NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19483
THIRD DIVISION Docket Number CL-19579

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(The Chesapeake and Ohio Railway Company
((Chesapeake District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7036) that:

(a) The Carrier violated the Agreement when it failed and refused to pay employe McClain Elam sick pay under Rule 60 for December 19, 26, 29, and 30, 1969.

(b) Claimant McClain Elam shall now be paid for the four days stated above at the rate of $2.976 per hour.

OPINION OF BOARD: While on furloughed status (cut-off) Claimant was offered four days work which he declined on account of illness. He now claims sick pay on the ground that, since the illness occurred when he was protecting extra work to which he was entitled under the Agreement, he is entitled to sick benefit pay under Rule 60 of the Agreement.

It is Carrier's position that, although Claimant was entitled to the work in question, the applicable agreement does not provide sick pay benefits to a cut-off employee such as Claimant.

FACTS OF RECORD

The forerunner of the present sick pay agreement reads as follows:

"RULE 60 - ABSENT ACCOUNT PERSONAL ILLNESS WITH PAY

> The policy of the Management is to be liberal in the matter of allowing pay for Group 1 employes, telephone switchboard operators, crew callers, messengers, and file assorters absent account personal illness, except where undue advantage is taken of this policy."

On October 1, 1969 a broader and more detailed version of Rule 60 was agreed to by the parties.

"RULE 60 - ABSENT ACCOUNT PERSONAL ILLNESS WITH PAY

1. There is hereby established a non-governmental plan for sickness allowances or sickness allowances supplemental to the sickness benefit provisions of the Railroad Unemployment Insurance Act as now in effect or as hereafter amended. The purpose of this plan is to provide sickness allowances to employes absent account of illness and to supplement the benefits provided under the Railroad Unemployment Insurance Act where benefits are payable thereunder.

2. The plan provided for herein contemplates that on any given day for which an employe is entitled to benefits under both the Railroad Unemployment Insurance Act and this Rule that the Carrier shall supplement the benefits provided under the Act and received by the employe to the extent of the difference in benefits provided under the Act and that provided in this Rule (but only for days on which the employe would have had a right to work with a maximum of five (5) days supplemental benefits in any calendar week).

3. Beginning on the first day an employe is absent from work due to personal illness (not including pregnancy) and extending in each instance for the length of time determined by the provisions of the subsections of this Section 3, each such employe shall be entitled to a sickness allowance for such days of illness on which he otherwise would have worked (subject to the provisions of Section 2 hereof) in accordance with the schedule of benefits set forth in the following subsections:

(a) Employes with less than 2 years service - ½ pay after 5 working days lost but not exceeding 5 days in any calendar year.

(b) Employes with 2 to 5 years service - entitled to 5 days pay after first 5 working days lost in any calendar year.

(c) Employes with 5 years to 10 years service - entitled to 10 days without any waiting time in any calendar year.

(d) Employes with 10 or more years service - entitled to 20 days without any waiting time in any calendar year.

(e) Employes may accumulate unused sick leave for previous years up to a maximum of 60 full time days.

"4. The supervising officer of the Carrier will supply employes entitled to file for sickness benefits under the Railroad Unemployment Insurance Act the necessary papers for filing claim and supplying the Carrier such information as it may need in connection therewith in order to facilitate the collection of money due the employe from the Retirement Board and the making of payment by the Carrier of any supplemental benefits due the employe under the provisions of this rule.

In the event an employe forfeits sickness benefits under the Railroad Unemployment Insurance Act for any day of sickness because of his failure to file for such benefits, he shall only be entitled to any Carrier paid supplemental benefit due for that day, except where the failure to file was unavoidable.

5. It will be optional with the Carrier to fill or not fill the position of an employe who is absent account of personal illness, including the first five (5) days of an employe with less than five (5) years service who is absent account of personal illness, under the provisions of this rule. If the Carrier elects to fill the vacancy the rules of the Agreement applicable thereto will apply. The right of the Carrier to use other employes on duty to assist in performing duties of the position of the employe absent under this Rule is recognized provided, however, the absentee's work performed by 'other employes' is performed within the assigned hours of the 'other employes'.

