NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21478
THIRD DIVISION Docket Number CL-21352

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, CL-8002, that:

1. The Carrier violated the effective Clerks' Agreement when it failed and refused to compensate Rosemary Scully for sick leave to which she was entitled by virtue of her seniority;

2. The Carrier shall now be required to compensate Rosemary Scully for one (1) day's pay at the pro rata rate of Position JT 596 as sick leave for November 29, 1973, and for an additional fourteen (14) days' pay at the pro rata rate of Position JT 596 as compensation for unused sick leave for 1973, due to the Carrier's failure to compensate her for a day when she was absent due to her personal illness, and for unused sick leave for the year 1973.

OPINION OF BOARD: Claimant, Mrs. Rosemary Scully, is an employe of Carrier with seniority date of November 4, 1946. She worked from that date until October 7, 1963 when she was granted a leave of absence due to illness (the record indicates an arthritic condition). Following a ten-year leave of absence she exercised her seniority and returned to work on October 1, 1973 in the East Joliet Agency, apparently displacing a junior employe. Thereafter on November 29, 1973 she was off duty due to sickness and applied for but was denied sick leave under Rule 56(a)(2) of the controlling Agreement. Subsequently she applied for **and was denied** compensation for fourteen (14) sick leave days not used during calendar year 1973. On January 18, 1974 she filed the instant claim under the Clerk's Agreement in a letter reading as follows:

"Mr. E. E. Lawler, Agent
E. J. & E. Railway Company
Joliet, Illinois

Dear Sir:

Please allow me fifteen (15) days pay at the pro-rata rate of pay of JT-596 Cashier Helper. I am claiming these fifteen days account of the Carrier not allowing me one (1) days sick pay when I was off sick on November 29, 1973 from Position JT-596 and also; because the Carrier did not compensate me for the additional fourteen (14) days sick allowance which I should have been compensated for at the rate of pay of JT-596 as

"per Rule 56 of our current working agreement. I feel the Carrier is in violation of our Agreement and wish to call your particular attention to Paragraph (a) No. 2 and also to Paragraph (d).

In view of the above statements an early settlement of this claim will greatly be appreciated. Please note my seniority date is November 4, 1946 which gives me twenty-seven (27) years seniority rights or years of service.

Sincerely,

/s/ Rosemary Scully
Rosemary Scully
Account No. 2478"

This claim was denied by her supervisor on March 1, 1974 by letter reading in pertinent part as follows:

"On January 1, 1973, you were on a sick leave of absence and not an employee in active service, thus not qualified for benefits under Rule 56. Your claim is without rule support and is declined."

Further appeals on the property culminated in a denial by Carrier's Director of Labor Relations on September 12, 1974 reading as follows:

"It appears that the issue in this case is whether or not Rule 56 was amended to the extent you suggest in your appeal letter. Your Organization is stating in effect that on November 16, 1972 a clerical employe need not qualify for the improved benefits of Rule 56. It is the Carrier's position that the foregoing changes did not alter or amend the application, interpretation or practices under Rule 56 as to basic qualifications. The rule still reads: 'Employes who on January 1st have been in service ...'. Furthermore, the employe must also occupy a position because of the blanking provisions in the rule. The policy has and is that the clerical employes must perform some compensated service in the preceding year. Rule 56 must be read as a whole in order to arrive at a conclusion on a given set of facts.

It is therefore the position of this office that a clerical employe away on sick leave under these circumstances is not entitled to the yearly sick leave allowance. For example, see Third Division Awards 5201, 8762, 13688 and 18646. Accordingly, the claims in this case are declined."

The dispute having failed of resolution on the property it now comes to us for final disposition.

The disputed Rule 56 reads, in part pertinent to this case as follows:

"Rule 56 - Sick Leave

(a) Employes covered by this agreement shall be allowed sick leave with pay during each calendar year as follows:

1. Employes who on January 1st have been in service one (1) year and less than ten (10) years, ten (10) working days.

2. Employes who on January 1st have been in service ten (10) years or over, fifteen (15) working days.

* * *

(d) Employes who, during any calendar year do not use all of the sick leave days which they are entitled to under the applicable provisions of this rule, will be compensated for those days they have not used. Compensation will be allowed at the rate of the position they occupy, or in the case of an unassigned employe, at the rate of the last position worked prior to December 15 of any calendar year."

