

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25300
Docket Number CL-25192

Edward L. Suntrup, Referee

(Brotherhood of Railway, Airline and Steamship Clerks
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE: (

(Bessemer and Lake Erie Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-97681
that:

1. Carrier violated the effective Clerks' Agreement when, on May 6, 1982, it granted Clerk Claude A. Thompson, Jr. one day off as personal leave and then refused to compensate him for such day;

2. Carrier shall now be required to compensate Mr. Thompson for eight (8) hours' pay at the pro rata rate of the position of Janitor, General Superintendent Office, Greenville, PA for May 6, 1982.

OPINION OF BOARD: On May 7, 1982, the Claimant, Mr. C. A. Thompson, Jr., filed Form 200 G.E. with the Carrier for one day's Personal Leave pay for May 6, 1982. The request for payment was filed under Rule 18-1 of the current Agreement. On May 10, 1982, the request for Personal Leave compensation was denied by the Carrier on the grounds that Rule 18-1 did not apply to "unassigned Clerks" which was the position held by the Claimant on May 6, 1982. After the claim was appealed on property up to and including the highest Carrier Officer designated to hear such this case is now before the Third Division of the National Railroad Adjustment Board.

The Rule in question was incorporated into the current Agreement on February 8, 1980, as Rule 18-1 under the title of Personal Leave Days. When this Agreement was signed the renegotiated Rule entitled Sick Leave was also incorporated therein as Rule 18.

The position of the Claimant hinges on a number of the arguments. First of all, the Claimant holds that although Rule 18 specifically states that only "a regularly assigned employee" is eligible for benefits under that Rule, Rule 18-1 only uses the language "employee" without specifying anything about a "regularly assigned employee". Since such is the case, the Claimant contends, those sections of Rule 18-1 which deal with Personal Leave are applicable also to unassigned employees. Secondly, the Claimant argues that Rule 18-1 states that employees who exercise the Personal Leave Day provisions of this Rule are "not subject to requirements governing sick leave" and that this means, in effect, that these provisions are applicable to unassigned employees. Thirdly, the Claimant argues that he was not advised of the Carrier's position on Rule 18-1 prior to requesting and getting the day off in question.

A study of the contractual provisions at bar shows that Rule 18-1 only uses the term, "employees" and that there is no specific reference made to a **"regularly** assigned employee' as is the case in Rule 18. At the same time, however, Rule 18-1 also does not use the language: "unassigned employee". The question may be raised as to why the parties to this contract did not use the latter language in Rule 18-1 if they meant this Rule to apply, in part, to unassigned employees as the Claimant argues when they in fact did use such language in other parts of the contract when it is a question of protections for unassigned employees. Rules 4(b) and 20(a) (b), for example, use this language. Consistency of contract construction would imply that the term, 'unassigned' be used in Rule 18-1 if that is what was meant. The same applies, of course, for the language, "regularly assigned employees". The use of the term, **"employees"**, in and by itself in Rule 18-1 does not permit a reasonable conclusion one way or the other on this matter.

The second argument of ~~the~~ Claimant is that Rule 18-1, by incorporating the phrase, **"...not** subject to requirements governing sick leave..." in its language when it deals with Personal Leave provisions thereby implies that unassigned employees enjoy the protections of this clause with respect to these benefits. A close study of Rules 18 and 18-1 shows that both of these Rules deal with Sick Leave benefits. Rule 18 establishes eligibility requirements, the number of Sick Leave days, with pay, an employee is eligible to receive annually depending on seniority date, and various other conditions which must be fulfilled in order that employees receive these benefits. With variations, it is a fairly standard. ~~the~~ Sick Leave clause. Rule 18-1, first of all, amends that part of Rule 18 which deals with the number of Sick Leave days, with pay, an employee is eligible to receive annually depending on seniority date, etc. The Claimant does not dispute that this part of Rule 18-1 applies only to employees with *regularly assigned-status, Rule 18-1 also goes on to say, however, that those additional days stipulated in Rule 18-1 for Sick Leave may be used as Personal Leave days. It is when such days are used for this latter purpose which is the focal point of the instant dispute. The resolution of the dispute factually centers on the meaning of the phrase: "...not subject to requirements governing sick leave..." and the intent of the parties when that phrase was introduced into the language of Rule 18-1. The position of the Carrier is that this phrase means that an employee need not be ill. and need not furnish evidence to that effect in order to enjoy the protections relative to Personal Leave benefits as long as the employee complies with the 48 hour advance notice requirement in Rule 18-1 and other conditions stated therein and that this provision in Rule 18-1 does not change ~~the~~ Personal Leave eligibility requirements as stipulated in Rule 18. Since the Sick Leave provisions in Rule 18-1 represent a true extension of Rule 18, and since the Personal Leave **provisions** in Rule 18-1 can be read as but a variable manner in which the additional Sick Leave days available in Rule 18-1 can be taken **with** pay, the interpretation of the phrase **"...not** subject to the requirements governing sick leave..." as proposed by the Carrier appears to be the more reasonable one of Rule 18-1 which is here quoted in pertinent part:

"The sick leave days provided in this section...may, at the option of the employee, be taken as sick leave and subject to the requirements of Rule 18 or upon 48 hours' advance notice from the employee to the proper carrier officer may be taken as leave days, not subject to **requirments** governing sick leave. Such leave days may be taken only when consistent with the requirements of the carrier's service (Rule 18-1 (1) (b) duplicated at (2) (b))."

The Board has also closely studied the considerable information in the record with respect to the intent of the two sides when Rule 18 and 18-1 were framed and there appears to be a great deal of honest disagreement land some apparent misunderstandings) concerning this intent. The parties may wish to address this subject at a future round of negotiations; The role of this Board, however, is but to interpret contract language presented for its consideration as the Organization correctly **states** in its Submission (First Division Award 21459; Third Division Awards 13491, 17474, 21265).

Lastly, the Claim that the Claimant was not advised of the Carrier's position on Rule 18-1 prior to requesting and getting the day off in question is disputed by the Carrier a number of times in the record. For example, the Carrier stated that: "(w)hile he was granted permission to be off duty on the day, he was not granted payment under Rule 18-1 and was informed that unassigned Clerks are not entitled to the benefits of either Rule 18 or 18-1". This assertion by the Carrier is repeated in the record. By long established precedent **this Board cannot** set itself up as a trier of fact when it is a question of conflicting evidence (Third Division Awards 9230, 9322, 10113, 10791, 21238, 21612). So long as the evidence presented by the Carrier is not so clearly devoid of probity that its acceptance would be per se arbitrary or unreasonable, the Board may not substitute its judgment in cases of this **type**.

Information found in the Carrier's Submission to the Board which was not submitted during the handling of the case on property is **inadmissable** (Third Division, 21395; Fourth Division, 4132, 4135, and 4136.

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 not violated.

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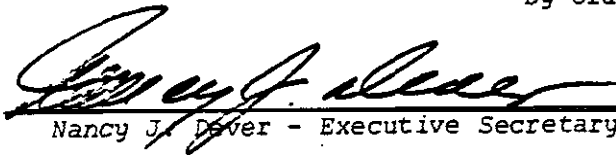
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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 28th day of February 1985.