PUBLIC LAW BOARD NO. 2263

AWARD NO. 19

CASE NO. 13

PARTIES TO THE DISPUTE:

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

and

Consolidated Rail Corporation

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood (CR-0404) that:

(a) The Carrier violated the Rules Agreements effective February 1, 1968, Agreement dated April 19, 1974, and the Interim Rules Agreement effective April 1, 1976, particularly Rule 4-I-1 and others in effect between the Brotherhood of Railway, Airline and Steamship Clerks and itself when it denied sick pay to Ms. W. Weatherholt for April 15, May 4 and 6, 1977. Doctor's excuse attached for your ready reference. Ms. Weatherholt is a monthly rated clerk, rate of $904.42 (beginners rate) on position #1534, Sort and Mail. Ms. Weatherholt is regularly assigned to this position and has a seniority date of May 28, 1975. This violation occurred in the office of Mr. R. Reschke, Manager Billing Center, Detroit, Michigan.

(b) The Carrier now be required to compensate Ms. Weatherholt (3) day's pay at the monthly rate of $904.42 for the above named dates inorder to terminate this claim.

OPINION OF BOARD:

The facts of this case are not contested and the matter comes to us as a dispute over the interpretation and application to those facts of Rule 4-I-1 Sick Leave, which reads in pertinent part as follows:

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Rule 4-I-1 Sick Leave

(a) Subject to the conditions enumerated, an employe who has been in the continuous service of the Company for the period of time as specified, will be granted an allowance not in excess of a day's pay at his established rate for time absent on account of a bona fide case of sickness:

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

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

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

Note 1: Until an employe has completed three years of continuous service, each consisting of 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 therefore shall be calculated from the date of his entrance into service.

The unrefuted record establishes that Claimant entered service of the Carrier on May 28, 1975. She was furloughed from June 20, 1975 to August 11, 1975. Thereafter, she worked until December 22, 1975 when she was granted an unpaid medical leave of absence. She remained on medical leave for approximately 15 months and did not return to service until March 9, 1977. During the time she was on leave her seniority continued to accrue and she displaced a junior employe upon her return to service.

During the period of claim, Claimant was assigned to Position #1534, Sort and Mail, Detroit System Office, 7:30 A.M. to 4:00 P.M., thirty minutes lunch, rest days of Sunday and Monday, rate of $904.42. On April 15, May 4 and 6, 1977, Claimant was absent from duty account of illness. Upon her return, she presented a doctor's certificate for each date. By letter dated May 25, 1977, claim was submitted in Claimant's behalf under the provisions of Rule r-I-1, claiming a day's pay for each date listed above.

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By letter of March 14, 1978 Carrier's Senior Director-Labor Relations made a final denial of the claim, reading in pertinent part as follows:

> Claimant worked for the Carrier a total of 96 days to March 9, 1977, and with the time worked subsequent to this date she still had under one year of continuous service.
>
> Rule 4-I-1 requires an employee to be in continuous service of the Carrier for one year to receive five working days the following year; two years for 7½ working days; and three years for 10 working days.
>
> Note 1 in 4-I-1(a)-3 clarifies the term "continuous service" by defining it as the years an employee is compensated by the Company for service. Your position that Third Division Award 16591 is applicable is incorrect, as the claimant in that Award had a seniority date of March 3, 1948, and had the required continuous service with the Carrier.
>
> Accordingly, claim is denied.
>
> Very truly yours,
>
> J. R. Walsh
> Senior Director-Labor Relations

Thereafter, the matter was appealed to this Board for disposition.

As the well-developed record and submissions on the property show, there is a division of authority among the reported decisions concerning the meaning of the phrase "in the continuous service of the Company". Specifically, two cases have defined "continuous service" to mean implicitly the day-to-day performance of work without a break. Awards 3-5201 and 3-13688. The majority view, however, has equated "continuous service" with maintenance of the employer-employe relationship without severance, irrespective of whether the employe actually performed compensated duties throughout the period without

missing a day from work. Awards 3-5469; 3-16591; 3-16535; 3-21478; Awards 14 and 15 of SBA No. 269. In the absence of additional qualifying language or convincing evidence of a contrary practice by parties under a particular contract, we favor the view expressed in the latter line of cases, e.g.:

In Third Division Award No. 16591 (McGovern) the Board held:

"Carrier in furtherance of its position propounds the argument that the word continuous is the key word in the cited rule and that since its ordinary and generally understood meaning is without break, cessation or interruption, Claimant has no basis for his action in this case.

"We have reviewed and considered the arguments advanced by both sides in this controversy. The cited rule, which governs the disposition of this case is clear, precise, unambiguous and in our judgement not susceptible to the interpretation which Carrier urges upon us. Claimant, although absent from his assignment because of illness, was for all intents and purposes still an employe of the Carrier. The relationship was that of employer-employe, the best argument for this being his subsequent return to duty without any question being raised by Carrier as to his status. His seniority was unimpaired and unaffected by his prolonged illness. He was therefore in continuous service as those words were meant to be construed by the parties. To hold otherwise would mean that one day's illness would interrupt an employe's service, thus effectively rendering sick leave provision of the contract nugatory. Further, Claimant remained on the rolls of the Carrier and having had far in excess of five years service, was entitled to 10 days sick leave beginning on January 1. It was not within the contemplation of the contracting parties than an employe must actually perform his duties at the beginning of the calendar year as a condition precedent to qualifying for sick leave. If this was the intent of the parties, language could have been inserted in the contract to specifically state that intent. The language adopted militates against such an intent. We will accordingly sustain the claim. (See Awards 14 and 15 of Special Board of Adjustment No. 269)"

In Third Division Award No. 16535 (McGovern) the Board said:

"The rule upon which the claim is based is clear and unambiguous. There is no question that the Claimant was in the continuous service of the Carrier, as was evidenced later by granting of his vacation with pay and subsequent return to duty status. Carrier has candidly admitted this interpretation as being correct when it stated that if an employe was ill the last few days of a given year and his illness continued for a few days into the next year, they would not deduct from his pay. To submit that a man, employed from 1943 to 1964 is not considered as being 'in continuous service' of the Carrier as envisioned by the rule, is a proposition to which we cannot subscribe. We will sustain the claim."

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In Third Division Award No. 21478 (Fischen) the majority held:

"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 employes 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."

We find no additional qualifying language in Rule 4-I-1(a)(1) which would dictate a result other than that followed in the majority line of cases supra. Carrier suggests that such language is found in Note 1 to Rule 4-I-1(a)(3) which must be imputed back to the phrase "continuous service" in Rule 4-I-1(a)(1). Clearly, the condition subsequent set forth in Note 1 applies to attainment of the ultimate sick leave benefit level of ten working days granted in Rule 4-I-1(a)(3). But both by context and its own terms, that condition does not govern attainment of the two previous benefit levels set forth at Rule 4-I-1(a)(1) and (2). Thus, we conclude that Note 1 is not dispositive of this case.

Claimant herein sought three (3) working days of sick leave in April and May 1977. At that time, she had completed in excess of one (1) year of continuous service, including the furlough and medical leave of absence time,

since her date of hire on May 28, 1975. She thus fulfilled the requirements of Rule 4-I-1(a)(1) and Carrier erred in denying her request for sick leave. We shall sustain the claim.

AWARD

Claim sustained. Carrier shall comply with this Award within thirty (30) days of issuance.

E. T. Lynch
Employe Member

E. A. Welsh
Carrier Member

Dana E. Eischen, Chairman

Date: Dec. 8, 1981