

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 38050
Docket No. CL-38923
07-3-05-3-359**

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

PARTIES TO DISPUTE: (
(Transportation Communications International Union
(CSX Transportation, Inc. (former Seaboard Coast
(Line Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Union (GL-13084) that:

- 1. Carrier is in violation of the current Working Agreement (Sick Rule), when it failed to pay Clerk Loretta Watkins (381951) sick days for the dates of January 22 and 23, 2004. The Carrier had scheduled Ms. Watkins, an unassigned employee in District 10, Payroll, to work on January 22 and 23, 2004. Ms. Watkins was sick on January 22 and 23, 2004, but the Carrier is refusing to pay Ms. Watkins her sick days account of her being unassigned.**
- 2. As a result of the above violation, Carrier shall compensate Clerk Loretta Watkins (381951) eight (8) hours' pay at the rate of \$151.61 for the days of January 22 and 23, 2004.”**

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.

A. Background

The Claimant was displaced from an operating craft payroll position on October 24, 2003. Of the three options she had available to her at that time, the Claimant opted under Rule 17(e) to become an unassigned employee, thereby making herself available for extra or relief work under Rule 18.

On January 22 and 23, 2004, the Claimant was called to fill a temporary vacancy on Position No. 174. She did not report for the assignment on either date as a result of a bona fide illness. The Claimant thereupon made a request to be paid a sickness benefit day for each day of her absence. The Carrier denied the Claimant's request.

B. Position of the Parties

Carrier's Position: It is the Carrier's position that this claim should be denied in its entirety because: (1) The Claimant was not entitled to and had no demand right to work. Notwithstanding the fact that she was unassigned and available for work on the claim dates noted above, she did not accept the assignment, and, therefore, had no entitlement to benefits emanating from being assigned to a position. (2) Under the principle expression "unius est exclusio alterius," the fact that the parties were quite specific in their Agreement to except from the long-standing Rule and practice regarding sick leave entitlement for Guaranteed Extra Board employees, but did not provide a similar exception for others such as unassigned available employees, makes this issue ripe for negotiations. Accordingly, the Board should not pass affirmatively on this issue.

Organization's Position: While the Organization acknowledges that unassigned employees are not, per se, entitled to claim sickness benefits, the instant case is distinguishable in that on the days at issue, the Claimant was not an unassigned employee. In this regard, the Organization asserts that the Claimant

was, for all practical purposes, the incumbent of Position No. 174 and, therefore, had an entitlement to work. As such, the Organization maintains that this status grants to the Claimant the sickness benefits she claimed. In addressing the Carrier's "unius est exclusion alterius" contention, it is the Organization's position that the language of Rule 49(b) is clear on its face, thereby providing the Claimant the sickness benefits she now claims.

DISCUSSION

Rule 49 - Supplemental Sickness Benefits at paragraph (b) reads, in pertinent part, as follows:

"Subject to conditions hereinafter set forth, employees who have been in continuous service of the Carrier for the period of time, as specified, will be allowed in each year their daily rate of compensation for time absent account bona fide sickness on days when they would otherwise be entitled to work. . . ."

As an initial note, it is well settled by controlling authority that the Board has no power to impose principles of equity or justice. Our responsibility and obligation is to interpret and apply the provisions of the Agreement between the parties as written. Nor are we clothed with any authority to rewrite the Agreement in favor of either side to the dispute, for to do so would deprive them of the bargain struck.

In the instant matter, the Claimant functions much like a substitute replacing an incumbent employee on leave. Rule 18 provides that once an unassigned employee is called for work and accepts and works in an encumbered position, he/she is entitled to receive the pay associated with said position. The question before the Board is whether the Claimant was "entitled to work" on January 22 and 23, 2004. Following a careful review of the record evidence, the Board finds and concludes that she was not so entitled. In reaching this conclusion, the Board finds guidance in Third Division Award 13810. In that case, a clerical unassigned employee was called to protect a vacancy on Stenographer Position No. 313. On the date she was to report for the assignment, she laid off on account of illness. The Organization maintained, as it does in this case, that she was entitled to payment under the sick leave Rule. The Board disagreed, and held:

“The Board has held in a number of cases that an employee (E. g., Awards 2209, 2389, 13459 of Third Division.) is not assigned to a position until he begins work on such position. Thus as of September 6, 1960 Claimant Vaughan was not entitled to any benefits flowing from assignment to the temporary vacancy in question. On that date she was still an unassigned employee on furlough. It follows that she was not entitled to sick leave for said date.”

So to in the instant matter does the Board conclude that the Claimant was not entitled to any benefits flowing from the temporary vacancy for Position No. 174.

The Board reviewed the cases cited by the Organization, including Public Law Board No. 2945, Awards 49 and 95. We find them inapplicable because the facts in those Awards are substantially different from those before the Board in the instant claim.

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 25th day of January 2007.