

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20278
Docket Number MW-20216

Joseph Lazar, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees)
(Burlington Northern Inc.)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to allow Section Foreman W. T. Burton sickness benefits during January 1972 (System File MW-70(e) h/20/72).

(2) Section Foreman W. T. Burton be allowed \$365.84 because of the violation referred to within Part (1) of this claim.

OPINION OF BOARD: Claimant seeks sickness benefits of \$365.84 under Rule 63 of Agreement. He entered service in the Carrier's Track Department April 16, 1935, and he was promoted to section foreman effective January 15, 1945. Effective May 1, 1971, the parties negotiated the sick leave benefit rule, Rule 63, of the current agreement. Under the terms of Rule 63, the Claimant, having had more than twenty (20) years of continuous service in which he had qualified for vacation under the provisions of the National Vacation Agreement of December 17, 1941, as amended, was entitled to 20 days' sick benefits in the year 1971.

Claimant was off account illness for five days in October, 1971, and received payment for these five days under sick benefit rule 63. On December 6, 1971, the Claimant was again absent to have surgery for an ulcer. He claimed and was allowed payment for fifteen days sick benefits under Rule 63, from Monday, December 6, through Friday, December 24, 1971.

When Claimant became ill on December 6, 1971, he immediately secured a leave of absence. When his sick benefits for 1971 were used up after Friday, December 24, 1971, the Carrier placed the Claimant on leave of absence effective December 27, 1971. Claimant's illness continued on until his return to service March 1, 1972. He did not perform any compensated service for the Carrier between December 6, 1971 and March 1, 1972, when he again returned to service as section foreman at Beulah, North Dakota.

On January 29, 1972, Claimant submitted claim forms seeking payment of 20 days' sick benefits for January 3 through 28, 1972.

The claim for 20 days' sick benefits **for** January 3 through January 28, 1972 was denied by the Carrier on the basis of **Rule 63 I, reading:**

- "I. **Employee** on formal leave of absence or absent because of disciplinary reasons are **not** entitled to the benefits of this rule during such absence nor until they report for and perform service upon the expiration thereof, nor for any day on which they do not have the right to work."

The Carrier takes the position that when Claimant was on leave of absence December 27, 1971 and continued being absent until March 1, 1972, Claimant was on **a** formal **leave** of absence during which he **was** not entitled to the benefits of **Rule 63**.

The Organization denies that Claimant was on formal **leave** of absence under **Rule 63 I**. The Organization takes the position that Claimant **was** on a single and continuous sick leave of absence pursuant to the provisions **of Rule 15**, Leave of Absence, and that such status did not change on December 27, 1971 with the expiration **of** sick benefits for 1971. Rule 15 reads:

- "A. Except for physical disability, leave of absence in excess of ninety (90) calendar days in **any** twelve (12) month period shall not be granted unless by agreement between the Company and the duly accredited representative of the **employees**.
- B. The arbitrary refusal of **a** reasonable amount of leave of absence to **employees when** they can be spared, or failure to handle promptly cases involving sickness or business matters of serious importance to the **employees**, is an improper practice and may be handled **as** unjust treatment under this Agreement."

The Carrier's position is logical, and if Claimant was in the **status** of formal leave of absence under **Rule 63 I**, we would have no choice but to deny this **claim**. The problem before us is to determine whether Claimant was on formal leave of absence under **Rule 63 I**.

We note that the term "formal **leave** of absence" in **Rule 63 I** is given no contractual definition. **What** does it mean? Does it include absence for sickness provided for in **Rule 15**? It is clear from the record that Rule 63, which is captioned "Sick and **Funeral** Leave", is expressly intended to serve the purpose and objective of providing

sickness benefits. It is equally clear that Rule 63 was the source for Claimant's 20 days' sick benefits in 1971. It is also clear that Claimant was on leave under the provisions of Rule 15 between December 6 and 27, 1971. On this record, we have no choice but to conclude that "formal leave of absence" does not and cannot reasonably include absence for sickness as provided for in Rule 15. To hold otherwise would totally frustrate and make senseless the provisions of Rule 63.

The question is raised, however, whether "formal leave of absence" starts to run when sickness benefits are used up; i.e., after December 27, 1971. Such an interpretation would preserve some of the usefulness and purpose of Rule 63. We can find, however, no language whatsoever in Rule 63 to support such construction. It is not our province to write such language into the rule. Our review of the record clearly shows that Claimant was on a continuous leave of absence for the same illness for the continuing and entire period of December 6, 1971 to March 1, 1972. We can find no language in the Agreement to justify calling one part of this period (December 6-24, 1971) sick leave and not formal leave while calling the second part of this period (December 27, 1971-March 1, 1972) formal leave and not sick leave. Since all of the leave, as a whole, involves the very same sickness, and since the Carrier recognized and paid for the first part as sick leave under Rules 63 and 15, we must conclude that the second part here in dispute is equally sick leave and not formal leave for the purposes of these rules.

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 Employees involved in this dispute are respectively Carrier and Employees 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.

Award Number 20278
Docket Number MW-20216

P a g e 4

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.