

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32055
Docket No. CL-31957
97-3-94-3-110**

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (
(Transportation Communications International Union
(CSX Transportation, Inc. (former Chesapeake and Ohio
(Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11013) that:

(a) The Carrier violated the Agreement at Shelby, Kentucky on Sunday, September 13 and 20, 1992, when it failed and/or refused to permit Mr. L. D. Pinson to work the vacancy of swing position R04 due to incumbent B. L. Blair being off sick; and,

(b) The Carrier shall now allow L. D. Pinson eight (8) hours at the time and one-half rate of his regular position in addition to his other earnings for the above dates."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

An employee in Yard Clerk Relief Position R04 works the position of the Claimant, a General Yard Clerk, on Sundays. On Sundays, September 13 and 20, 1992, the Relief Clerk laid off. Her absence was recorded as "sick no pay", because she had no remaining sick leave entitlement and was thus not compensated by the Carrier.

The Organization contends that, under these circumstances, the Claimant was entitled to be called from his rest day to fill the assignment on the two days it was vacant. The Organization cites Rule 42, Weekly Guarantee, which reads in pertinent part as follows:

"(a) Except as provided in Section (b) of this rule [not relevant here], nothing herein shall be construed to permit the reduction in days for regularly assigned employees and/or positions covered by this Agreement below five (5) per week; except, however, the guarantee applying to a 'position' will be waived on any given day on which the regular incumbent is absent, and only then when another employee is not available to cover the assignment."

The Carrier defends its position by reference in Section 9 of Rule 60, Sick Leave, which states in part as follows:

"1. There is hereby established a non-governmental plan for sickness allowances supplemental to the sickness benefit provisions of the Railroad Unemployment Insurance Act, as now or hereafter amended. It is the purpose of this sick leave rule to supplement the sickness benefits payable under the Act and not to replace or duplicate them.

* * *

9. It will be optional with the Carrier to fill or not fill the position of any employee who is absent account of personal illness under the provisions of this rule. . . ."

Rule 42 goes beyond a five-day guarantee for "regularly assigned employees." It also applies to "positions." The sole exception to the position guarantee involves the

absence of the regular incumbent, as here, but only "when another employee is not available." The Organization has shown the Claimant was "available."

Rule 60, Section 9 holds to the contrary, however, in stating that the Carrier has the option "to fill or not fill" a position when any employee is absent because of illness "under the provisions of this rule."

The Organization argues that Section 9 is inapplicable here because the absent Relief Clerk had exhausted her sick leave, received no compensation, and thus was not "under the provisions of this rule." The Board finds this an irrational reading of the Rule. The Relief Clerk is clearly covered by Rule 60, both as to its benefits and its limitations. The Board does not read Section 9 to be dependent on whether the absent employee received compensation or not. As a specific Rule governing illness absence, it may be read as a modification of Rule 42 which concerns absence in general.

The Organization contends, however, that past practice establishes the Carrier has interpreted the Rule in the manner which the Organization argues should be applied here. Examination of the Organization's four cited instances of on-property settlements does not support this view. Case CG-17862 (Baltimore 3961) concerns rearrangements owing to vacation, with no reference to employee absence owing to illness.

Case CG-16806 (Baltimore 3688) simply involves reconsideration of illness leave pay to an employee after it was determined she was not required to furnish a doctor's certificate. This instance in fact appears to support the Carrier's position, in that the claim therein states the employee "was off sick and received no pay, but the Position E-27 was blanked." (Emphasis added).

Case No. CG-16804 (Baltimore 3686, incident in 1980) is closely similar to the instance here under review, although the absent employee did have sick leave credit available, but failed to furnish a doctor's certificate. Only Case No. CG-15013 (GO-428, incident in 1979) appears to be identical to that reviewed here. In both instances, payment was at the pro rata rate, not the punitive rate sought here. These two claim settlements, involving incidents 17 and 18 years ago, hardly constitute an established practice sufficient to defeat the Board's interpretation of the applicable Rules.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 10th day of June 1997.