Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7612
SECOND DIVISION Docket No. 7566
2-PFE-CM-'78

The Second Division consisted of the regular members and in addition Rebecca Kolf Veltin when award was rendered.

Parties to Dispute: (Railway Employes' Department, A. F. of L. - C. I. O. - Carmen
(Pacific Fruit Express Company

Dispute: Claim of Employes:

1. That the Pacific Fruit Express Company violated the controlling agreement, particularly Rules 21(c), 15 and 37, when they unjustly withheld Carman Charles P. Moss from service beginning with doctor's release dated June 30, 1976.

2. That accordingly, the Pacific Fruit Express Company be ordered to compensate Carman Moss beginning July 2, 1976, as follows:

a) Full seniority rights;

b) Full vacation rights;

c) Sick leave and all other benefits that are a condition of employment maintained;

d) Compensate him for all wages lost and lost time plus 6% annual interest rate;

e) Reimburse him for all losses sustained account loss of coverage under health and welfare and life insurance agreements during the time held out of service.

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.

The facts in the case are not substantially disputed and may be summarized as follows:

The claimant, a Cuban, was granted a disability annuity from the Railroad Retirement Board effective January 27, 1970. He had been found to be suffering from a pulmonary disease. The physician who had made the diagnosis was Dr. Hector L. Garcia, the claimant's personal physician.

On June 10, 1976, the same Dr. Garcia found the claimant to have sufficiently recovered to return to work. His "To Whom It May Concern" statement reads as follows:

> "Mr. Carlos Mesa was seen by the undersigned this morning. Physically, I find no contraindication for him to return work."

The claimant presented the statement to the Superintendent of the Mechanical Department but was not permitted to return to work. The Superintendent, on July 7, 1976, wrote the following letter to the claimant:

> "This will acknowledge receipt of Dr. H. L. Garcia's note dated June 10, 1976, saying he did not find anything against your return to work.
>
> Cannot accept same as an adequate medical release for you to return to duty particularly since recent x-ray report (copy attached) dated May 4, 1976 indicated a serious back condition to the degree of a Class V back which is an unacceptable health standard for working in or around our Shops here at Tucson especially when taken with the other gross physical disabilities which caused your retirement in the first place.
>
> Accordingly, and considering you have been on pension since January 27, 1970, do not see any reason in the idea of endeavoring to re-induct you back into active service at a time when the work is more arduous and heavier than ever and you seem to have anything but a clean bill of health. Consequently, it is my best judgment and conclusion that you should remain on pension and not attempt to disturb your retirement arrangement, particularly since the medical authorities cannot give you any better certificate or prognosis than described above.
>
> This does not mean that on some date in years to come you may not recover sufficiently to resume work. You may

"Well may but that time is not now. Therefore, you should continue to take the best care of yourself and your situation can be reviewed again next year when opportune to do so."

The Organization submitted the present claim on September 2, 1976. The Carrier answered it on October 22, 1976. The following paragraph is contained in the Carrier's answer:

"According to requirements of the Railroad Retirement Board and long-standing Company policy in these instances, any case of this kind should be handled by retiree personally with Railroad Retirement Board, and shop management cannot initiate, 'expert' or engage in active participation in the matter. The Railroad Retirement Board will take appropriate action according to the merits of the individual case and subsequently notify Pacific Lines Imployee in San Francisco regarding the official change of status, if any, respecting the retired person. In any event, medical evidence of record and disability status for such an individual cannot be efficiently charged for local purposes except by Railroad Retirement Board which has previously determined the disability status."

On receipt of this statement, the Local Chairman got in touch with the Railroad Retirement Board to inquire whether the Carrier had taken a correct position. The Railroad Retirement Board replied by letter dated November 29, 1976. In part, the letter reads as follows:

"Disability annuities continue for life unless the annuitant recovers and returns to work for a railroad or has earnings in excess of $200 in any month from work for hire or from self-employment. The RRB does not make determinations as to whether an annuitant can or should return to his last railroad employment. The employer is responsible for determining whether an annuitant has recovered sufficiently to be returned to his railroad job. The RRB has no authority to intervene with the employer regarding the matter.

The annuitant is responsible for notifying the RRB upon return to work. It is important that the report be made as soon as possible so as to prevent an overpayment."

