

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/ Division of TCU
(Southern Railway Company

STATEMENT OF CLAIM:

1. That the Southern Railway Company violated the terms and conditions of the controlling Agreement, specifically Rules 58 and 34, when they failed to compensate Carman D. T. Johnson for the time (110 days) that they held him off from work after his doctor had released him to return to work.

2. That accordingly, the Southern Railway Company now be ordered to provide relief in the amount of pay for one hundred and ten (110) days' pay at the regular Carman's rate; this includes all work days between September 5, 1989 and January 5, 1990.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The sequence of events in this Claim is as follows:

"August 7, 1989 -- Based on swelling of his arm and hand, Claimant is advised by Carrier doctor that he must be confined to light duty. Since there is no light duty, Claimant is sent home.

September 1 -- After several visits, Claimant's doctor releases Claimant to return to work on September 5.

September 6 -- After examination, Carrier Medical Director advises Claimant he is medically disqualified from duty until his condition improves and he is re-examined.

September 27 -- General Chairman writes to Carrier requesting Claimant's examination by a neutral doctor under Rule 58.

October 25 -- Carrier denies use of Rule 58 procedure as 'inappropriate' since there is 'no conflict of medical diagnoses'.

November 4 -- General Chairman rejects Carrier response, stating that Claimant's physician 'released him without restrictions.'

November 10 -- Carrier acknowledges Organization position and offers to discuss case further.

December 22 -- Medical Director advises Claimant of receipt of information from Claimant as to his condition and schedules a further examination.

December 28 -- Medical Director receives report of re-examination and advises Claimant he may return to work.

January 4, 1990 -- General Chairman advises Carrier he has learned of Claimant's imminent return to work and states:

"Therefore, upon Mr. Johnson's return to work, this dispute will be settled and I will close my file on same."

January 5 -- Claimant returns to work.

January 29 -- General Chairman initiates Claim for lost time owing to Carrier's failure to follow Rule 58 procedure:

Rule 58 provides in pertinent part as follows:

'When the organization desires to protest the removal of an employee from service because he has been physically or mentally disqualified by the Chief Surgeon, the case shall be handled in the following manner:

(a) The General Chairman may file with the Director of Labor Relations a written protest of the disqualification . . . within thirty (30) days. . . . Should the medical findings of the employee's doctor conflict with those of the carrier's doctor, the management and the employee shall [arrange for examination by a neutral doctor].

. . .

(c) If the neutral doctor decides that the employee is fit to continue in service and properly perform the employee's normal duties, such neutral doctor shall also render a further opinion, as to whether such fitness existed at the time the employee was withheld from service. If the neutral doctor concludes that the employee possessed such fitness when withheld from service, the employee will be compensated for actual loss of normal earnings during the period withheld for each working day withheld from assignment and will not be deprived of any other contractual benefit to which he may be eligible."

The Carrier argues that the Claim is barred from consideration by the Board, contending that the General Chairman's January 4, 1990 letter stated that "the dispute will be settled" upon the Claimant's return to work. The Carrier contends that the later Claim for pay is simply an attempt to reopen a closed matter. The Organization, however, points out that the only "settlement" was the need to have a neutral doctor sanction the Claimant's return to work. Since the Claimant did return, the Organization contends that nothing further was required to achieve such return. The Organization further contends that the January 29, 1990 Claim was based on the Carrier's alleged Rule violation in failing to follow Rule 58 in the first place.

The Board concludes that the Carrier has no convincing basis to argue that the matter has been fully resolved. As to the merits of the matter, the Board further does not agree with the Carrier that there was no "conflict" in the "medical findings" of the Claimant's doctor and the Carrier's Medical Director. Despite agreement on certain symptoms, the doctors obviously disagreed on the Claimant's capacity to perform his normal duties. This is the essence of Rule 58's purpose. The Carrier ignored this at its own peril. Rule 58 also provides for retroactive pay in the event of specific findings by a neutral doctor. What such findings may have been cannot, of course, be determined now. However, failure of the Carrier to agree to the Rule 58 procedure requires a remedy and that requested in the Claim is appropriate.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1992.