

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20524
Docket Number CL-20599

William M. Edgett, Referee

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

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7483) that:

1. Carrier violated the controlling agreements between the Brotherhood of Railway, Airline and Steamship Clerks and the Union Pacific Railroad Company when, on November 20 and 27, 1972, December 4 and 11, 1972, Claimant was unable to report for service on each of the claim dates due to illness, and request for compensation due under Rule 42 - Sick Leave Allowance - was denied.

2. Carrier shall now be required to compensate Claimant for wage loss suffered due to the denial by the Carrier of Sick Leave allowance for eight (8) hours' pay at the pro rata rate of the position of Chief Clerk at Pendleton, Oregon for the dates of November 20, November 27, 1972, December 4 and December 11, 1972.

OPINION OF BOARD: Claimant, a furloughed employee, regularly relieved the chief clerk position at Pendleton, Oregon. She was called for service on the dates of claim, but was unable to work because of illness. The claim is for sick pay on the dates she was called but unable to perform service and is based on Rule 42 which reads:

"Rule 42 - Sick Leave Allowance.

(a) Subject to the conditions enumerated, employees who have been in the continuous service of the Company for the period of time specified will not have deduction made from their pay for time absent on account of a bona fide case of sickness:

(1) Upon completion of one (1) year of continuous service under these rules, a total in the following year of five (5) working days.

(2) Upon completion of two (2) years of continuous service under these rules, a total in the following year of seven and one-half (7-1/2) working days.

"(3) Upon completion of three years (3) or more of continuous service under these rules, a total in each year of service thereafter of ten (10) working days.

NOTE 1: (a) Until an employe has completed three (3) years of continuous service, each consisting of twelve (12) calendar months during which he is compensated by the Company for service and does not lose his seniority, his sick leave allowance and eligibility therefor shall be calculated from the date of his entrance into service.

(b) effective January 1st following completion of three (3) years of continuous service as specified in NOTE 1 (a), the calendar year January 1 to December 31 shall be the 'year of service' for sick leave purposes.

(c) During the period of transition from a service year to a calendar year as provided above, an employe shall be allowed not more than the equivalent of one (1) working day for each calendar month or major fraction thereof intervening between the date of completion of three (3) years of service and the commencement of the following calendar year, but in any event not more than ten (10) days, exclusive of any unused sick leave allowance accrued under Section (d) of this rule.

EXAMPLE: An employe completes three (3) years of service on July 1st. Regardless of whether he has received a sick leave allowance prior to July 1st, he will be allowed not more than six (6) working days, exclusive of any unused sick leave allowance accrued under Section (d) of this rule, between July 1 and December 31, i.e., the equivalent of one (1) day for each intervening calendar month.

NOTE 2: Where employes are regularly required to work their eight (8) hour assignments on their rest days and/or holidays, when they are absent due to sickness on such days, the designated holidays and assigned rest days will be considered as working days for the purpose of applying this rule; however, the absent employe will be allowed only straight time rate for the time lost on such days.

(b) It will be optional with the Company to fill, partially fill or blank the position of an employe who is absent account his personal sickness, or under provisions of Section (e) of this rule, and is receiving an allowance under this rule. If the Carrier elects to fill the position in its entirety, appropriate rules of the agreement will be followed. The use of

"other employees on duty and on other positions to perform a portion of the duties of the employee absent under this rule is permissible. Without prejudice to any rule in this Agreement, it is understood that an employee on a lower rated position who is used for four (4) hours or less on a higher rated position on a given day will be allowed the higher rate for four (4) hours. If used for more than four (4) hours, he will be allowed the higher rate for his entire tour of duty.

NOTE: Solely for clarification of this rule, 'other employees' is defined as those employees assigned to other positions and on duty at any work location at the point where the vacancy occurs.

(c) The employing officer must be satisfied that the sickness is bona fide. Satisfactory evidence as to sickness, preferably in the form of a certificate from a reputable physician, may be required in case of doubt.

(d) To provide a reserve against a prolonged sickness, an employee will accumulate sick leave allowance during any given year to the extent of his unused allowance which accrued under Section (a) of this rule the preceding year, or during his transition period. Any such accrued allowance will, in cases of bona fide sickness, first be applied against his absences before applying sick leave allowance accruing during the year in which the absence occurs.

