

The Second Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

Parties to Dispute: (System Federation No. 121, Railway Employees'
(Department, A.F.L.-C.I.O.
((Carmen)
(
(The Texas & Pacific Railway Company)

Dispute: Claim of Employees:

1. That the Texas and Pacific Railway Company withheld Carman H. Cox from service without just and sufficient cause during the period from May 20, 1974, to May 29, 1974.
2. That, accordingly, the Texas and Pacific Railway Company be ordered to compensate Carman H. Cox for a total of forty (40) hours at the pro rata rate: eight (8) hours for each of the five (5) days he was unjustly withheld from service.
3. Additional compensation of eight (8) hours at the overtime rate May 27, 1974 legal holiday.

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 employe 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.

Claimant had been out of service due to an illness and gall-bladder surgery. On May 20, 1974, he reported for duty with a release from his personal physician, which stated that he was able to return to work on that date, and a local Company physician who examined him on May 20, also found him physically fit to return to duty. Thereafter, the medical reports were forwarded to Carrier's Chief Medical Officer in another city.

The Chief Medical Officer signed a return to service statement on May 28, 1974, and Claimant returned to duty on May 30, 1974.

Claimant relied upon Second Division Award 6704 (involving this Carrier) and submitted a claim seeking reimbursement for the period May 25 through May 29, including premium pay for May 27 - a holiday.

At this stage of the development of the law on this topic, it is hardly open to question that a Carrier has a right to assure that an employee who has been physically afflicted is properly qualified to return to service, nor do we read the Organization's contention as dispacing that concept. It is equally clear that a Carrier can reasonably delay a return to service so as to obtain the judgment of its own Chief Medical Officer.

Although the Claimant asserts that he was capable of returning to work on May 20, 1974, he seeks pay from May 25; which computation is based upon the conclusions of Award 6704 which stated, in essence that in a case where a personal physician and a local Carrier physician concurred in the recommendation to return an employee to duty, and those recommendations were forwarded to Carrier's Chief Medical Officer; said officer must act within a reasonable time, and five days was such a reasonable time.

Although this Referee noted, in Third Division Award 20344:

"...nonetheless, we are compelled to note that each individual circumstance must be considered upon its own individual merits."

nonetheless, inasmuch as Award 6704 resolved a dispute between this Carrier and a shop craft employee, its conclusions should control, absent a compelling reason to the contrary, or a showing of a significant factual divergence.

As noted, the Claimant's presentation of the matter on the property clearly shows that his claim is based upon Award 6704. Although the record makes repeated reference to "5 days" during which administrative procedures should be completed, we do not read Award 6704 to be as restrictive as the claim suggests. In that dispute, the personal physician and a Company physician concluded, on March 13, 1972, that the Claimant therein was able to return to work. The Award states that Carrier was obligated to make its determination "...within 5 days of March 13, the date he returned to service, or by March 18, 1972. Since Carrier failed to do so, we will allow the claim for the period March 19,..." (underscoring supplied). Thus, for purposes of consistency, the claim period should commence on May 26, 1974, rather than May 25.

The record is clear that the final two (2) days of the claim period, i.e., May 28, and May 29, were Claimant's rest days and we find no justification for reimbursement concerning those days. Although the record supports a conclusion that Claimant, if he had been returned to service pursuant to this Award, would have been compensated at the pro-rata rate for the holiday (May 27, 1974), no basis has been presented for this Board to conclude that he would have been entitled to any punitive pay for that day. Accordingly, we will sustain the claim to the extent of reimbursement at the pro-rata rate for May 26, and May 27, 1974.

A W A R D

Claim sustained concerning May 26, and 27, 1974, as stated in Findings, above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By: Rosemarie Brasch /ae
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 10th day of September, 1976.

CARRIER MEMBERS' DISSENT AND CONCURRING OPINION TO AWARD 7131

DOCKET 6934, REFEREE SICKLES

Matters of record discussed in the memorandum submitted to the Referee by the Carrier Members indicated that this entire claim was invalid; we, therefore, dissent to that portion of the award which sustains part of the claim.

S. I. Naylor

Felton

G. W. Gordon

P. C. Carter

W. B. Jones