Docket CR-3562

Special Board of Adjustment
No. 1011

Parties to Dispute

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| Transportation Communications International Union | ) | Case No. 25 |
| vs | ) | Award No. 25 |
| Consolidated Rail Corporation | ) | |

STATEMENT OF CLAIM

1. Carrier violated the Rules Agreement effective July 1, 1979 particularly Rule 10 and other Rules when Carrier denied Claimant's request for sick pay while he was on continuous sick leave due to a heart condition. Claimant because sick on December 20, 1985 and remains off to this date. Claimant was paid sick time for the dates of December 20-24, 27-29, 1985. He was paid a personal day December 30, 1985. On or about December 30, 1985 Claimant called the Carrier and advised it that he would be off on sick leave for some time yet and he requested that he be paid sick pay due him for the year 1986. At that time it was agreed to pay him. However,upon instructions from payroll the Carrier officer then informed the Claimant that he would have to perform one day's work in 1986 before he could be credited with his 1986 sick days. This is an error. Further, the Carrier also erred when it paid the Claimant a sick day instead of holiday pay that he was entitled to for December 24, 1985.

2. Claimant, R. S. Carnahan, should be allowed eight (8) hours' pay for the December 24, 1985 Christmas Eve holiday and one day be added to his sick leave allotment for 1985 account of the Carrier paying him sick pay instead of holiday pay.

3. Claimant, R. S. Carnahan, also be allowed eight hours' pay for ten days in accordance with Rule 38 of the Agreement, beginning with January 3, 1986 account of the above listed violation.

4. Award 30 of Public Law Board No. 2934 supports the Organization in this claim.

5. Claim is presented in accordance with Rule 45 and should be allowed as presented. Please advise as to the pay period that this claim will be allowed.

6. In addition to the amounts claimed above, interest at the rate of 14%, compounded daily, will be paid at the time this claim is resolved.

FINDINGS

The Claimant suffered a heart attack on December 20, 1985. He requested sick pay and was paid as follows. He was paid a personal day on December 30th; he was paid for sick days on December 20-24, 27-29th; he was paid holiday pay on December 25 & 31st of 1985. In 1986 he was paid vacation time from January 3rd and all work days of that month up through January 28th. January 1, 1986 was a paid holiday. The Clamant returned to active duty on January 31, 1986.

On January 31, 1986 the Chairman of Local 735 filed a claim on behalf of the Claimant which is outlined in the Statement of Claim cited in the foregoing.

In denying the claim on property the Carrier admitted, however, that an error had been made when the Claimant was paid sick leave on December 24th, in lieu of holiday pay, and a personal day on December 30th, in lieu of sick pay. The position of the Carrier is that, once the error had been admitted, it results in no monetary changes to the Claimant. The Board agrees. Let the record here show that payment for December 24 should have been for a holiday; and payment for December 30th should have been for a sick day in the year 1985. No. (2.) of the Statement of Claim is thus resolved in this manner.

Resolution of No. (3.) of the Statement of Claim, however, involves more than clerical errors. When the claim was filed, it was filed on grounds that the Carrier's policy dealing with implementation of the Sick Leave Rule was in error. The provisions at bar are the following.

"RULE 38 - SICK LEAVE

There is hereby established a non-governmental plan for sickness allowance supplemental to the sickness benefit provisions of the Railroad Unemployment Insurance Act as now or hereafter amended. It is the purpose of this sick leave rule to supplement the sickness benefits payable under the Act and not to replace or duplicate them.

(a) Employes in service prior to May 1, 1979 will be granted sick leave allowance in accordance with the provisions of former Penn Central Rule 4-I-1 attached as Appendix 12, or, if they so desire, such employes may elect to be covered by the sick leave provisions otherwise set forth in this Rule. Any such employe making this election must so notify his employing officer in writing on or before December 31, 1979, and, if such election is made, it shall be irrevocable. Sick leave under former Penn Central Rule 4-I-1 shall hereafter be paid in the current payroll period."