6. The employing officer must be satisfied that the illness is bona fide. Satisfactory evidence in the form of a certificate from a reputable doctor will be required in case of doubt. The Local Chairman and the General Chairman will cooperate with the Railway to the fullest extent to see that no undue advantage is taken of this rule.

7. Before applying the foregoing provisions the Carrier shall determine, under the principles stated in this paragraph, whether sick leave compensation or supplemental allowances are to be paid. Any employe who is not entitled to Railroad Unemployment Insurance Act sickness benefits by virtue of insufficient earnings in a base year or where period of illness is not of sufficient length to satisfy a waiting period will be paid compensation, and all such amounts paid will be reported as compensated sick leave. In all other instances supplemental allowances will be paid and they will not be reported as compensation.

8. For the time necessary to attend funeral and handle matters related thereto, in the event of death of a spouse, child, parent, parent-in-law, brother or sister of an employe who has been in service one year or more, unused 'sick leave' days which have accrued to him under this rule (not exceeding three consecutive work days unless, in individual hardship cases, local agreement is otherwise reached) may be used, which will be deducted from the time which he would otherwise have available for time lost account personal illness."

It is conceded by Petitioner that an employee of Claimant's class or status was not entitled by rule or practice to sick leave pay prior to October 1, 1969. Petitioner asserts, however, that the October 1, 1969 re-written Rule 60 covers claimant notwithstanding the prior practice. The pregnancy exclusion in Rule 60 and the restriction on payments to "days on which the employee would have had a right to work" are pointed to as indicating the parties consciously made certain exceptions and would have excepted cut-off employees if such had been intended. Thus Petitioner's basic contention is that the face of the Agreement evidences intent to cover cut-off employees who lose work account of illness.

In addition, Petitioner argues that Rule 60, being supplementary to the Railroad Unemployment Insurance Act, has the same coverage as that Act except as Rule 60 may specifically provide different coverage and, further, that the Act does not exclude workers who fill temporary vacancies.

Carrier, on the other hand, takes the position that it has never been the policy, practice, or agreement with the Organization, either prior to or subsequent to October 1, 1969, to grant sick pay benefits to cut-off employees. And though sick benefits have been in effect on the property for over twenty-five years, Carrier notes that the Organization has never taken the position it now urges.

In a circular letter dated July 22, 1953 Carrier issued general instructions on then existing Rule 60 and a related agreement, Memorandum Agreement No. 4. Carrier asserts that this circular has never been revoked and is still in effect. In pertinent part the circular states that:

> " ...an employe displaced while absent account of personal illness and whose seniority does not entitle him to any other position after being displaced should not be allowed any pay under Rule 60 and Memorandum Agreement No. 4 after being displaced."

Carrier asserts that the above passage precludes sick payments to an employee such as claimant.

In reference to the present Rule 60 and Memorandum Agreement No. 4, Carrier asserts that they were revised, effective October 1, 1969, for two purposes only: (1) to establish a private sickness benefit plan supplemental to the Railroad Unemployment Insurance Act and (2) to provide sick pay to all regularly assigned employees not previously covered.

Carrier also asserts in effect that, by withdrawing or not progressing several claims on the property involving the same issue, the Organization has conceeded that cut-off employees are not entitled to sick pay benefits. And finally, Carrier points to section 5 of Rule 60 as further support of its position that only regularly assigned employees are covered by the Rule. The pertinent text is as follows:

"***It will be optional with the Carrier to fill or not fill the position of an employe who is absent account of personal illness****."

RULINGS ON PETITIONER'S CONTENTIONS

Petitioner's basic contention is that the clear and unambiguous language of present Rule 60, except for the pregnancy exclusion, provides sick benefits for any day on which any employee had a right to work but does not do so because of sickness.

