

The Second Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

( Brotherhood Railway Carmen of the United States  
( and Canada  
Parties to Dispute; (   
( Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That the Carrier has violated the provisions of the controlling agreement when Carman D. D. Strong was not promptly returned to service following examination by a Carrier doctor on October 1, 1982.
2. That Carman D. D. Strong be compensated for all lost time commencing on October 1, 1982, continuous until he was finally returned to service on December 25, 1982, sixty-one (61) actual work days out of eight-five (85) actual calendar days.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 Carman D. D. Strong was employed by the Carrier at its train yard and rip track facilities known as Tennessee Yards, Memphis, Tennessee, when he was granted a medical leave of absence beginning April 27, 1982 for injuries sustained while off duty. On September 30, 1982, the Claimant contacted the Memphis Foreman's office and stated that he had been released by his personal physician to return to work. That same day he reported to the Carrier and received a physical examination by the Carrier's Memphis doctor. Some time thereafter the Carrier's Memphis office sent the report on the Claimant's health to the Carrier's Chief Medical Officer Dr. T. V. Mears, at St. Paul, Minnesota for approval.

The record, as presented by the parties to this dispute, does not provide the Board with a very clear picture of what happened next. The Carrier's Chief Medical Officer, in a letter dated after this claim was filed, stated that at the time he was reviewing the Claimant's file he received additional information that "there had been possibly some significant psychiatric problems." Although there is no record of the Carrier or its doctor requesting additional information from the Claimant, a psychiatric report prepared by Claimant's treating doctor on November 30, 1982 was received by the Carrier on December 7, 1982. This report was prepared by Claimant's doctor after the initial filing of this claim on November 23, 1982.

Once the report was received by the Chief Medical Officer, it took approximately one more week for him to review it and to approve the Claimant for a return to work, and then another ten days for the Carrier to return the employee to work. Thus, a total of eighty-five days (sixty-one working days) elapsed between the time Claimant reported ready to work on September 30, and his eventual return to work on December 25th.

The Organization argues that the Claimant's medical leave was only for a physical injury, and that if there were other reasons not to return him to work, the Carrier should have notified him of these reasons. According to the Organization, the Carrier failed to notify him of these reasons, and never directed him to return to either his or the Carrier's physicians for further medical evaluation.

For purposes of analyzing this claim the Board must first separate the period before December 7th, when the Carrier received the Claimant's doctor's report, from the period after that date, when the Carrier was solely responsible for any undue delay in returning Claimant to work. The Organization does not dispute that a Carrier may require proof of an employee's fitness to return to work after a medical leave. The Carrier may require the Claimant to submit a statement from his personal physician(s), and may either accept this statement, or require another examination by one of its doctors. Second Division Award No. 6569. In addition, the Carrier may direct and require an employee to be examined by a psychiatrist or psychologist as long as the Carrier's action is not based upon arbitrary or capricious reasons. (Third Division Award No. 25634.) However, the Carrier must make its request for additional examinations or reports within a reasonable period. (Second Division Awards No. 6331, No. 9143) Although the Carrier in the instant dispute argues that the Organization's claim rests upon no specific contractual provision, these principles have evolved over the years out of the Carrier's implicit right to ascertain whether an employee is fit to return to work, a right which also is not explicitly spelled out in the contract.

In the instant case the Organization does not argue that a request by the Carrier for information from Claimant's doctor about Claimant's mental health was arbitrary or capricious. Instead it claims that no request was ever made. And yet, a psychiatric report from Claimant's doctor appeared in the Carrier's Chief Medical Officer's office on December 7, 1982. This is the only fact clearly evident from the record; it is a safe assumption that the Claimant's doctor would not have sent such a report, however, without a request from the Carrier, either directly, or indirectly through the Claimant.

Both the Carrier and the Employees bear the burden of expediting the necessary information for the Chief Medical Officer to make a determination of an employee's fitness to return to duty. (Fourth Division Award No. 4269) If the Carrier delayed in requesting such information, then it bears the burden of delaying the Claimant's return to work. But in this case the Board has no evidence of whether the delay was caused by the Carrier in requesting the information, the Claimant in relaying this request to his doctor, or his doctor in complying with it. Therefore, the Board must hold that the Organization has not met its burden of proving that the Carrier is solely responsible for the delay prior to its receipt of the physician's report of the Claimant.

The facts occurring after the report was received on December 7th are more definite. The Carrier acknowledges that eighteen days elapsed between the receipt of the doctor's report and Claimant's clearance to return to work. The Board is of the opinion that this delay was too long. In similar situations this Board has approved delays of five days, a week, even ten days, depending on the circumstances involved. (See Awards cited in Third Division Award No. 20344) The Carrier has cited no cases in which delays of almost three weeks have been upheld. Furthermore, the Carrier has not offered any special reasons, other than its own administrative procedures, for this delay. The Chief Medical Officer had only to review a letter from a treating physician, and once he had arrived at his decision, a simple telephone call from him would have sent the Claimant back to work. Furthermore, the Claimant had already filed this claim by the time the Carrier received the report, indicating his strong desire to return to work immediately.

Balanced against the Claimant's rights is the need for the Carrier to make certain that the Claimant was fit to return to work. Under the circumstances the Board finds that a delay of five days was appropriate, in order to give the Chief Medical Officer some time to review and consider the information and transmit his decision to the Carrier. Consequently, the Claimant should have been paid for all regularly-scheduled work days after December 12, 1982.

The Board need not address the Organization's complaint that the Carrier violated the contract by refusing to allow them an extension of time to respond during the handling of this case. Neither party missed any procedural deadlines. Consequently, this point does not affect the outcome of this dispute.

#### A W A R D

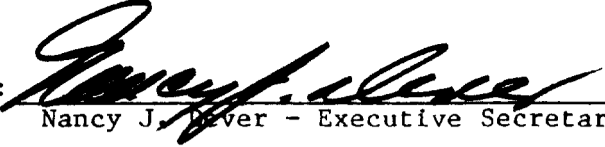
Claim 1 is granted as to the period after December 12, 1982. Claim 2 is granted in that the Claimant shall be compensated for all regularly-scheduled work days after December 12, 1982.

Form 1  
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Award No. 10738  
Docket No. 10516  
2-BN-CM-'86

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of February 1986.