NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23874

THIRD DIVISION Docket Number CL-23304

George E. Larney, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

(Kentucky and Indiana Terminal Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8996) that:

(1) Carrier violated the Agreement of January 30, 1979, when on Thursday, March 1, 1979 Carrier delivered retroactive payments and did withhold retroactive payments for days claimed pursuant to Rules 58A (Sick Leave) and 58B (Compassionate Leave) of our current Agreement.

(2) Carrier shall, because of the violation cited in (1) above, compensate the employes represented by our Organization for all days claimed and allowed pursuant to the Rules stated above, commencing with April 1, 1978 and ending on January 31, 1979.

OPINION OF BOARD: As part of their collective bargaining negotiations in the latter part of 1974, the parties mutually agreed to replace the then existing sick leave rule (Rule 58) with an altogether new concept in compensating for sickness due to bona fide illnesses. The parties agreed that the purpose of this new plan was to supplement benefits payable under the sickness provisions of the Railroad Unemployment Insurance Act and as such was not intended to either replace or duplicate such sickness benefits as prwided by the Act. In order to insure there was nothing in the new plan which, in any way, would conflict or run afoul of the Railroad Unemployment Insurance Act provisions, the parties made a joint written inquiry to Mr. Neil Speirs, the then incumbent Labor Member of the Railroad Retirement Board. Mr. Speirs in a letter dated November 14, 1974, suggested what appeared to be minor changes in terminology as a direct result of questions posed by the Internal Revenue Service in its scrutiny of sick leave agreements as administered under the Railroad Retirement Tax Act. Speirs suggested the term "sick benefits" be used in place of "compensation"; that the term "benefit rate" be used in place of "basis of pay"; and that the term "allowances" be used in place of 'payments". Speirs assured the parties that by making these suggested changes in terminology the plan could be approved as a nongovernmental plan for sickness insurance within the meaning of the applicable provisions of the Railroad Unemployment Insurance Act. Thereafter, the parties agreed to all the suggested changes and modified the negotiated plan accordingly. The parties informed Speirs of their action and Speirs in turn, by letter dated December 9, 1974, related to the parties the following:

> "Allowances paid under Rule 58-A SICK BENEFITS would be regarded as paid under a nongovernmental plan for sickness insurance within the meaning of Section 1 (j) (ii) of the Railroad Unemployment Insurance Act. Such payments would

not be 'remuneration' as defined in the Act and would not interfere with the receipt of sickness benefits under the Act. They would not be subject to contributions under the Railroad unemployment Insurance Act and would not be creditable as 'compensation' under that Act or the Railroad Retirement Act."

In pertinent part, provisions of the new sick leave agreement which became effective as of January 1, 1975, read as follows:

"2. Subject to conditions hereinafter set forth, employees who have been in continuous service of the company for the period of time as specified will be allowed sick benefits in such year for time absent account bonafide sickness on the following basis:

LENGTH OF SERVICE	BENEFIT DAYS PER YEAR	BENEFIT RATE (% OF DAILY RATE)
1 to 4 years	5	85%; except where the work of the absentee is kept up by the remaining employees (within the assigned hours of the remaining employees) without cost to the carrier or can reasonably be deferred, the benefit rate will be 100%.
4 to 8 years	10	
8 years and over	12	

In order to qualify for the first year's service, an employee must have rendered compensated service on not less than 120 days during the preceding calendar year. In order to qualify for benefits thereafter an employee must have rendered compensated service on not less than 75 days in the preceding calendar year.

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4. For any day for which an employee is entitled to sickness benefits under Section 2 of this agreement and such days of sickness are not days for which benefits are payable under the Railroad Unemployment Insurance Act, sickness benefits will be payable to such employee in such amounts equal to the daily benefit amount established in Section 2.

5. For any day for which an employee is entitled to sickness benefits under Section 2 of this agreement and such days are also days for which sickness benefits are payable under the Railroad Unemployment Insurance Act, sickness

benefits will be payable to such employee in such amounts so that such benefits in connection with the benefits from the unemployment Insurance Act shall total the daily benefit amount established in Section 2 above.

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13. The daily rate referred to herein means the daily or guaranteed rate, whichever is higher.

The above agreement is in full and final settlement of the notices served by the Brotherhood on the Carrier dealing with sick leave compensation and compassionate leave dated March p, 1970, and January 25, 1974.

This agreement supersedes all other rules, agreements, and understandings in conflict herewith and shall continue in effect until changed as provided in accordance with the Railway Labor Act, as amended.

Signed at Louisville, Kentucky, this 23rd day of October, 1974."

Subsequent to the effective date of this sick leave agreement, negotiations for a National Agreement were entered into by and between the Clerks Labor Organization and a number of Carriers including the instant Carrier represented by the National Railway Labor Conference. A National Agreement was cons-ted on January 13, 1979 and ratified and made effective as of January 30, 1979. In this National Agreement and of paramount importance to this subject dispute, the parties agreed among other things to a General Wage Increase Provision which reads in relevant part as follows:

"ARTICLE II - GENERAL WAGE INCREASE

SECTION 1. Effective April 1, 1978, all hourly, daily, weekly, monthly and piece-work rates of pay in effect on March 31, 1978 for employees covered by this Agreement shall be increased in the amount of 3 percent applied so as to give effect to this increase in pay irrespective of the method of payment. . . .

SECTION 2. Effective October 1, 1978, all hourly, daily, weekly, monthly and piece-work rates of pay in effect on September 30, 1978 for employees covered by this Agreement shall be increased in the amount of 15 cents per hour applied so as to give effect to this increase in pay irrespective of the method of payment."

In addition, the Agreement also prwided for several Cost-of-Living Adjustments, one effective June 30, 1978 and one effective December 31, 1978, which were to be incorporated into basic rates of pay.

As a result of these agreed upon wage increases, the Carrier moved to institute said increases retroactively, which Carrier claims to have done by authorization on February 5,1979. However, in so doing, Carrier did not retroactively increase the Benefit Rate for sick and compassionate leave embodied in Rules 58A and B. Carrier defends its actions of not adjusting the sick leave benefit arguing that sick leave is an insurance benefit subject to the prwisions of the Railroad Unemployment Insurance Act and therefore such benefit is not a wage subject to the negotiated wage rate increases under the National Agreement. The Organization takes the position the negotiated wage rate increases are applicable to the sick and compassionate leave benefits as payment for these benefits are based on a percentage of the daily rate.

Based on a review and close scrutiny of the entire record, we are persuaded that the distinction Carrier attempts to make between sick leave benefits as pay for time lost as opposed to sick leave benefits as an insurance payment, is really a conundrum meant to confuse the issue at hand. We find that the great care taken by the parties in crafting the language of their sick leave agreement had to do solely with their concerns that any such payments would not conflict with or run afoul of applicable prwisions of the Railroad Unemployment Insurance Act, rather than having anything to do with the rate at which this leave would be paid. It is our position that even though sick leave benefits are not deemed to be wages as such, nevertheless, the rate at which this benefit is to be paid, clearly stated in the parties' sick leave provision as a percentage of the daily rate, necessarily warrants such rate to be tied to the level of negotiated wage increases. It is our determination therefore that Carrier erred when it did not extend the retroactive wage rate increases made in the daily rate to the sick and compassionate leave benefit formula set forth in Agreement Rules 58A and 58B.

FINDINGS: The Third Division of the Adjustment, after giving the parties to this dispute due notice of hearing thereon, and upon the whole. record and all the evidence, finds and holds:

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: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of May, 1982.