NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23065
Docket Number CL-22742

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Seaboard Coast Line Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8664) that:

1. Carrier violated the Agreement(s) when on February 27 and 28, 1977, it failed and refused to allow Clerk-Operator R. L. Hughes, Rockport, Florida, sick pay as provided in the Agreements.

2. Carrier further violated the Agreement(s) when it deducted from first period April, 1977, payroll sick pay that had previously been allowed Claimant for February 24, 1977, March 6, 1977 and March 7, 1977.

3. Account these violations, Carrier shall compensate R. L. Hughes $44.35 for each date, February 27 and 28, 1977, and shall reimburse Claimant $44.35 for each date, February 24, March 6 and 7, 1977, which has been deducted from his pay, total amount due Claimant $221.75.

OPINION OF BOARD: Although the Claimant is the regular incumbent of a Clerk-Operator Position, Thursday through Monday, he also works as an Extra Train Dispatcher when needed.

He marked off sick from his regular Clerk-Operator assignment on Thursday, February 24, 1977. When he returned to work on February 25, he was instructed to work as Assistant Chief Dispatcher.

On February 27 and 28, the Claimant was scheduled to work as a Clerk-Operator, however, he marked off. On March 1, he was called to work as a Train Dispatcher.

On March 6 and 7, 1977, the Claimant was scheduled to work as a Clerk-Operator, but he marked off sick on those days. The Employe was compensated for sick leave for February 24 and March 6 and 7, however he was notified that he had not worked sufficient days in 1976 as a Clerk-Operator to qualify him for sick leave under the BRAC Agreement, as it related to February 27 and 28. Moreover, he was advised that the sick leave that he was allowed for February 24 and March 6 and 7 was paid in error and was to be deducted from his future pay.

The Organization asserts that the Carrier's action is in violation of Rule 49, which provides a supplemental sickness benefit to employes based upon length of service.

The Carrier pointed out that in the preceding year, the Claimant performed service for the Company as an Extra Train Dispatcher on all but 35 days, during which he worked as a Clerk-Operator; and that he was allowed vacation and all other benefits for 1976 which accrued under the Dispatcher's Agreement. According to the Carrier's January 31, 1978 declination letter, the Dispatcher's Agreement does not provide for sick pay for Extra Dispatchers and thus, it was proper to refuse the compensation. The Carrier asserts that the Employe cannot have it both ways, and that he cannot enjoy the benefits under the Dispatcher's Agreement without assuming the less desirable provisions.

In this regard, we note that Rule 49 requires that in order to qualify for the benefits of that rule, an employe must have rendered compensated service of not less than 75 days in the preceding calendar year. Thus, the fact that this Claimant did not perform that period of service under the BRAC Agreement renders him ineligible for the sick leave provided under said Agreement, according to the Carrier.

We have noted that the Employe has been assigned under the Dispatcher Agreement in 1977 and thus, commenced to earn sick leave benefits thereunder for the period of time subsequent to this claim. However, that factor should not have a bearing on our decision in this case.

Essentially, we are called upon to decide whether or not the 75 days of compensated service refers to service with the Carrier, or if it refers to service under the BRAC Agreement. Both sides have cited ample awards as precedent to its contentions in that regard. We do confess that the issue is not clear cut and susceptible of easy determination. However, in the final analysis, we continue to return to the language of the rule which is before us. Rule 49 states, in Paragraph (b), that subject to certain conditions employes who have been in "continuous service of the Carrier" for the period of time as specified will be allowed certain sick leave compensation. Thereafter, the rule refers to length of service and benefit days per year, and immediately thereafter the Agreement contains the qualifying language which includes the reference to 75 days.

Thus, it appears that the parties who negotiated the Agreement were talking in terms of continuous service "with the Carrier" and not merely service under the specific Agreement. Such a conclusion is certainly not inconsistent with potential equities when one realizes that an individual such

as this Claimant would be deprived of benefits - under the Carrier's assertion - merely because he had been promoted to a higher position for a significant number of days.

Upon a consideration of the entire record, we are inclined to sustain the claim.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 14th day of November 1980.

DISSENT OF CARRIER MEMBERS
TO
AWARD NO. 23065, DOCKET NO. CL-22742
(Referee J. Sickles)

It is well known in this industry that the jurisdiction of this Board is limited to interpretation and/or application of agreements made by and between the parties signatory thereto.

Rule 49 - Supplemental Sickness Benefits - is a rule made by and between this Carrier and those of its employees represented by B.R.A.C. and applies to those employees and no others.

For purposes relevant to this dispute, Rule 49 provides for a maximum of 85% of daily rate of compensation on 15 days for employees having 15 years or more of service.

To qualify, an employee must render not less than 75 days' compensated service in the preceding calendar year. Because Rule 49 applies only to clerks, the required 75 days' service in the preceding calendar year must be service performed under the Clerks' Agreement. To determine otherwise would result in certain employees receiving sickness benefits in excess of the maximum 15 days per year provided for in the Agreement.

This employee received 15 days' sickness benefits during 1977 per the provisions of another agreement (Train Dispatchers'). This Award requires this Carrier to pay 5 additional days' sickness benefits which, of course, exceed the maximum allowance provided in either agreement.

This claimant worked only 35 days as a clerk-operator during 1976. All other service performed in 1976 was as a train dispatcher. Vacation and other benefits for 1976 including the higher dispatcher rate of pay were enjoyed by this claimant.

This Award apparently connotates that any employee holding clerk seniority need not work a single day in a clerk position and could qualify for sickness benefits under the Clerks' Agreement so long as service is performed on not less than 75 days in the preceeding calendar year on positions represented by another organization or on positions not represented by any organization.

There is inequity here in that via this Award this claimant will receive windfall allowances because of combining benefits of two agreements for employees represented by separate organizations when such benefits are not afforded other employees. This employee should not have been treated any differently than an employee working solely under the Clerks' Agreement or the Dispatchers' Agreement.

Summarily, this employee did not qualify for sick benefits under the terms of the Clerks' Agreement; therefore, he should not have been allowed benefits under that agreement.

The decision rendered in this matter is not supported by the agreement language and is not consistent with the principle of common ordinary meaning of the language used.

The decision rendered in this Award is certainly inconsistent when one realizes that an individual such as this claimant would reap benefits not intended merely because of his seniority status under the Clerks' Agreement, while other employees working full time under the Clerks' Agreement receive less.

Awarding of benefits under two agreements is clearly contrary to the idea that an employee cannot enjoy the benefits of two agreements; he must work under the regulation of one or the other, but not both.

Therefore, we are compelled to so record by issuing this dissent.

P. E. LACOSSE

W. F. EUKER

J. E. MASON

J. R. O'CONNELL

P. V. VARGA