NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22914
THIRD DIVISION Docket Number CL-22630

Richard R. Kasher, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8640) that:

1. The Carrier violated the effective Clerks' Agreement when it refused to compensate Clerk M. A. Fornal for sick leave to which he was entitled in the year 1977;

2. The Carrier shall now compensate Mr. Fornal for fifteen (15) days' pay as sick leave for the year 1977.

OPINION OF BOARD: This is a claim for fifteen (15) days sick leave for Claimant M. A. Fornal. Mr. Fornal has a seniority date of April 6, 1960. On September 23, 1976 he became ill and was removed from active service by the Chief Surgeon, who directed him to submit to a psychiatric examination. After January 1, 1977, Claimant considered himself entitled to sick leave compensation and requested payment for fifteen days pursuant to Rule 56, which reads in pertinent part as follows:

"Rule 56 - Sick Leave

(a) Employes covered by this agreement shall be allowed sick leave with pay during each calendar year as follows:

1. Employes who on January 1st have been in service one (1) year and less than ten (10) years, ten (10) working days.

2. Employes who on January 1st have been in service ten (10) years or over, fifteen (15) working days.

* * *

(d) Employes who, during any calendar year do not use all of the sick leave days which they are entitled to under the

"applicable provisions of this rule, will be compensated for those days they have not used. Compensation will be allowed at the rate of the position they occupy, or in the case of an unassigned employe, at the rate of the last position worked prior to December 15 of any calendar year."

Rule 56 was negotiated as part of a Mediation Agreement, N.M.B. Case No. A-9085, effective November 16, 1972. Prior to that date, the sick leave provision read as follows:

"Where the work of a regular employe is kept up by other employes without additional cost to the Railway Company, a clerk, who has been in continuous service as such one year or more, will be allowed compensation for time absent account bona fide sickness on the following basis:

(a) Clerks who on January 1st have been in service continuously one (1) year and less than two (2) years, one (1) week (five (5) working days).

(b) Clerks who on January 1st have been in service continuously two (2) years and less than three (3), (seven and one-half (7½) working days).

(c) Clerks who on January 1st have been in service continuously three (3) years or over, two (2) weeks (ten (10) working days).

"Supervising officer must be satisfied that the sickness is bona fide, and that no additional expense is incurred by the Railway Company. Satisfactory evidence as to sickness in the form of a certificate from a reputable physician, preferably a Company physician, will be required in case of doubt.

"Employes absent from work a fractional part of a day due to sickness may have said fractional part of the day absent computed on the basis of the closest whole hour or hours charged against their annual sick leave provided herein."

The deletion of the word "continuous" from the phrase "in continuous service" found in the predecessor Rule was, in part, dispositive of a similar dispute, by Referee Dana E. Eischen:

"Upon consideration of the record as developed on the property and the authorities cited by the parties, we are convinced that Carrier violated Rule 56 in denying Claimant her sick leave for 1973. The core of this dispute lies in a determination whether Claimant as of January 1, 1973 had been 'in service ten (10) years or over' as that phrase is used in Rule 56. The words of the rule say 'in service' and nothing more; there is no express requirement that Claimant be on active duty nor that she have performed compensable service in the preceding year. Carrier argues that these additional qualifications must be read into the rule because of the mutual intent of the parties as evidenced by past practice. This reasoning is faulty on two grounds: 1) In the face of clear and unambiguous language we may not look to contrary practice and 2) The so-called practice was under the old rule which required the employe to have been 'in service continuously' to qualify for sick leave. If Carrier wishes to return to the old rule or obtain modification of Rule 56, it must seek to do so at the bargaining table. We cannot re-write Rule 56 in the manner sought by an Award of this Board, even in the face of unanticipated and possibly inequitable situations.

"Claimant was on a leave of absence status as of January 1, 1973, her employment relationship with Carrier had never been severed since 1946 and, for the purposes of Rule 56, she had been 'in service' for over ten years. See Awards 5201, 16535 (Supplemental); Awards 14 and 15 of SBA No. 269. Accordingly, we find that Carrier violated the controlling Agreement when it denied her a sick leave day on November 29, 1973 and later refused to compensate her for her unused sick days in 1973. The claim shall be sustained."

The thrust of the Organization's argument is that Referee Eischen's award is res judicata of the instant dispute:

"It is the position of the Employes that this dispute has already been decided by Award No. 21478 (Docket CL-21352) of your Honorable Board. While the circumstances in this case are not identical to those found in that Docket, the issues are identical."

In Award 21478, the Claimant had been on sick leave from October 7, 1963 until October 1, 1973, almost ten years. She returned on October 1, 1973 and was ill on November 29, 1973. Her claim was for payment of one day sick leave for that date and for fourteen days residual sick leave pursuant to Paragraph (d) of Rule 56. In the instant case, Claimant worked

for the Carrier from January 1, 1976 until September 23, 1976, when he became ill.

The Carrier argues that acceptance of the Organization's reasoning results in a definition of "in service" as requiring nothing more than an employe's presence on the seniority list. The Carrier urges that Rule 56 must be read in conjunction with other rules in the Agreement in order to reach the correct interpretation of this rule. Several rules in the parties' Agreement were cited as having relevance to the term "service," namely Rules 3, 4, 7, 8, 11, 14, 18, 19, 42 and 44. The Carrier also asserts that Referee Eischen did not address this contention in Award 21478 due to a procedural mishap:

> "It should be noted that another theory of the case, i.e., that interpretive guidance to the words 'in service' in Rule 56, may be found in Rules 4, 7, 8, 11, 14, 18, 19, 42 and 44 was never raised on the property but was presented de novo at Board level. Likewise certain casuistic exercises in English grammar and an unfounded insistence that the Organization had 'conceded' by implication the crux of the dispute were raised for the first time at the appellate level. Under clearly established authority regarding our scope and jurisdiction none of these belated arguments may be considered by us."

So, the thrust of the Carrier's argument is that the phrase "in service" cannot be considered in a vacuum. The Carrier asserts that Referee Eischen might have reached a different result had he viewed the question from the perspective of the four corners of the Agreement.

The Carrier is correct in its assertion that the term "in service" cannot be analyzed in a vacuum. However, the phrase has a variety of meanings, depending upon the context in which it is used. Therefore, a definition from Black's Law Dictionary or the Oxford Unabridged is simply insufficient. In Rule 4, cited by the Carrier, for example, the word "service" is used synonymously with an employment relationship. Rule 19 uses the term "service" in reference to furloughed employes and their return "to service," i.e., to full-time employment.

So how do we remove ourselves from the vacuum? The answer is by applying the facts to the meaning of the phrase within the context of Rule 56, since there is no indication by contract language or intent that the parties linked the meaning of the term "service" in Rule 56 to any other rule in their Agreement. By applying the facts of the instant dispute

to Rule 56, the result reached is identical to the result reached in Award 21478.

Accordingly, the claim should be 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

The Carrier violated Rule 56 by refusing 15 days sick leave to Claimant.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of July 1980.