"RULE 4-I-1 - SICK LEAVE

(FORMER PENN CENTRAL SICK LEAVE RULE)

(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.

.....

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.

The Organization arques that under Rule 4-I-1(a)(3) the Claimant was eligible for his ten (10) days of sick leave in 1986 by the fact that he had completed three years or more of continuous service prior to the first dayof that year and that he was eligible for such sick leave pay from the first day whether he had worked during that calendar year or not. According to the Organization, there is no other requirement for sick leave eligibility under

the Rule at bar.

The Carrier does not agree. Its position on this Rule apparently goes back to a directive issued by its Labor Relations Department in 1982 which states the following:

> "...If an employee is off sick on his last scheduled work day of a calendar year and received sick pay for such day, he would be entitled to receive sick pay for the continued illness from the new year's entitlement; however, such payment only will be made retroactively upon his return to active service....".

According to the Carrier, even though it established this interpretation of the Sick Leave Rule in 1982 as a matter of policy it knows of no other interpretation which applied since 1968 and further, the Organization has not challenged such implementation of the Sick Leave Rule in the past. Therefore, the employees have "...acquiesed by their silence" to the correctness of the Carrier's interpretation.

The Board is sensitive to arguments dealing with prior practice, as mirror of mutual understandings, when it is question of ambiguous or unclear language of contract. Absent the latter, however the language used by the parties to frame their intent must have priority. A close reading of Rule 4-I-1(a)(3) shows that the guiding language to resolve the instant dispute is the following: "...a total in each year of service thereafter...". Either an employee is in the service (or employment) of a Carrier or not. The Carrier states that to be in "service" means to actually be on assignment. Such narrow construction is not common or widespread in this industry, nor is it in the mind of this Board even correct. Was 1986, at the time of the filing of the claim, a service year for the Claimant? Did it, at that time, represent an additional year of "...continuous service"? What is at stake is the continuation of employment status to use yet other terms. While not totally on point because of differing circumstances, and because these Awards dealt with old Rule 66 and its version of the Sick Leave, this

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Board can but agree with arbitral precedent which has established that:

> "...(the vacation) rule upon which the claim is based in clear and unambiguous. There is no question (in the case cited as in this one) that the Claimant was in 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 to be correct when it stated that if an employee (applicable to this case) 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..." (Third Division 16535).

The old Rule 66 in question states, in pertinent part, that:

> "An employee who has been in the continuous service of the Carrier three years or longer, ten (10) working days...".

The Organization further argues that Award 30 of PLB 2945 issued in 1984 which involved these same parties and the same Rule 4-I-1 of the former Penn Central, supports its position. The Board has studied this Award and must agree in part with the Carrier that this case involves a substantively different matter than the instant case because the former deals with sick leave rights while an employee is in a bumping status. The instant case deals with an employe who had not yet returned to work the following year after being sick the preceding one. What the two cases do have in common, however is that they both deal with different aspects of what continuous service means. In Award 30 the Board concluded that even in situation of bumping the rule, as written, does not add up to "the proposition that entitlement to sick allowance requires an employee to own a regular position at the time of the sickness underlying the request for sick allowance". The Board goes on to say that if the parties wanted such deliminations in the Rule they could easily have formulated them. The same is true for employment status in the instant case. The Board must conclude that the Carrier, in the instant case, has proffered an interpretation of the Agreement's Sick Leave Rule which is not supported by language of the Rule itself.

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On merits, the claim for ten days of Sick Leave for 1986, under the applicable Rule, is sustained. Factually speaking, however, the record shows that the Claimant was subsequently paid nine (9) sick days in 1986 on various dates from March 6th to September 18th, and that he carried one (1) sick day over into 1987. Request for relief under (3.) of the Statement of Claim, therefore, cannot be honored.

AWARD

The claim is sustained only in accordance with the Findings.

Edward L. Suntrup, Neutral Member

R. O'Neill, Carrier Member

J. R. Jenkins, Employee Member

Date: 9-8-89