Award No. 14130
Docket No. SG-14347

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert Schmertz, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Erie-Lackawanna Railroad Company:

> On behalf of H. L. Schadt, Signal Foreman, for pay for time lost between April 25 and August 14, 1962, account illness and disability. [Carrier's File: 101.4 Signalmen Item 100]

EMPLOYES' STATEMENT OF FACTS: Claimant Schadt has rendered continuous service in the Signal Department since September 1, 1922, and had been a monthly rated Signal Foreman for approximately twelve (12) years. He entered a hospital April 23, 1962, for clinical observation and tests, and subsequently underwent surgery for carcinoma of the larynx. He returned to work on August 15, 1962, worked several months, then retired.

This claim is for sick pay for the time he lost between April 25 and August 14, 1962, and is based on the fact that it has been a long established policy to allow such pay to monthly rated employes. A copy of this policy is attached hereto as Brotherhood's Exhibit No. 1.

Based on his years of service, Mr. Schadt would have been entitled to one hundred and twenty (120) days of sick pay under this policy.

On or about May 8, 1962, Mr. Schadt instructed Mrs. Schadt to have his superior make arrangements to have the proper papers filled out so that he could draw his sick pay. Upon contacting his office, she was informed that it would be unnecessary for him to make out such papers, as he would receive his regular pay for one hundred and twenty days.

Mr. Schadt received no sick pay within the next three weeks, so he contacted his superior and he (the superior) made inquiries about these sick pay checks, and advised Claimant later that the Accounting Department had received the time sheets for time claimed and, due to some confusion, they had been laid aside but they would be gotten out at once. Three weeks after that the superior and Mr. Schadt went to the Division Engineer's office

concerning Carrier's decision in this dispute, and its decision should not be disturbed.

Based upon the facts and authorities cited, Carrier submits that this claim should be denied in its entirety for want of merit on rule support.

OPINION OF BOARD: This case concerns a claim by Signal Foreman H. L. Schadt for sick pay for the period April 25 and April 14, 1962.

There is no dispute as to whether or not Mr. Schadt was off work ill for the period in question. Rather the dispute or issue is whether or not the Carrier is obligated to make the requested sick leave payments.

The Organization contends that a long established and continuing past practice requires the Carrier to make payment. The Organization concedes that in many instances past practice under Board awards has not been sufficient to establish an obligation not specifically set forth in the agreement. In this instance, however, the Organization argues, the circumstances warrant a finding by the Board that a past practice has created an obligation.

Specifically, the Organization cited the following circumstances to substantiate this position.

1. The past practice was "accepted" by a mediator as part of the agreement in 1944 contract negotiations even though not reduced to writing.

2. The past practice, while it may originally have been a gratuity, lost this status during the 1944 negotiations because it was used by the Carrier to mitigate wage increases,

and

3. The past practice is of such duration that there have been a number of subsequent negotiations and new agreements without any change or abrogation, thereby causing the past practice to be in effect a part of the agreement.

The Organization also claimed that the Carrier through its behavior led the Grievant to believe that he would be paid sick leave; that checks and vouchers were drawn but not signed; that he received W-2 forms reflecting as paid the non-paid sick leave and in general comported itself in a manner which would lead one to the conclusion that it recognized the existence of an obligation.

The Carrier takes the position that past practice cannot be used to create a contractual obligation where none existed in the agreement. It is admitted that some awards use past practice as aids to interpret unclear or ambiguous clauses. In such situations, the practice is, in the Carrier's opinion, "bottomed" on a rule within the agreement. [See Award 6912, Rader] However, to use past practice to create a new rule or obligation is, according to the Carrier, at variance with the weight of the Board's awards.

In the Carrier's opinion this is particularly true in a situation in which the past practice is a "gratuity" and that is the category in which the Carrier places the payment of sick leave benefits. To be more specific, the Carrier contended that whether or not sick leave was paid depended upon

the circumstances of the case at that particular time; that payments had always been handled in that manner; that internal Carrier communication reflected this policy (see Organization Exhibit 1); that on occasion other employes had been denied payment, and that the grievant himself in his capacity as Local Chairman was advised in a case he was processing that payment for illness was a gratuity. According to the Carrier, this case was never appealed after the claim was denied by the Division Engineer.

