

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 32163
Docket No. CL-32592
97-3-95-3-533

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(Transportation Communications International Union

PARTIES TO DISPUTE: (

(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-11173) that:

(a) Carrier violated the rules of the current Clerks' Agreement at Fresno, California, commencing on January 1, 1993, when it failed and/or refused to correctly credit Claimant R. D. Pedersen with the correct number of sick leave days when it removed him from an exempt position and returned him to a scheduled position.

(b) Claimant R. D. Pedersen shall now have his sick leave days correctly adjusted by adding five (5) days which were taken (January 3, 6, 7, 8 and (February) 25, 1992) while assigned to an exempt position and charged to scheduled covered unused allowance; and

(c) Claimant R. D. Pedersen, in addition to (b) above, shall also be credited with ten (10) days sick leave for 1991, as a result of such violation of Agreement Rules.”

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as

approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

At issue in this case is whether Carrier violated the Agreement when it deducted sick days used by Claimant when he was an exempt employee from sick days he was entitled to when he returned to the clerical ranks after he was removed from his exempt position. Claimant was appointed to an exempt (salaried) position from January 1, 1991, and held the position until March 1, 1992, when he was removed from the position and exercised his clerical seniority at Fresno, California, on Relief Position No. 9339.

The Organization maintains that there are no provisions within the Sick Leave Agreement which allows the Carrier to deduct sick leave allowance from an employee who is in the capacity of something other than a Clerk. Nor was there any enunciated practice to that effect. The Carrier contends that nowhere in the Agreement provision dealing with Sick Pay is there a prohibition against Carrier's treatment of Claimant. Moreover, the Carrier asserts that there was, indeed, a past practice of deducting sick leave used as a non-Agreement employee from that employee's sick leave entitlement when s/he returns to a position covered by the Agreement.

The present record before the Board offers no assistance in resolving the parties' dispute in this matter. As noted by the Carrier, the Agreement is silent with respect to the situation in which an employee uses sick leave in an exempt position and then returns to an Agreement-covered position. Nor has the Organization offered any evidence to indicate that Carrier's assertions regarding its past practice are incorrect. Thus, the instant claim is dismissed for failure of proof.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 13th day of August 1997.