

The Second Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(
(Pacific Fruit Express Company

1. Carrier violated Rules 21(c), 15, and 37 when they unjustly withheld Carman G. S. Duarte from service following his medical release to return to duty on October 31, 1980 and returning him to service on November 17, 1980.
2. That accordingly, the Carrier be ordered to compensate the claimant and make him whole for all wages, health and welfare benefits, seniority rights, and any and all other benefits he would have been otherwise entitled to under existing Agreements during the time claimed.

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.

Claimant contends that Carrier unreasonably kept him out of service from October 31, 1980 through November 17, 1980 when despite his having obtained a release from his physician consistent with Agreement Rule 21(c), it required him to undergo a medical examination before permitting him to return to work on November 17, 1980. Claimant argues that this delay was unnecessary and costly since he was unable to earn his normal living during the time he was withheld from service. He asserts that in addition to violating Rule 21(c) which establishes return rights of employment for employes absent on account of sickness, accident, suspension or leave of absence, Carrier also violated Rule 37, when it by definition, suspended him defacto from service without first filing appropriate definable charges against him. Claimant avers that Carrier's delay in making a belated determination concerning his physical ability to return to work has been addressed by the Board and cites several Second Division Awards to underscore his position. (See Second Division Award Nos. 6278, 6331, 6363, 6629 et. al.)

Carrier contends that the claim is procedurally defective since the initial claim presented by the Local Chairman was modified as it progressed through the appeal steps. It argues that this modification which included the assertion

of a Rule 36 violation and Claimant's tardy appeal presentation on March 25, 1981, four (4) days after the expiration of the Agreement prescribed sixty (60) day time limit requirement vitiated the efficacy and defensibility of the claim. Carrier argues that even considering the claim on its merits, the claim is without substantive support, since the record explicitly shows that he was not unreasonably kept out of service. Instead, it contends that it acted properly and in accordance with its inherent managerial rights when it required Claimant to undergo a return to work physical examination and clearance approval by its Chief Medical Officer. It asserts that Claimant did not submit a bona fide medical note when he returned to his shop on October 31, 1980 and argues that, in fact, he was prohibited from doing carman's work as evidenced by the prognosis assessment set forth in the "Patient Instructions Docket" prepared by the University of Arizona Hospital Medical Clinic. It notes that when it called the aforesaid medical clinic on October 7, 1980 to verify the information contained in the docket, it was pointedly informed that Claimant could not do any work involving lifting for six (6) weeks. Moreover, it asserts that Claimant neglected to sign Form CS-5662-A to release pertinent medical records or comply with the reporting requirements of Executive Bulletin 907. It argues that in view of Claimant's recent hospitalization for a back injury that occurred off-the-job and for non-job related reasons during the weekend of September 26, 1980 and his past accident record on the property, it was well within its right to reject his contentions of fitness on October 31, 1980 and require that he be physically cleared by the Chief Medical Officer.

"In our review of this case, we find no procedural improprieties that would warrant a preemptory Board dismissal. We agree with Carrier that it had the right to disregard the medical note characterized herein as a "Nursie Note", which Claimant displayed cavalierly on October 31, 1980 especially when he was recently injured off the job. He was hospitalized on September 27, 1980 at the University of Arizona Hospital Medical Clinic and treated for the incurred injuries. He evidently did not communicate with Carrier until he reported on October 31, 1980 and he was then apparently uncooperative when he did not formally submit the note he allegedly asserted was his return ticket to work. Carrier was not unreasonable when it required that he be physically cleared to return to work and allowed him to be examined at its expense by Dr. R. S. Gearhart, Tucson, Arizona, subject to final clearance by its Chief Medical Officer. We cannot agree with Carrier that his return to work on November 17, 1980 was reasonable or perhaps too reasonable as Carrier argues, when he was returned on the basis of a leaked report. According to Carrier, when its Tucson office heard that Dr. R. S. Gearhart's report was submitted to the Chief Medical Officer, it assumed this was a release to work order and allowed him to return to work on November 17, 1980. We find this logic excessive. More germane to this issue, however, is whether under all the circumstances herein, Claimant could have been returned to work sooner. Recognizing that each medical case possesses unique attributes that require variant considerations, we believe that ten (10) days was sufficient time to render a return to work medical determination. We find no complicating mitigative factors that would reasonably explain Carrier's apparent delay, but we do find record omissions that are equally inexplicable. For example, the record does not contain Claimant's so called return to work note or Dr. Gearhart's November 13, 1980 report. The exhibits attached to Carrier's submission do not contain any communications from Dr. Gearhart. Upon this record, we find no persuasive compelling reason why Carrier waited until November 17, 1980 to return him to work and we will accordingly award him five (5) days back pay for this delay.

Form 1
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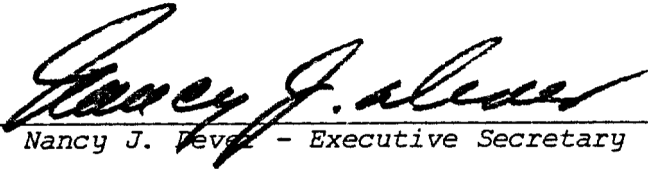
Award No. 9953
Docket No. 9565
2-PFE-CM-'84

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of June, 1984