NOTE: This rule does not comprehend any accumulated sick leave allowance from any year except the one immediately preceding the year during which the absence occurs.

(e) For the time necessary to attend funeral and handle matters related thereto, in the event of death of a spouse, child, parent, parent-in-law, brother or sister of an employee who has been in service one (1) year or more, unused 'sick leave' days which have accrued to him under this Agreement (not exceeding three (3) consecutive work days unless, in individual hardship cases, local agreement is otherwise reached) may be used, which will be deducted from the time which he would otherwise have available for time lost account personal sickness.

(f) No allowance will be made under this rule for any day on which the employee is entitled to compensation under any other rule or agreement.

"(g) Any supplemental sick allowance made in cases where the employee is entitled to other benefits, will be limited to the difference between any allowance he may be eligible to receive from any governmental agency account absent from work and the amount to which he is entitled under this rule. In computing such supplemental allowance, only the period during which the employee is accorded sick leave allowance as provided in this rule will be considered.

(h) An employee falsely claiming sick or funeral time will be subject to disciplinary action.

(i) Upon termination of employment relationship or retirement, the provisions of this rule will not be applicable."

The Organization relies on the content of the Rule, particularly the fact that the term employee has not been qualified and on several awards (Awards 19483 and 19633) of this Board. Carrier asserts that the practice on the property has been contrary to the position of the Organization and also asserts that the Rule is critically different from the one before the Board in the cases cited by the Organization. Carrier also says that the Rule clearly supports its position.

Since the awards cited by the Organization are of much importance in this claim, they will be considered first. Award 19633 followed Award 19483 and was on the same property so an examination of Award 19483 will suffice.

Carrier naturally wishes to avoid the effect of the award and so it attempts to distinguish it. Critical examination of the award, the involved Rule, and Carrier's argument has shown that it is not distinguishable in its essential holding.

In Award 19483, as in the instant claim, the parties had re-negotiated a former general rule to make it more detailed and comprehensive. In the case before us, that event occurred on July 15, 1967. In Award 19483, the facts showed that the practice on the property was to limit payment of sick pay to regularly assigned employees. Carrier strongly urges that the practice on its property is identical. The Organization takes issue with that point, but for our purposes we will assume, without deciding, that Carrier is correct as to the practice. Both rules are intended to supplement Railroad Unemployment Insurance. Section (G) of the rule here makes it clear that the 1967 revision was intended to, and did, accomplish this. Both rules are accurately described as a non-governmental plan for sickness insurance. In both claims the persons claiming under the Rule were on furlough and were unable to report when called "account sickness".

Carrier, since it knew it was going to meet a sustaining award under a similar rule, took pains to show that it should not apply here. In doing so it referred to Award 19483 as "a situation in which according to the language of the rule adopted Carrier had extended sick leave benefits to furloughed employees but sought to resist payment on the basis of a past practice established under a prior rule". That description is quite accurate when applied to Carrier's position in the case before the Board in this docket.

The rule change and past practice have been considered. The heart of the case is, of course, to be found in the language of the rule. The Board's holding in Award 19483 rested on its view of the rule before it, and was expressed in these words:

"We find this language and the other text of Rule 60 to be simple and straightforward. If we qualified the term 'employee' throughout Rule 60 by the term 'regularly assigned', we would in effect rewrite the Agreement which we have no power to do."

The principle holding in Award 19483 was that the parties had not qualified the word "employee" by stating, for example, "regularly assigned employee". Claimant there, as here, is an "employee" and to decide that the rule did not cover her, the Board would have to add a qualification to the rule that the parties did not.

The Board, in Award 19483, said that the prior contrary practice strengthened the Claimant's case because "it would be more plausible in the instant facts to preserve such prior practice by the express terms of present Rule 60, if such had been the intent of the parties." We concur.

Carrier's wish to distinguish its rule from the one before the Board when it ruled in Award 19483 must fail. All of the words, it is true, are not identical. The purpose of the rule is the same, and on the critical point, the use of the word "employee" without qualification it is identical. The logic and analysis of Award 19483 is applicable here and will be followed. It is followed not simply to achieve uniformity but from a belief in its soundness and from its applicability to the rule and facts before us.

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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 Employees involved in this dispute are respectively Carrier and Employees 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:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November 1974.