This Rule, inter alia, was created by a Mediation Agreement in NMB Case No. A-9085, signed November 16, 1972. Prior to that date another Sick Leave Rule was in existence by Agreement of these parties reading as follows:

"Where the work of a regular employe is kept up by other employes without additional cost to the Railway Company, a clerk, who has been in continuous service as such one year or more, will be allowed compensation for time absent account bona fide sickness on the following basis:

(a) Clerks who on January 1st have been in service continuously one (1) year and less than two (2) years, one (1) week (five (5) working days).

(b) Clerks who on January 1st have been in service continuously two (2) years and less than three (3), (seven and one-half ($7\frac{1}{2}$) working days).

(c) Clerks who on January 1st have been in service continuously three (3) years or over, two (2) weeks (ten (10) working days).

"Supervising officer must be satisfied that the sickness is bona fide, and that no additional expense is incurred by the Railway Company. Satisfactory evidence as to sickness in the form of a certificate from a reputable physician, preferably a Company physician, will be required in case of doubt.

Employes absent from work a fractional part of a day due to sickness may have said fractional part of the day absent computed on the basis of the closest whole hour or hours charged against their annual sick leave provided herein."

The record shows that this former Sick Leave Rule was amended to its present form in Rule 56 pursuant to a Section 6 Notice served by the Organization on March 31, 1970.

In the present case the Organization argues that Claimant in calendar year 1973 was contractually entitled to fifteen (15) working days' sick leave under Rule 56(a)(2). Specifically, the Organization points to her seniority date of November 4, 1946 and the fact that she was an employe of Carrier at all times since that date and concludes that she had been "in service" on January 1, 1973 for twenty-seven (27) years. Notwithstanding that she was on leave of absence for the ten years, October 1963 to October 1973 (including January 1, 1973), the Organization maintains she is entitled by Rule 56 to enjoy the 15 days sick leave or be compensated for same if not used by her. Thus the Organization relies on the clear and express contract language and urges that it be enforced by us as written without reference to collateral questions of equity or Carrier's arguments of contrary practice. The Organization contends that if the Rule as written is burdensome to Carrier it may be changed, if at all, only at the bargaining table where it was written and not by arbitral interpretation.

For its part, Carrier contends that the language of Rule 56 includes prior practices and interpretations of the predecessor Sick Leave Rule which expressly required employes to have been "continuously in service" to qualify for the leave. In words or substance the position of Carrier developed on the property was that Rule 56 therefore required implicitly, if not in express language, that Mrs. Scully actually have occupied a position and been in active work status on January 1, 1973 and that she have performed some compensated service during the preceding calendar year (presumably 1972). Since Scully fulfilled neither of these requirements which Carrier reads into Rule 56, it denied her requests for sick leave in 1973. For these reasons, Carrier urges a determination that it has not violated Rule 56 and a denial of the claim.

It should be noted that another theory of the case, i.e., that interpretive guidance to the words "in service" in Rule 56, may be found in Rules 4, 7, 8, 11, 14, 18, 19, 42 and 44 was never raised on the property but was presented de novo at Board level. Likewise certain casuistic exercises in English grammar and an unfounded insistence that the Organization

had "conceded" by implication the crux of the dispute were raised for the first time at the appellate level. Under clearly established authority regarding our scope and jurisdiction none of these belated arguments may be considered by us.

Upon consideration of the record as developed on the property and the authorities cited by the parties, we are convinced that Carrier violated Rule 56 in denying Claimant her sick leave for 1973. The core of this dispute lies in a determination whether Claimant as of January 1, 1973 had been "in service ten (10) years or over" as that phrase is used in Rule 56. The words of the rule say "in service" and nothing more; there is no express requirement that Claimant be on active duty nor that she have performed compensable service in the preceding year. Carrier argues that these additional qualifications must be read into the rule because of the mutual intent of the parties as evidenced by past practice. This reasoning is faulty on two grounds: 1) In the face of clear and unambiguous language we may not look to contrary practice and 2) The so-called practice was under the old rule which required the employe to have been "in service continuously" to qualify for sick leave. If Carrier wishes to return to the old rule or obtain modification of Rule 56, it must seek to do so at the bargaining table. We cannot re write Rule 56 in the manner sought by an Award of this Board, even in the face of unanticipated and possibly inequitable situations.

Claimant was on a leave of absence status as of January 1, 1973, her employment relationship with Carrier had never been severed since 1946 and, for the purposes of Rule 56, she had been "in service" for over ten years. See Awards 5201, 16535 (Supplemental); Awards 14 and 15 of SBA No. 269. Accordingly, we find that Carrier violated the controlling Agreement when it denied her a sick leave day on November 29, 1973 and later refused to compensate her for her unused sick days in 1973. The claim shall be sustained.

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: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1977.