Carrier's counter contention is that present Rule 60 did not alter prior practice under which a cut-off employee was not entitled to sick pay. Petitioner maintains that present Rule 60 erased prior practice, but concedes that cut-off employees were not entitled to sick pay under prior practice.

After a careful study of the issues and arguments presented of record, we find that the intent to cover a cut-off employee is manifest within the confines of Rule 60, itself, and, consequently, we will not enforce a contrary prior practice.

The face of Rule 60 evidences a clear and unambiguous intent to provide broad employee coverage. Paragraphs 1, 2, and 3 of Rule 60 read as follows:

"1. There is hereby established a non-governmental plan for sickness allowances or sickness allowances supplemental to the sickness benefit provisions of the Railroad Unemployment Insurance Act as now in effect or as hereafter amended. The purpose of this plan is to provide sickness allowances to employes absent account of illness and to supplement the benefits provided under the Railroad Unemployment Insurance Act where benefits are payable thereunder.

2. The plan provided for herein contemplates that on any given day for which an employe is entitled to benefits under both the Railroad Unemployment Insurance Act and this Rule that the Carrier shall supplement the benefits provided under the Act and received by the employe to the extent of the difference in benefits provided under the Act and that provided in this Rule (but only for days on which the employe would have had a right to work with a maximum of five (5) days supplemental benefits in any calendar week).

3. Beginning on the first day an employe is absent from work due to personal illness (not including pregnancy) and extending in each instance for the length of time determined by the provisions of the subsections of this Section 3, each such employe shall be entitled to a sickness allowance for such days of illness on which he otherwise would have worked (subject to the provisions of Section 2 hereof) in accordance with the schedule of benefits set forth in the following subsections:
* * * *".

Though not an essential element of our findings, we note that the Railroad Unemployment Insurance Act, referred to in paragraph 1 above, makes no distinction between a regularly assigned employee and other employees. More important, at the time the parties agreed on the new Rule 60, they were well aware of the prior practice and the various categories of employees, regularly assigned, extra, cut-off, etc. Yet the above references to "employee" do not convey even a hint that such language is intended to make distinctions between and among employees or otherwise give effect to prior practice. Here we note particularly the following references:

> Paragraph 1: ...The purpose of this plan is to provide sickness allowances to employees absent account of illness...
>
> Paragraph 2: ....(but only for days on which the employee would have had a right to work with a maximum of five (5) days supplemental benefits in any calendar week).
>
> Paragraph 3: Beginning on the first day an employee is absent from work due to personal illness...each such employe shall be entitled to a sickness allowance for such days of illness on which he otherwise would have worked....

We find this language and the other text of Rule 60 to be simple and straightforward. If we qualified the term "employee" throughout Rule 60 by the term "regularly assigned", we would in effect rewrite the Agreement which we have no power to do.

In conclusion we observe that the Carrier does not contend that the language of Rule 60 is unclear. It urges instead that, because employees excluded from sick pay by prior practice were not expressly covered by present Rule 60, the new Rule is still limited by prior practice. The logic here is questionable. It would have been more plausible in the instant facts to preserve such prior practice by the express terms of present Rule 60, if such had been the intent of the parties. Furthernore, we believe the prior practice issue presented here has been definitively covered by the principles stated in Award No. 4457 (Carter). In pertinent part that Award states as follows:

> "***Carrier contends, however, that it has been the practice before and after the negotiation of the Memorandum of Agreement effective July 15, 1944, to handle similar situations in the manner here employed. If such a practice existed, it could not have the effect of nullifying the plain words of the quoted agreement. The Memorandum of Agreement effective July 15, 1944, nullified any practice in conflict with its terms. If the practice was continued after the effective date with the acquiescence of the Employes, it might bar a claim for reparations but it does not bar a claim to put the agreement into effect. Where the language of a contract is free from ambiguity, a continued practice, which conflicts with its terms, does not have the effect of changing its meaning or staying its enforcement. ***"

For the reasons and findings enumerated above, we shall sustain the claim.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 17th day of November 1972.