

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 24902
Docket No. 44605
98-1-97-1-S-6732

The First Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Locomotive Engineers
(Southern Pennsylvania Transportation Authority
((SEPTA)

STATEMENT OF CLAIM:

"This claim, BLE 94 027-T2, is on behalf of Thomas J. Gorden that he be made whole for all time lost account being required to obtain and provide to a crew dispatcher a Doctor's note prior to marking up from illness on April 2, 1994. In violation of Article VII section 701 of the agreement. (BLE-94-027-T2)"

FINDINGS:

The First 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.

On March 27, 1994, Claimant Engineer T. J. Gorden marked off sick for his next work day, March 28. At the time he marked off sick, Claimant was told by the Crew Dispatcher that if he was off sick more than three days, he would be required to provide a doctor's note before he could mark up and work. Claimant protested and advised the Crew Dispatcher that no such requirement was contained in the parties' Agreement.

Claimant attempted to mark up on the evening of March 30, 1994. The Crew Dispatcher informed Claimant that he could not work until he submitted a doctor's note. Claimant went to his doctor on April 2. He was examined and obtained a doctor's note certifying his ability to work. He gave the note to the Crew Dispatcher on April 2, 1994. He marked up for his next regular assignment (which he worked) on April 4, 1994. As a result of being required to produce a doctor's note in order to return to work, Claimant felt that he was being denied an opportunity to work on days he was available. A claim was filed. The claim was denied by Carrier and was eventually placed before this Board for final resolution.

Carrier denied the BLE claim on three grounds. First, it contended that the NRAB does not have jurisdiction in this dispute. Second, it alleged that the Collective Bargaining Agreement prohibits the instant grievance from being considered because the subject matter of the grievance has already been reviewed and disposed of through the grievance machinery. Third, the instant grievance was placed on the list of cases to be heard by the SEPTA-BLE Public Law Board where it is pending.

At the outset of the Referee hearing of this case at the NRAB in Chicago, Illinois, in December 1997, Carrier's representative pointed out that it intended to argue that all SEPTA-BLE cases being considered this day were not properly before the Board, and that the Board has no jurisdiction to review the cases on their merits. It was agreed that the jurisdictional arguments would be the same in all cases. In the interest of saving time, the arguments would only be presented to the Board once.

Carrier presented a straightforward argument based on excerpts from the parties' Collective Bargaining Agreement and Section 153, Second of the Railway Labor Act to support its position that the BLE was required to give Carrier ninety days' notice before it submitted a dispute that was listed on the parties' PLB to the NRAB. It pointed to the following language to support its position:

"Article IV, Section 402(b) of the parties' Agreement

In accordance with Section 3, Second, of the Railway Labor Act, as amended by Public Law 89-456, there is hereby established a SEPTA-BLE Public Law Board, hereinafter referred to as the 'Board.' The Board shall have jurisdiction over requests promptly submitted in accordance with paragraph (a) above.

RLA-Section 153, Second

In the event that either party to such a system, group or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

Carrier argues that the parties (SEPTA-BLE) have agreed by contract, in accordance with Section 3, Second of the Railway Labor Act, as amended by Public law 89-456, to establish a Public Law Board. Once that PLB is set up, disputes between the parties placed on that Board cannot be removed and sent to the NRAB unless Carrier is given ninety days' notice of the Union's desire to do so.

The BLE argues that the language relied upon by Carrier was placed in the original 1934 law to allow the parties who had private dispute settlement procedures on their properties prior to the passage of the RLA to be covered. Under the new legislation, if either party utilizing a private dispute resolution procedure wanted to be covered under the new law, it was required to give ninety days' notice to the other party. The language of the agreement that established Public Law Boards was authorized by an amendment to the RLA adopted in 1966. The original language referred to by Carrier that addresses the ninety days' notice has no relationship to the PLB established under the SEPTA-BLE Agreement.

This Board has reviewed the jurisdictional arguments in some detail. It is not persuaded that Section 153, Second of the RLA relied upon by Carrier is applicable in this instance. This Board therefore has concluded that it does have jurisdiction to review the SEPTA-BLE cases before it.

Carrier also argues that, based on the history of this grievance and others on the same subject, the instant grievance should be dismissed because it should not be reviewed by the Board on its merits. It cites Section 401(m) of the parties' Agreement as its authority on this point.

Section 401(m) of the Agreement states as follows:

The Board has reviewed the record and the arguments presented in support of each party's position. That review persuades it that Carrier put in place a new policy of requiring employees to supply doctor's notes when no question of the legitimacy of an employee's absence existed. The Board finds this new policy to be in violation of Section 701(c) of the parties' Agreement. It is apparent from the record that Carrier obtained agreement from some of its other Unions for the new policy. It has not come to any agreement on this issue with the BLE. Until it does, it must honor the conditions of Article 701(c) in dealing with employees who return to work after being sick for three or more days. It cannot unilaterally establish a new policy of requiring an employee to supply a doctor's note as a general rule.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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

Dated at Chicago, Illinois, this 10th day of June 1998.