

The Second Division consisted of the regular members and in addition Referee T. Page Sharp when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(Burlington Northern Railroad Co.

Dispute: Claim of Employees:

1. That the Carrier has violated provisions of the controlling agreement when Carman S. B. Nickens was not promptly returned to work following examination by a Carrier doctor on December 3, 1981.
2. That Carman S. B. Nickens be compensated for all lost time commencing May 14, 1982 and continuing to and including September 12, 1982, plus ten percent (10%) interest.

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.

S. B. Nickens, Claimant, had been out on an extensive medical leave until his personal physician gave him permission to return to work. He reported to work on December 3, 1981, at which time he was examined by the Carrier's physician. By February 22, 1982, the case had been referred to another Medical Department of Carrier who on that date wrote Claimant:

"We are in receipt of letter from the Chief Medical Officer at St. Paul, Minnesota requesting that you arrange to have your personal physician make a study of your condition, particularly as to medical problems and obesity.

Please have your physician forward his findings and what recommendations he has requested you to take no later than March 1, 1982.

Please acknowledge receipt by affixing your signature in the space provided on copy of this letter."

Claimant promptly signed the letter. On March 23, 1982, the Carrier wrote the Claimant again a letter which stated in pertinent part:

"Please arrange to forward to my office statement of medical record from all physicians that treated you since you have been off work from your last injury, giving findings, treatment required and capabilities of employment as a carman."

Apparently Claimant chose not to comply with this additional request. Instead he filed a time slip on July 12, 1982 claiming pay from May 14, 1982. The parties were unable to resolve this dispute. However, Claimant was given another physical on August 13, 1982, and was returned to work on September 13, 1982. The time claim was progressed to this Board.

The Carrier raises several procedural arguments. First, it states that the claim was addressed to the wrong Carrier Official, therefore the time limits have run. The claim was addressed to the Superintendent Field Car Maintenance. The Carrier states that another office had been designated to receive claims and that the Organization was aware of this fact. However, the Superintendent responded:

"Referring to your claim letter of September 2, 1982, regarding Carman S. B. Nickens.

It is true Mr. Nickens has been off duty for a considerable length of time and has taken a physical to return to work by a company doctor on December 3, 1981, and referral of this case was made to the Chief Medical Doctor for his approval. He was requested at that time to have a full medical workup from his family doctor sent to St. Paul, so they could make a decision. It was necessary to make several requests from Mr. Nickens to get the necessary reports from his family doctors. After this was received he was requested to again report to his doctor and get a complete medical report containing his present health and his weight problem. He was also requested to again see company doctor. This was taken care of on August 13, 1982.

With the above explanation and the delays we encountered in getting Mr. Nickens to secure the necessary information, your claim as submitted covering pay from May 14, plus 10% interest is respectfully declined as the delay in the return to work has been solely due to Mr. Nickens slow response."

It is obvious that the Organization would not have sent the claim to this individual if it had been aware that he was not the proper party. Whether or not this individual had a duty to inform the Organization that he was the wrong party is not for decision. The fact that he declined the claim and stated explicitly his reasons for doing so cloaked him with apparent authority. Therefore, we hold that regardless of the proper party, he became proper by his answer.

Another procedural objection raised by the Carrier concerned the date of the incident. Its contention is that December 3, 1981, was the date of any alleged violation and that the sixty day provision of Rule 34(a), which it claims is not applicable, would render any claim out of time limits. Rule 34(a) reads in pertinent part:

"(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence..."

The contention is that any claim arose on December 3, 1981, the date of the refusal of the Carrier to return Claimant to service.

The Claimant contends that Rule 34(d) governs this case. It reads:

"(d) A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retrospectively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient."

The Organization argues that the violation is continuing and agreeably forfeits all of the time out of service occurring more than sixty days from the filing of the time claim. Considering that Claimant was continually making attempts to return to work and was being consistently denied the right to return, the Board concludes that the claim was continuing.

The Carrier also contends that no claim can exist because the Organization has pointed to no rule violation in its Statement of Claim. Numerous awards have upheld the right of a Carrier to examine its employees. This right is important both for the welfare of the employees and the financial welfare of the Carrier. This right is tempered with reasonableness. As the Carrier adequately stated in one of its pieces of correspondence to the Claimant:

"The Second Division Awards, which you cite, cover different fact situations from the instant case and so are not in point. However, one of the awards you cite, No. 7866, held that the Carrier has the right to hold employees out of service pending physical examination for a reasonable period and that period must be fitted to the facts and circumstances of each case and that the Board resists efforts to apply a fixed period, such as you are attempting to do in this case."

This Board concurs in that judgment. No arbitrary period of time can be set as each case will turn on the facts. We do find that there is a contractual right, the consequence of the Carrier's right to require examination, to complete the matter and to make a decision in a reasonable period of time.

The Carrier's examining physicians had a very unusual request in their first request to the Claimant, that his physicians do additional procedures before they could make a decision. Apparently he complied with this request. The second request of March 23 asking for more statements was apparently not complied with. After several weeks of not hearing from this request, the Carrier's physicians were due to make a decision. The indecision on their part put Claimant in a limbo situation. From the facts of the case this information must not have been critical because the Claimant was put back to work without the Carrier having received this information.

The delay of the Carrier is highlighted by the last action of the doctors. After putting Claimant to all this delay the physicians still took one month after the examination to make a decision.

It is regrettable that an employee is put to such delay when he is eager to return to employment. The fault is not of his making. The obligation of the Carrier is to make a decision, not necessarily to put an employee back to work. If the decision had been made in March or April, that based upon the information diagnosed Claimant was not able to return to work, he would then be in a position to respond. He could challenge the decision of the Carrier's Medical Department under the terms of the contract. The causal attitude of the Medical Department even after the last examination indicates a lack of responsibility in letting the Claimant know of his future employment status with the Carrier.

We hold that the claim is continuing and that a reasonable time for response had long passed, even before the time claim was filed. We will grant the claim with the exception of any interest on the monetary payment. There is no provision in the Agreement for interest.

Form 1
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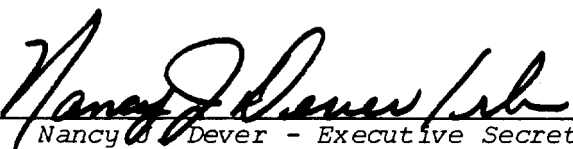
Award No. 10502
Docket No. 10439
2-BN-CM-'85

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 7th day of August 1985.