The Organization does not deny that sick leave payments began as a gratuity, and, as such, would not be enforceable. They contend, rather, that it ceased to be a gratuity in 1944, because of its "acceptance" as an agreement by the mediator, and by adherence to it subsequently.

The pattern of adherence or non-adherence is, at best, sketchy. The Carrier has listed a number of individuals who previously were denied payment. The Organization has questioned whether any of them were Signalmen Foremen. Based upon the Record, it is impossible to determine to what Organization the individuals belonged. The Record does, however, contain the instance referred to above in which Mr. Schadt protested non-payment of sick leave to a Mr. A. E. Young. As was noted above, the denial of this claim was never appealed. While this is neither dispositive of Mr. Schadt's claim nor does it necessarily yield the conclusion that the Organization and/or Mr. Schadt agreed with the denial, it does at least demonstrate that denials have been made previously, and were done so because the Carrier considered them gratuities.

In any event, a pattern of adherence in this case can only be meaningful if the Board finds that the gratuity was converted into an obligation as a result of the 1944 negotiation.

The Record, insofar as those negotiations, is not particularly enlightening. The Carrier has denied possession of any information to the effect that such an agreement was made. The Organization has introduced a "memo for the record", dated June 27, 1945, written by the General Chairman in which a Carrier representative to the 1944 negotiations is portrayed as telling the mediator that sick leave payments were "an agreement . . . in effect for some time", and that "the mediator agreed to accept the arrangement as an agreement."

The Carrier has argued that a mediator has no function involving accepting or rejecting items as part of agreements; that this is the parties' responsibility, and that since it was not written in the agreement, it cannot be considered as a part of it. While this may be normal mediation practice, it is argued by the Organization that the mediator at that time also had to make an evaluation as to whether the contract was in line with others in the industry, and that the Carrier in effect received "credit" for the sick leave payments, thereby causing them to lose their status as gratuities.

There is no evidence to substantiate the claim that the Carrier received any such credit, nor, indeed, is there any showing that the mediator even possessed such authority. It does appear from the Record that the agreement was passed upon by a Mr. H. H. Schwartz, Chairman of the National Railway Labor Panel. The parties, by joint letter, dated May 29, 1945, submitted the agreement to the Panel with the following explanation:

> "This increase in rate is proposed to correct inequalities, and to bring this rate of pay for Signal Foremen in line with rates that are paid for similar positions on other railroads."

Whatever authority this Panel may have had is not clear. However, this letter would appear to leave the Board with the inference that it only had before it the written document. Whatever other arrangements which may have existed do not appear to have received this Panel's consideration and, therefore, could not operate to mitigate obligations the Carrier otherwise would have had.

The Board, therefore, must conclude that there is no basis for finding that the 1944 negotiations converted the gratuity into an obligation. Without such a basis, the Board would be exceeding its authority were it to conclude that the payment of a gratuity for many years foreclosed the Carrier from withdrawing it or withholding it under such circumstances as it might unilaterally establish.

This Board is replete with awards which hold that benefits which began as gratuities unless converted by special circumstances into agreements remain gratuities, and may be withdrawn [Award 7339 (Cluster), Award 8123 (Bakke), Award 12176 (Stack).] It should be noted that there are a number of awards holding that a gratuity was converted into an obligation [Award 4349, Award 2436]. In these the Board found the practices were not only of long duration, but were not clearly administered either initially or during their duration as gratuities. They had, in effect, lost their gratuity status and had become, through mutual understanding, agreements. In the matter before us, we fail to find any special circumstances which would warrant the conclusion that the Carrier ever in practice or intent treated these payments as other than gratuities. They, therefore, lacked the mutuality required of an agreement.

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 4th day of February, 1966.