood that existing customs and practices in the application of this rule will be continued."

The Organization's principal contention is that the Rule, by its literal language, applies to all "Employes" without exception, and thus the Carrier's refusal to accord its benefits to the Claimants constitutes a violation of the Agreement and a costly discrimination against them.

The record shows that, save for the incumbents of three positions for which explanation is made, the benefits of the Rule have never been extended to Group 3 employes either before or since the inception of the Rule in 1938. The three positions excepted of the dozen or more comprehended in Group 3 were those of private chauffeur to the President of the Carrier, the Chief Watchman (until his retirement in 1962) and office cleaner. The reason for these exceptions was that the respective occupants of those positions had all been receiving sick time allowances before 1938 when the Agreement with its Rule 36 was entered into. Since the Rule expressly preserved "existing customs and practices" the Carrier was therefore constrained to continue such benefits to the incumbents of those positions after the Agreement was adopted.

This does not mean, however, that the application of the Rule can be extended, by interpretation alone and absent mutual understanding, to include positions in Group 3 which had never been receiving sick time allowances. The fact is that the Rule on its face is not unexceptional in its application as the Organization claims, but rather is expressly subject to "existing customs and practices". Manifestly, too, from the point of view of positions covered by the Rule (as distinct from the rate of benefits thereunder, Cf. Award 3312), this is the way the Rule has been consistently applied through the years. And as this Board has many times held, even without benefit, as here, of express contractual language recognizing past practice and custom, long established practice and custom will not be disturbed (See, among many others, Awards 10607, 10122, 10834, 10798, 8538).

In its endeavor to show that the practice has not been consistently applied the Organization points also in this connection to the situation as to the "Boat Dispatchers". Employes in this position were also added to the coverage of the Agreement as a consequence of the representation election of 1954 and were thereafter accorded the benefits of Rule 36. But this action of the Carrier was entirely compatible with its past practice in this regard since these employes are included under Group 2 of the Scope Rule, positions whose incumbents, along with those under Group 1, were traditionally the beneficiaries of sickness allowances. Indeed, as Group 2 employes it would have been discriminatory for the Carrier to exclude them from such benefits once those positions were added to that Group.

The Carrier makes other arguments in its submission in defense of its position, but we do not pass upon them one way or another. For the reasons stated herein and upon the basis of the entire record we hold that the claim has not been sustained and must, therefore, be denied.

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

That the parties waived oral hearing;

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June 1965.