

CORRECTED

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13975

Docket No. 13843

08-2-NRAB-00002-070009

07-2-9

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

(International Brotherhood of Electrical Workers

PARTIES TO DISPUTE: (

(BNSF Railway Company

STATEMENT OF CLAIM:

- “1. That under terms of the controlling Agreement, Mechanical Department Electrician J C. Thompson was unjustly held out of service for the period July 24, 2003, through February 19, 2004.**
- 2. That accordingly, the BNSF Railway be ordered to compensate Electrician Thompson for any and all lost wages, rights, benefits and privileges which were adversely affected by being unjustly held out of service.”**

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 were given due notice of hearing thereon.

Undisputed record evidence indicates that Grievant Thompson was withheld from his position as Electrician in the Mechanical Department at Alliance, NE, after incurring an off-duty injury on September 16, 2001. While rehabilitating, he was required to provide periodical information from his physician supporting his continuing inability to perform service.

In this claim the Organization alleges that he complied with that requirement. It argues that although his personal physician completed a Medical Status Form releasing him to return to work on July 24, 2003, Carrier failed to act on that release until February 24, 2004. Since Claimant was able to return in July but unjustly held out of service thereafter, he must be compensated for all losses incurred during that period.

According to the Organization, when Claimant's physician on July 24, 2003, completed his report recommending that he be allowed to return to work that day, he noted that Claimant should expect a wait of 3 to 5 days for Carrier to conduct an evaluation and return to work. It took Carrier until August 21, 2003, however, for its Medical Department to reply with instructions and a Fitness for Duty form, and it wasn't until February 20, 2004 that Claimant was actually allowed to return to work. Carrier, the Organization contends, explains that delay in terms of the restrictions imposed by Claimant's physician, but it fails to explain why it took until January 8, 2004, for it to contact Claimant's physician.

Carrier argues at the outset that the Claim is time barred. Although it seeks payments from July 24, 2003, the claim was not presented to Carrier until April 12, 2004, well past the 60-day time limit prescribed by the Agreement. This is not a situation in which the triggering incident is belatedly discovered, reasonably suggesting that the later date should be considered as the starting date for computing time limits. Clearly, the Organization's representatives knew that Claimant was not returned to work in July, 2003. Its Local Chairman had been provided with copies of each letter authorizing Claimant to continue on his medical leave. Yet instead of objecting by September 22, 2003, as required, the Organization did not present its claim until April 12, 2004.

Moreover, Carrier contends, if the merits are reached, on the record evidence presented the Board must conclude that the delay in returning Claimant to service was a direct result of his personal physician describing to Carrier

medical limitations that could not possibly be accommodated. The form he completed recited a veritable laundry list of lifting, bending, climbing and other limitations. Carrier simply had no position that Claimant could fill consistent with the restrictions noted. While Claimant's doctor ultimately clarified that the restrictions were temporary and that the medications prescribed would not affect his ability to work, no excessive delay in this connection has been attributed to Carrier.

The Board's review of the record suggests that Carrier had good cause to be concerned about the restrictions recited in the Medical Status Form dated July 24, 2003. It would have been rash to read that document as an unqualified release to return to work. On the other hand, the record also pulses with evidence of **unexplained delay on Carrier's part in dealing with the issues presented. After Claimant presented himself for service—repeatedly—in a very real sense Carrier failed to act. More specifically, after Carrier's Medical Department on August 21, 2003 advised the Claimant that he could expect to be contacted by the Mechanical Department in three to five days for an evaluation, despite repeated calls from Claimant attempting to find out when he could return, Carrier took no action, apparently failing even to return calls. Indeed, it was not until December 15, 2003, in response to Claimant's note of December 10 asking for an explanation as to why he was not being allowed to return that his Shop Superintendent advised he was unable to accommodate his request for restricted duty. Ultimately, on February 16, 2004, Claimant was instructed by Field Manager Angela Bailey to return to his doctor and secure another Medical Status Form. He did so, presenting to the Alliance Mechanical Facility exactly the same form he had proffered in July, 2003. He was then finally returned to work subject to the same restrictions listed eight months earlier.**

Neither party can objectively consider itself blameless here. If Claimant's Physician had submitted an ambiguous or misleading report, or at least one perceived by the Mechanical Department as preventing it from reinstating him, Claimant had a basic obligation to see that his physician cleared matters up with his employer. But the railroad had a corresponding duty to advise Claimant of the reasons it believed justified withholding him from service, and if it was unable or unwilling to rely on the report of Claimant's physician, it had an obligation to see that he was examined by its own medical personnel. Said another way, it had every right to accept or reject the information supplied, but it had no right to indefinitely

delay making its own determination or direct Claimant with respect to what further information it required .¹

Having rejected the argument that Claimant's own actions were solely responsible for his being withheld from service, the Board concludes that Claimant was the victim of administrative forces beyond his control. No explanation is offered for why this claim was not submitted sooner, but the violation was continuing in nature, with Claimant's losses ongoing and renewed each pay period. Accordingly, pursuant to rule 34(d) his claim will be allowed retroactively to 60 days prior to its filing, or February 14, 2004.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 25th day of November 2008.

¹ Carrier did undertake to speak with Claimant's physician until January 8, 2004.

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 13975

DOCKET NO. 13843

NAME OF ORGANIZATION: International Brotherhood of Electrical Workers

NAME OF CARRIER: BNSF Railway Company

- “1. Is Claimant Thompson entitled by the terms of Award No. 13975 to be compensated for all lost time commencing July 24, 2003 and continuing to the date of his restoration to service on February 20, 2004, as urged by the Organization, or retroactive only to sixty days prior to April 12, 2004 when the claim was submitted, as asserted by Carrier?”
2. Regardless of the timeframe intended to be covered by Award No. 13975, is Claimant owed additional monies as a result of overtime missed for the period February 14-20, 2004?”

Pursuant to the Executive Session conducted by conference call with the parties on October 14, 2009, written Submissions were received on December 7 and 12, 2009 setting forth the respective positions of both parties on the issues stated above. Briefly, the Organization maintains that the \$6,914.88 that Claimant Thompson received after the Award was rendered was incorrect with respect to the time period covered, as well as with respect to the straight time rates at which calculated, because he may have worked some hours at overtime rates during the period withheld from service. The Carrier argues that it applied the Award correctly by reimbursing the Claimant for all time missed at straight time rates starting on February 14, 2004.

The Organization filed its claim on Thompson's behalf on April 12, 2004. The Board awarded backpay "retroactively to 60 days prior to its filing, or February 14, 2004." It is undisputed that the Claimant returned to work on February 20, 2004. Accordingly, notwithstanding an apparent error in the Carrier's initial computation of backpay owed resulting in an overpayment to the Claimant, proper application of the Award as intended by the Board entitled the Claimant to be compensated only for all time lost for the six day period beginning on February 14, 2004 and continuing through February 19 until his return to service the next day, a total of four working days.

With respect to the second issue presented, consistent with prior arbitral authority on the property cited by the Carrier, under the circumstances presented Claimant Thompson was entitled to reimbursement at straight time and not at overtime rates for work not actually performed. In sum, the Board concurs with the Carrier's assertion that absent distinguishing circumstances, claims of this nature are normally resolved by payment at straight time rates. See, e.g., Second Division Award 12863 involving these same parties.

In accordance with the foregoing, the Board concurs with the Carrier's positions on both issues presented.

Referee James E. Conway, who sat with the Division as a neutral member when Award 13975 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 14th day of January 2010.