Award No. 13732
Docket No. CL-14302

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert P. Mesigh, Referee

PARTIES TO DISPUTE:

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

THE LONG ISLAND RAIL ROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5433) that:

1. The Carrier violated the Clerks' Agreement and the long established practice and understanding with the monthly rated clerical employes represented by this Brotherhood, by which all monthly rated clerical employes who have fifteen years seniority or more are allowed a specified number of sick days with pay in accordance with their seniority, when it denied Clerk Gloria Sica sick pay from November 12th to November 16, 1962, inclusive.

2. Clerk Sica having over fifteen years service, who was unable to work from November 12th to November 16, 1962, account of sickness, be paid five days' pay.

EMPLOYES' STATEMENT OF FACTS: For many years prior to and subsequent to December 1, 1935, when this 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, custom and understanding in existence whereby the Carrier made no deduction from the wages and salaries of any of the monthly rated clerical employes, having fifteen or more years service, when they were absent from duty on account of illness. The employes were paid a certain amount of sick days according to their years of service beyond 15 years. This custom, practice and understanding has been in affect for longer years than most employes can remember. The first time this established practice was departed from according to our information was in February, 1962, and a claim was handled to the highest officer of the Carrier who sustained our request and paid the claim on June 20, 1962. (See Employes Exhibit "A")

Furthermore this Carrier has accepted, admitted, agreed upon and understood that the sick pay allowance was a part of the working conditions of the employes and equivalent of an agreement rule, when on August 7, 1962, it sent a letter to the General Chairman advising as follows:

1. There is no rule in the collectively-bargained agreement governing the payment of wages to employes absent account illness.

2. The practice of allowing sick wage payments to its employes having fifteen or more years of service, has been based on the merits of each individual case, subject to approval of the Department Head.

3. The Board lacks jurisdiction to consider this controversy since:

(a) It is without power to write a new rule into the agreement between the parties.

(b) The controversy does not fall within the four corners of the basic Rules and Working Conditions Agreement.

Accordingly, your Honorable Board must dismiss the Employes' claim.

(Exhibits not reproduced.)

OPINION OF BOARD: Argument presented by the parties' representatives was offered for all four Dockets of CL-14302, CL-14681, CL-14682 and CL-14873.

The basic facts are all essentially the same in each Docket, except for varying periods of time and different Claimants. It is agreed by the parties that the basic issue in CL-14302 is the same in CL-14681, CL-14682 and CL-14873.

The basic issue to be decided in all four Dockets is whether the Carrier violated the Clerks' Agreement and the established past practice and custom of granting sick pay allowances to the Claimants, having the necessary fifteen years or more of service, by denying the four claims on the basis of managerial prerogative to grant sick pay allowance only to deserving employes and on the merits of each individual case.

The Organization contends the established practice, for approximately forty years, was to grant to all employes sick pay allowances having fifteen or more years service, without any qualification by Carrier as to the merit of each individual case.

The Carrier maintains that prior, on, or subsequent to November 16, 1962, the date of the instant claim, the practice was to grant sick pay allowances only to deserving employes, based upon the medits of each individual case, and did not confer any right upon the employe to demand or receive wages during disability.

The Record reflects that all four Claimants had received sick pay allowances previously to the instant disputes, and that sick pay allowance is not part of any rule in the Agreement.

The Organization cites many awards of this Division in support of their contentions, however, in the awards so named, the Carriers in those Dockets attempted to abrogate an established practice by unilateral acts in abolishing or changing the practice without negotiation or being abrogated by agreement. Carrier served a Section 6 notice, in the instant dispute, to resolve or discontinue the practice by negotiation. Through counter proposals of the Organization, an Agreement was resolved under date of March 23, 1964, covering a sick

pay allowance rule. The record reflects that Carrier has continued to embrace past practice with regard to sick pay allowances for forty years and subsequent to the dates of the four claims, has agreed that "established practice to continue."

Award 12176 adopted by this Division on February 7, 1964 was a dispute involving the Brotherhood of Railway and Steamship Clerks and the Pennsylvania Railroad Company. Policy letters and inter-office memorandums submitted and introduced as evidence in the instant dispute, by both parties, indicates the practice on the two Carriers was identical.

Award 12176 held:

"* * * Our opinion is based upon the following facts culled from the record:

In 1922, a uniform policy for sick allowance was promulgated by Carrier which established the forerunner of the graduated scale referred to above. It in part provided '* * * the foregoing suggestions * * * shall not confer any right upon any employe to demand or receive wages during disability * * *' The memorandum of 1938 contained a similar provision. The specifics implementing this policy incorporated in the 1922 policy statement were unilaterally amended from time to time without prior consultation with the Organization."

The Organization denies that the 1938 memorandum is in existence, but it is the very yardstick used by both parties to determine eligibility for sick pay allowances in the four Dockets. The provisions are clearly set forth:

"New York, N. Y.
June 29, 1938

Personal

D. Y. C. H. T. F. H. D. H.

Effective as of July 1, 1938, the following schedule will be placed in effect covering allowance of wages to monthly salaried employes during sick leave, **it being understood as heretofore that each case will be considered on its merits** and in no instance will allowance exceed the authorization set forth by the Board of Directors; nor does the adoption of this guide confer any right on any employe to demand or receive wages during disability.

Length of Service	Full Rate	Half Rate
Under 15 years	—No allowance, but may count against vacation, if any, to which entitled.	
15 to 20 years	½ month	1 month
20 to 25 years	1 month	1½ months
25 to 30 years	1½ months	2½ months
30 to 40 years	2 months	3 months
Over 40 years	3 months	4 months
Those over 65 years of age	—Not to be allowed more than 2 weeks without authority of General Manager.	

J. A. A."

It is evidenced by the exhibits presented by both parties, that the yardstick referred to, was used to grant sick pay allowance to the four Claimants prior to the disputes now before this Board. We do not find that the Carriers' application of the long established sick pay practice was discriminatory to the four Claimants, nor do we find that all employes, upon obtaining fifteen or more years of service, were automatically "qualified" for sick pay.

The "Established practice shall continue" of granting sick pay allowances to deserving employes based upon the merits of each individual case, until a rule acceptable to both parties is agreed upon through negotiation.

That a violation of the Agreement has not been shown.

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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of July, 1965.

LABOR MEMBER'S DISSENT TO AWARD 13732, DOCKET CL-14302

In the case here involved Claimant was shown to have been considered a "deserving employe" and therefore entitled to, and the recipient of, sick pay in each of the five years immediately preceding the occasion out of which this claim arose.

Carrier argued and convinced the Referee that only because Claimant was a "deserving employe" had she theretofore been granted "sick pay".

There was no question but that the absence for which sick pay was claimed and denied was occasioned by bonafide illness.

The apparent sole criteria for the Carrier refusing payment of sick pay was that Claimant had been paid sick pay within the limits established in each

of the five preceding years and could not therefore, and because thereof, be considered a "deserving employe." She was not seeking sick pay beyond the established limits.

No other criteria was shown to have been considered or used. Nothing else was shown to have occurred that would have, or could have, changed Carrier's mind as to Claimant being a "deserving employe."

Carrier's actions were, and doubtless always will be, subject to review. Such actions as evidenced in the claim should have been found, in the absence of any other showing, to have been arbitrary and capricious. Such action should not have been allowed to sand. Something other than the fact that Claimant had in prior years been granted sick pay should have been demanded before Carrier could be allowed to abrogate the practice and deem the Claimant an "undeserivng employe." There was neither proof nor allegations offered by Carrier tending to show that Claimant was undeserving and I therefore dissent to this Award.

D. E. Watkins
Labor Member