Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8733
Docket No. 8786
2-MP-CM-'81

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

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

Dispute: Claim of Employes:

1. That the Missouri Pacific Railroad Company violated Item 6 of the Conditions of Employment when they withheld Carman H. D. Stewart from service for special medical examination from November 3, 1978 until November 14, 1978.

2. That the Missouri Pacific Railroad Company be ordered to compensate Carman H. D. Stewart for eight (8) hours at the punitive rate for November 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13, 1978.

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 employe 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 Claimant is employed as a Carman at the Carrier's San Antonio, Texas facility. Mr. Stewart had a hernia operation and had been off from work for some time. The Carrier has a policy which requires employees who are off from work for more than 30 days on account of serious illness or surgery to pass a physical examination by a physician hired by the Carrier. The results of these examinations must also be approved by the Carrier's Chief Medical Officer before the employee is allowed to return to active service. The Claimant was examined on November 3, 1978. The Carrier's Medical Officer approved him for service on Monday, November 13, and the Carrier attempted to contact him that morning. Evidently, the Carrier did not reach him with their first call but did contact him later that day. He returned to work at 7:00 a.m. Tuesday, November 14.

The Organization is seeking payment for each calendar day that the Claimant was held out of service from and including the date of the examination until he was approved and returned to service, November 14.

The instant case is another in a line of cases dealing with the Carrier's withholding of employees from service pending physical examinations. Of the more recent awards issued by this division dealing with this question are 6704 (O'Brien), 7089 (Twomey), 7131 (Sickles) 7388 (Zumas), 7472 (Weiss) and 8113 (Marx). Awards 7388 and 8113 are most notable as they involve the same parties as the instant case. In a reading of the above awards, a set of principles can be gleaned. It is the opinion of the Board that in deference to the principle of stare decisis the following axioms should apply in the instant case:

(1) The carrier has the inherent right unless restricted by Agreement, to require employees to be examined by a physician of its choice and has the right to have those results reviewed by its chief mecical officer before allowing an employee to return to service.

(2) Unless dictated by Agreement, the Carrier must exercise its prerogative to examine and approve an employee within a reasonable time. Usually five days is accepted as a reasonable period.

(3) The five-day period under most circumstances begins to toll after the date of the employee's examination by a Carrier physician.

(4) In counting the five-day period, the five days does not normally include Saturdays and Sundays, which are usually rest days of the Carrier's Medical Officer. The Carrier is also not liable for Claimant's established rest days.

In applying these principles to the instant case, we observe first that the claim for November 3, is invalid because as held in Award 8113, the 5-day period does not begin to toll until after the date of the exam which was Friday November 3. November 4 and 5 were not working days of the Chief Medical Officer and they were also the Claimant's rest days. These days would not be included in calculating the five days per the holding of Awards 8113, 7472 and 7131. Monday, November 5, would be the first day counted in the five-day period. November 7, 8, 9, 10 would comprise the rest of the period available to the Carrier to make its medical determination. See Awards 7472, 7131 and 6704. November 11 and 12 were again not working days of the Carrier's Medical Officer, therefore, the first and only date of potential liability for the Carrier would be Monday, November 13.

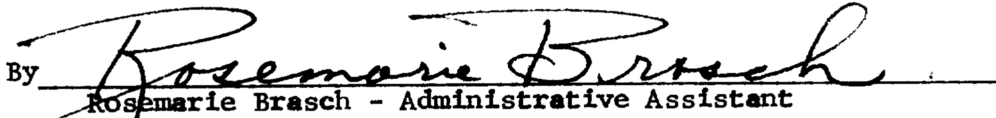
The Carrier argues that in respect to November 13 they are not liable. They argue that "... since he was called in time to work on that date ... his loss of that day's work was of his own making." However, upon a reading of the record, we find the Carrier's position is contrary to the facts. The Board cannot conclude he was called "in time to work". It is undisputed the Carrier didn't attempt to reach the Claimant until Monday November 13. We do not see how it would have been possible for the Carrier to notify the Claimant that he was eligible to return to service within a reasonable time prior to his shift when his shift started at 7:00 a.m. It is apparent that Carrier didn't call sufficiently ahead of the beginning of the Claimant's shift so that he could make himself available for service. The call, in most probability, came during his shift. Logically, the Carrier did not notify the Claimant in sufficient time to return to work as it has an obligation to do. Therefore, the Claimant is due one day's pay at the pro rata rate of pay.

A W A R D

Claim sustained to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board



By Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 3rd day of June, 1981.