In January, 1977, having come to the realization that it had taken an erroneous position both in regard to the resistance to the claimant's return to active employment on the basis of the Superintendent's lay judgment and in regard to RRB policy, the Carrier referred the claimant's return-to-work request to its Medical Department. In a letter dated February 16, 1977, Chief Medical Officer John H. Meyers disapproved the claimant's return to work.

The Organization declined to accept this verdict, and, on April 19, 1977, a meeting was held in regard to the claimant's case by representatives of the Carrier and the Organization. They agreed to the appointment of a third physician and to be bound by his conclusion. In a letter dated May 26, 1977, Dr. Stuart H. Goldman (who was selected by the parties to serve as the neutral physician) found the claimant fit to return to work without limitations. Thereafter, on June 1, 1977, the claimant was returned to work.

The Organization seeks a back-pay award covering the period from the date of Dr. Cheale's certification (June 10, 1976) to the date of the claimant's return to work (June 1, 1977).

Aside from resisting the claim on the merits, the Carrier contends that the claim was filed in untimely fashion and is therefore barred from our consideration. We reject the contention on the merits: 1) that untimeliness was not raised as a defense in the processing of the claim of the preparer -- which, by long-standing Board policy, a rule that untimeliness has, in effect, been waived as a defense; 2) that the date on which the clock began to run for the purpose of timeliness was July 7, 1976 (the date on which the Superintendent wrote the letter declining to re-employ the claimant) and that the claim was filed within 60 days thereof (namely, on September 2, 1976).

Two principles, long in being by Board policy, govern the determination of the case. One is that, in disputes involving an employe's physical disqualification, reliance must be had on the findings of physicians -- not the lay opinions of Carrier representatives or Organization representatives or arbitrators. The other is that, in situations involving an employe's request to return to work upon a finding of disablement, the Carrier has an obligation, promptly to act on the request and is liable to the employe for unwarranted delays incurred in failing to fulfill the obligation. Additionally to be noted is that it has long been established and understood that an employe is not barred from being restored to service by the fact, itself, that he had been declared entitled to and has been receiving a disability annuity. When these principles are applied on hand the facts here presented, the proper resolution of the case seems to us to emerge in self-apparent fashion.

Though we want to make it clear that we are neither holding nor suggesting that the Carrier acted in bad faith, we have no choice but to conclude that the Carrier twice erred and thereby caused a substantial delay in the determination of the claimant's request to be returned to service. The first error came when the Superintendent, rather than refer the claimant's request to the Medical Department, based the claimant down on the basis of his own observations and conversations. The Superintendent was not obligated forthwith to return the claimant to service on the basis of Dr. Carrie's certification. But he was not here to keep the claimant from going back to work on the basis of his independent disagreement with that certification. And the second error came when the Carrier rejected the claimant's request on the basis that the matter was for the Railroad Retirement Board to determine. The Carrier took this position without seeking the advice of its Medical Department and without otherwise checking on the position's validity. We think that it is indisputably unusual that the position would have been taken -- and that the claimant's delay would thus have been avoided -- had the Carrier resorted to either step. In effect, the Carrier left it to the Organization to do the necessary homework.

Contrary to the Organization's claim, however, it does not follow that the Carrier is responsible for the entire June 10, 1976-June 1, 1977 period. On the one hand, as already indicated, the Carrier was not obligated to accept Dr. Carrie's certification as determinative. And, on the other hand, the claimant had retired in the amount of time some three months prior to June 1, 1977 -- namely, when his request was returned to the Carrier's Medical Department. Dr. Fenton submitted his disagreement with Dr. Carrie on February 16, 1977. With this, there was a genuine medical deadlock. And from that point forward, there was the handling of the deadlock through proper and properly prompt procedures.

There is no way to make an entirely precise determination on the portion of the June 10, 1976-June 1, 1977 period which is attributable to the Carrier's fault and the portion of it which is attributable to reasonable and natural delays. Lacking evidence more definite, we are making the date of Dr. Fenton's report the dividing line. We thus hold that the claimant is entitled to reinstatement and wages lost in the period from June 10, 1976 through February 16, 1977 and not entitled to it for the period from February 17, 1977 to June 1, 1977.

A W A R D

Claim sustained as and to the extent given in Findings.

Award No. 7612
Docket No. 7965
2-TSE-CM-'78

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By _____
M. M. Harris - Administrative Assistant

Dated at Chicago, Illinois, this 24th day of July, 1978.