Award No. 14190
Docket No. CL-15080

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Harr, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5601) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly a past practice whereby salaried clerical employes were allowed pay for time lost due to personal disability, when it refused to allow J. A. Kennedy, Foreman, Baggage Department, Pennsylvania Station, New York, N. Y., New York Region, wages for time lost due to sickness.

(b) The Claimant, J. A. Kennedy, should be allowed eight hours' pay each day for November 27, 28, and 29, 1961. (Docket 1461).

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company — hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The Scope of this Rules Agreement defines Clerks as follows:

"Group 1 — Clerks as defined in the following paragraph:

Clerk — an employe who regularly devotes not less than four hours per day to the writing and calculating incident to keeping rec-

sick allowance is not subject to handling under the terms of the Agreement governing rates of pay and working conditions.

In a letter dated July 29, 1963, the Division Chairman advised that he did not concur with the position of the Superintendent-Personnel and requested that the case be progressed in Joint Submission."

Award 12176 (Stack) involved the same parties and issues.

Award 12176 held:

"**OPINION OF BOARD:** Does a sick pay practice which is long continued, which Carrier commenced as a 'gratuity' which during its history is changed from time to time without prior consultation with the Organization and which is twice the subject of unsuccessful proposals to make it the subject of a rule nevertheless because of its longevity have the force and effect of a rule such as to give rise to a valid claim for breach of the agreement when it is not followed.

We hold it does not.

In 1956 the Claimant was stricken with a serious illness which subsequently forced his retirement from the Carrier's service at age sixty-six. At that time the Claimant had been continuously in the service of the Carrier from age eighteen or a period of forty eight years. The Claimant for a long period before this claim arose had never availed himself of the sick time available to him under the practice in force. After granting fifteen days with pay as sick leave, the Carrier refused to allow any further time, although the Claimant's illness continued for a lengthy period thereafter.

Pointing to a Carrier (sic) practice of long standing wherein by a graduated scale based on years of service sick leave was made available to employes up to a maximum of four months for employes with over forty years service as its authority, the Organization on behalf of the Claimant asserted that when the Carrier by memorandum dated June 28, 1938, imposed a provision 'those over 65 years of age not be allowed more than 2 weeks (sick pay) without authority of the General Manager' it violated the agreement.

With this position we cannot agree. Our opinion is based upon the following facts culled from the record. In 1922, a uniform policy for sick allowances 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.

Finally in 1941 for a second time, a proposal by the Organization to reduce the prior practice to a rule was rejected and the proposal was withdrawn."

Award 12176 was cited with approval in Awards 13732, 13733, 13734 and 13735 by Referee Mesigh.

It is apparent that at the outset the Carrier took the position that sick pay benefits were established as a gratuity and that it did not intend to be bound contractually by its action. What it was never under an obligation to do the Carrier may discontinue at will.

We recognize the fact that consistent and long-continued practices, well known to and mutually accepted by the parties ripen into agreements that cannot unilaterally be changed or discontinued by the Carrier. This situation does not exist in the case at bar.

We find 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 28th day of February 1966.