Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12050
SECOND DIVISION Docket No. 11942
91-2-90-2-50

The Second Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division of TCU
(
(Southern Railway Company

STATEMENT OF CLAIM:

1. The Carrier improperly held Carman W. G. Johnson, Spartanburg, South Carolina, out of service.

2. That accordingly, the Carrier be ordered to pay Carman Johnson for all time lost from January 11, 1989 through January 26, 1989.

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.

The record shows that, because of a back problem, the Claimant was absent from December 14, 1988, onward. On January 11, 1989, he provided the Carrier with a return to work slip from his personal physician, dated January 10, 1989. However, the Carrier concluded that further medical testing was required to determine the Claimant's fitness for duty.

It is well-established that the Carrier may make fitness for duty decisions, if reasonably based. We find that to be the case here. Therefore, the only issue before us is whether the Carrier took an excessive amount of time to examine the Claimant and, subsequently, allow him to return to work. While the Carrier is required to move with reasonable speed after receipt of information that the employee is ready to return to work, for self-evident reasons, a set period of time has not been established. The facts and circumstances of each case may differ and they must be viewed on their own merits and within the general framework of past decisions, where applicable.

In this case, the Carrier gave no substantive explanation on the property of why it took from January 11, 1989, until January 26, 1989, to obtain an appointment for the Claimant's medical evaluation. Moreover, it already had in hand a professional confirmation that the Claimant was able to return to work. The Board also notes that the Claimant was examined by the Carrier's designated person on January 26, 1989, and was cleared by that person to return to work the next day.

In view of all of the foregoing, we agree with the Organization that there was undue delay in returning the Claimant to work. With respect to the damages issue, we again adopt the position of numerous Second Division Awards that found five days to be a reasonable amount of time to conduct an examination after a request to return to work is received (see Second Division Awards 11275, 11345, 11557, 10816, 7131 and 7474). The Claimant is awarded backpay for all time lost from January 16, 1989 through January 26, 1989.

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 15th day of May 1991.

CARRIER MEMBERS'
CONCURRING & DISSENTING OPINION
TO
AWARD 12050, DOCKET 11942
(Referee Muessig)

The Majority in Award 12050 properly found that the Carrier may make fitness and duty decisions if reasonably based, and the only issue before the Board was whether the Carrier took an excessive amount of time to examine the claimant and allow his return to work. It further found that the Carrier is required to move with reasonable speed after receipt of information that the employee is ready to return to work, but that no set period of time has been established.

After finding that the facts and circumstances of each case may differ and must be viewed on its own merits, the Majority proceeded to penalize the Carrier for exercising its right to have an employee examined and make a fitness decision for return to duty. It did so on the basis that "....Carrier gave no substantive explanation on the property of why it took from January 11, 1989, until January 26, 1989, to obtain a appointment for the claimant's medical evaluation." Review of the record of handling on the property adduced to this Board reveals that no foundation exists for the Majority's finding that no substantive explanation was given on the property.

The record indicates that Carrier determined that based upon claimant's past record of health problems it could not allow claimant to return to work until he had a test on a B-200 Machine at an orthopedic surgeon's office, that immediately upon receipt of a statement from claimant's personal physician that he was released for return to duty, Carrier sought to make an appointment with an orthopedist having the only available B-200 Machine in the area, and that the earliest appointment available was January 26, 1989.

Claimant was examined on January 26, 1989, and after evaluation, was returned to service on January 27, 1989. Certainly on this record Carrier moved with reasonable speed and should not be penalized for exercising its rights which the Majority clearly found it had.

For all the reasons noted above, we are constrained to dissent to that part of the Award penalizing the Carrier for the loss of time from January 11, 1989, through January 26, 1989.

J. E. Yost

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga