

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States  
and Canada  
{ Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. Carman Victor Hubert was unjustly held out of service from June 10, 1979 to July 16, 1979, without just cause.
2. That the Chicago and North Western Transportation Company be ordered to compensate Carman Victor Hubert eight (8) hours pay per day at the pro rate for all time lost between June 10, 1979 and July 16, 1979 as follows:

June 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29,  
30, 1979  
July 1, 2, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 1979

account Carrier violated the controlling agreement when it denied him his contractual rights.

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.

It is undisputed that the Claimant sustained a knee injury and underwent knee surgery some time during the first five months of 1979. On May 30, 1979, the Claimant reported for duty at Sioux City, Iowa, and was instructed to see the Company Doctor Rudersdorf to have a Company physical before returning to work. This physical was conducted on May 31, 1979. The results of the physical conducted by Doctor Rudersdorf were received by the Carrier's Chief Medical Director, Dr. Thomas G. Cook, on June 4, 1979. On June 2, 1979, the Claimant went to the Carrier's Sioux City facility to inquire as to when he could return to work and was not advised of a date. He also made visits to the facility on June 9, July 1 and July 5, 1979 but was not allowed to return to work. The Claimant was returned to service on July 16, 1979.

It is the position of the Employees that the Carrier deprived the Claimant of his right to work through managerial delay and inefficiency in addition to the neglect of the Employee's welfare and piece of mind. The Claimant wanted to work and exhibited a willingness to work, but was deprived of that right by factors and forces within control of the Carrier. It is the Employee's position that ten days were sufficient for the Carrier's Chief Medical Officer to render a decision concerning the Claimant's physical suitability for service. The Claimant was initially given an examination on May 31 by the local Carrier physician. Ten days from May 31 is June 10, thus they claim all time lost after that date.

In their submission, the Carrier asserts that the Claimant wasn't returned to work until July 16 because a signed release was not received from the Claimant's personal physician by the Medical Director until July 9, 1979. The Carrier's Medical Director would not release the Claimant to return to work until he received a release from the Claimant's own physician. This is why on July 5, 1979, when the Claimant returned to check on his work status, he was asked to secure a release from his personal physician. They assert in their submission, that the document the Claimant had submitted on or about May 28, 1979, was only an unsigned outpatient slip from his doctor. An outpatient slip is not an acceptable release from his physician. In this respect, they argue that the Claimant is responsible for the delay.

In reviewing the correspondence which constituted the record of the handling of the claim on the property, the Board finds that the Carrier's assertions regarding the Claimant's failure to produce a signed release from his personal physician until July 9, 1979, and their assertion that what he had previously submitted on May 28, 1979, was an unsigned outpatient slip, were made for the first time in the Carrier's submission. A reading of the correspondence leaves the Board with a clear impression that there was never any dispute, while the claim was being handled on the property, that the Claimant had presented a valid or acceptable release from his personal doctor. If he hadn't, it seems unlikely that the Carrier's local physician would have granted him the physical examination, released him for service, and forwarded the results to the Carrier's Medical Director in Chicago. As a matter of fact, in reviewing the correspondence on the property, it is noticed that the Carrier's reply to the initial claim stated affirmatively that "Mr. Hubert gave Company Doctor Rudersdorf a release from his personal physician..." It is also noticed that the response of the Director of Labor Relations made no mention of the failure to provide a signed release or the submission of an unsigned outpatient's slip. The Board also notes that there are no less than four separate assertions by the Organization in the record prior to the time the claim was appealed to the Board that the Claimant had submitted a valid release from his personal physician on May 30 and that he was required to provide another release on July 5, 1979, because the Carrier had lost the original release. In light of the Carrier's failure to rebut these assertions while the claim was on the property, they must stand as fact. It must be presumed to be fact that the Claimant did provide a valid release on May 28, 1979.

The only defense made by the Carrier while the claim was on the property was that the claim should be denied because the Claimant was in California for a portion of the period of June 10 through July 16. The Board can only consider this defense and cannot consider the defense proffered for the time in the Carrier's submission. It is well established that all evidence and arguments to be considered by the Board must be handled on the property before the case is appealed to the Board.

Considering the claim in light of Carrier's defense made on the property regarding the Claimant's trip to California, the Board agrees that the Carrier cannot be held liable for the period of time the Claimant was unavailable for service. The problem is that it cannot be determined precisely when the Claimant was unavailable. There is no dispute that he was gone for approximately two weeks. The best determination that can be made is that he returned from California approximately July 1, 1979; thus, he would have been unavailable from June 17 to July 1.

The remaining question is to determine at what time the Medical Director could be reasonably expected to have released the Claimant for service. Disputes of this general nature are not unusual and the Board has previously considered similar disputes. Several principles have evolved from these cases. One, that the Carrier has the right to determine the fitness of its employes, and that two, the determination be made in a reasonable period of time. A reasonable period of time seems to be fitted to the circumstances of each case. Awards have also made clear that a reasonable time is to be measured in working days available to the Chief Medical Officer. In this case, the Organization argues that ten days was a reasonable period of time for the Medical Director to make his determination. The record reflects that he received the report of the local physician on June 4. Ten working days from the date would have been approximately June 17, 1979. Thus, it is the finding of the Board that, under the particular circumstances of this case, the Claimant should have been approved for service by June 17. It is noted, however, that the Claimant was unavailable for the next two weeks due to his trip to California. Thus, the claim will be sustained for time lost between July 1 and his return to service on July 16.

A W A R D

Claim sustained to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 2nd day of February, 1983.