

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 Company

Dispute: Claim of Employees:

1. That the Carrier has violated provisions of the controlling agreement when Carman G. Whalen was not promptly returned to work following physical examination by the Carrier's physician on August 10, 1982.
2. That Carman G. Whalen be compensated for all time lost commencing August 15, 1982 through October 2, 1982. Mr. Whalen was returned to service on October 3, 1982.

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.

Claimant, G. Whalen, had been off duty on a medical leave prior to August 10, 1982, when he returned to work with a statement from his personal physician that he was able to return to work. The Carrier sent the Claimant to its physician for further examination as is its custom. The Claimant was returned to service on October 3, 1982. In the interim the Claimant filed a claim for the days he was being denied the opportunity to work.

A procedural argument to this claim was raised by the Carrier. It claims that Claimant filed his claim with the wrong person and when the mistake was corrected, the time limits had run. The local representative of Claimant sent the initial claim to the Acting General Car Foreman, because the General Car Foreman was on vacation. This individual declined the claim and was then told that Claimant would appeal to a higher authority. The claim was denied at a higher level by the General Superintendent Field Car Maintenance. At a later stage the Carrier advanced the position that the claim had been improperly filed and was outside the time limits.

The Board does not doubt that the Carrier is correct in its contention that the claim was improperly filed. It stated that it had circularized a memorandum that designated positions to whom claims must be filed. However, the fact that two levels of improper parties formally denied the claim undoubtedly led the Claimant to believe he had properly filed the claim. These individuals were under no contractual duty to notify Claimant that he had filed wrongly. But the fact that they answered cloaked them with apparent authority to answer the claims. Their actions bar the Carrier from now raising time limits as a defense.

The Agreement is silent concerning the number of days that the Carrier has to complete its examination and to either put an individual back to work or to refuse the same. Like many other unwritten provisions of the Collective Bargaining Agreement, this situation is covered by a rule of reason. No one is disputing the fact that the Carrier had the absolute right to have its physician examine the Claimant. Prudence would dictate that a Carrier would want to form its own medical opinion of the health of an employee, both for his own welfare and for purposes of liability.

The Carrier and the Claimant have cited numerous cases that hold that a short period of time, often ten days, is a reasonable period. The time frame necessarily depends on the facts of each individual case. Without mitigating circumstances a sixty day period of hiatus is excessive.

The Carrier states that the delay must be attributed to the Claimant's physician. It entered into the record a statement from the Carrier's treating physicians to a Carrier official which read:

"Mr. Whalen had a physical examination on August 10, 1982. At that time, he was noted to be on a number of medications and have a complicated history which suggests the possibility of serious neurological problems. Our examiner was not willing to make a final decision on this gentleman without further medical information and deferred the decision to our office. He suggested that we request further information. After reviewing the examination, we agree that further background was necessary before we could make a proper decision. At that time we sent out a letter, dated August 27, 1982, requesting information from his treating physician. The letter from his treating physician was not received in this office until late September and approval to work was mailed from this office on September 22, 1982. We feel strongly that careful review of this gentleman's problem was appropriate and he will need to continue to be monitored very carefully. If there are any questions, contact the Medical Department."

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The examining physician does not have the depth of information that a treating physician would have. It is obvious from the tone of this letter that the examining physician was most concerned about a possible neurological problem. After receiving the information from the treating physician, the Claimant was put back to work on a timely basis. Much of the delay can be attributed to the examining physician, the agent of Claimant.

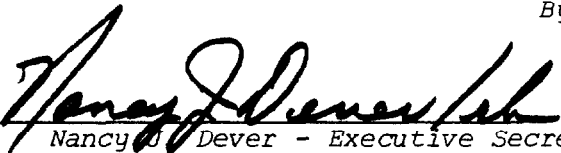
The Board finds that the examining physician should not have waited until August 27 to request the additional information from the treating physician. Given normal bureaucratic delay, three days should have been sufficient time to send for this information. Thus, the fourteen additional days were unwarranted. The Board will award Claimant pay for the amount of days he would have worked had he been reinstated September 8, 1982.

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.