NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24830

THIRD DIVISION

Docket Number MW-24493

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(City of Prineville Railway

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:

(a) J. K. Teague sickness benefits for January 14, 15 and March 19 and 20, 1981;

(b) R. G. McCoy sickness benefits for January 20,21 and 22, 1981.

(2) Because of the violation referred to in Part (1)(a) hereof, Mr. J. K. Teague shall be allowed four (4) days' pay ($321.60) at his straight time rate and, because of the violation referred to in Part (1)(b) hereon, Mr. R. G. McCoy shall be allowed three (3) days' pay ($213.36) at his straight time rate (System File CoP-102C).

OPINION OF BOARD: Claimants, J. K. Teague and R. G. McCoy, held seniority in their respective subdepartments in the Maintenance of Way and Structures Department at Carrier's facility in Prineville, Oregon. On January 14 and 15, 1981, and again on March 19 and 20, 1981, Claimant Teague was absent from service account of illness. Similarly, on January 20, 21, and 22, 1981, Claimant McCoy was absent from service account of illness. On March 12, 1981, the Organization filed two claims seeking sick leave pay for Claimants Teague and McCoy. Carrier declined the claim for Claimant Teague on March 16, 1981 and for Claimant McCoy on March 17, 1981. Similarly, on April 14, 1981, the Organization filed a claim for Claimant Teague account his illness on March 19 and 20, 1981. Carrier rejected this claim on April 16, 1981. By letter dated November 2, 1981, the Organization informed Carrier that it was sending the claims to this Board for handling.

The Organization contends that Carrier's failure to compensate Claimants for their absence from service account of illness violates Article III of the January 11, 1979 Letter of Agreement. That Article reads, in relevant part:

> "(B) The Agreement of June 11, 1975 is amended to read:
> 1. It is understood and agreed, effective January 1, 1979, up to 60 days of sick leave may be accumulated at one (1) day per each month in which work is performed and will be paid at one hundred per cent (100%) of daily wage..."

In the Organization's view, the language of Article III is clear and unambiguous. It provides sick leave entitlement, at 100% of daily wage, to employees who are absent from service account of personal illness. As the Organization see it, Claimants were thus clearly, entitled to be compensated for the days in question. Accordingly, the Organization asks that Claimant Teague be paid four days' pay at the straight time rate and Claimant McCoy be paid three days' pay at the straight time rate for their illnesses in January and March 1981.

Carrier, on the other hand, contends that the claim is procedurally defective as well as without merit. First, Carrier maintains that the Organization's letter of November 2, 1981 constitutes an appeal pursuant to Rule 43 of the Agreement. Appeals under Rule 43 must be taken within sixty days of the rendering of a decision by Carrier. However, Carrier points out, the letter of November 2, 1981 was written seven months after Carrier's denial of the claim. Thus, Carrier concludes that the claim was untimely appealed and should be rejected on this ground alone.

As to the merits, Carrier argues that this dispute is governed by Rule 46 of the Agreement. That Rule reads, in relevant part:

> "No allowance will be made under this rule for the first two working days that an employe is absent account sickness, unless, such absence continues for five (5) continuous working days or longer, nor shall any allowance be made under this rule for any day on which the employe is entitled to compensation under any other rule or agreement."

Carrier points out that Claimants were not absent for five (5) continuous working days in January and March, 1981. Thus, Carrier reasons that, pursuant to Rule 46, Claimants were clearly not entitled to compensation for the days in question.

First, we conclude that the claim is not procedurally defective. Carrier has designated only one officer to hear employee claims and appeals therefrom. Thus, General Manager B. J. Wigg's denial of the Organization's claims in March and April of 1981 constituted a denial from "the highest officer of the Railway designated for that purpose" to Rule 43(b). Therefore, the Organization's letter in November 1981 to General Manager Wigg's was not an appeal as contemplated by Rule 43(b). Instead, it was a notice, pursuant to Rule 43(c), of the Organization's intent to submit the dispute to the appropriate division of this Board. Stated simply, it was not an appeal and, therefore, was timely written.

The merits of this dispute center on the relationship of Rule 46 of the Agreement to Article III of the January 11, 1979 Letter of Agreement. If Rule 46 governs, the claim must fall; if Article III governs, the claim must be sustained.

We are convinced that Article III superseded Rule 46 and that the claim must be sustained. In June 1975 and again in January 1979 the parties entered into Letter of Agreement which specifically "supplement(ed) all existing agreements with respect to wages, holidays, guaranteed annual wage, minimum work force, Dental, Health & Welfare, etc..." These Agreements specifically provided, in Article III, that employees would be entitled to sickness benefits for each employee illness. Clearly, then, Article III renders null and void Rule 46 of the Agreement. Since Claimants are entitled to sickness benefits pursuant to Article III, the claim must be sustained.

An additional comment is appropriate. We understand Carrier's poor financial condition. However, we are bound to interpret the Agreement as it is written and Carrier's fiscal plight may not color our judgment as to Claimants' entitlement to sickness benefits.

Finally, we note that other arguments raised by Carrier for the first time before this Board are not properly before us. For us to consider such arguments, they must have been first aired on the property. They were not. Accordingly, and for the foregoing reasons, the claim is 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: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of May, 1984