

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

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

Dispute: Claim of Employes:

1. That the Burlington Northern Railway Company violated and breached the letter and intent of the contractual rights of Carman Terrel McColez, then they arbitrarily, discriminatorily and without just cause, withheld him from the service of the Carrier from the date of April 16, 1984 until the date of May 19, 1984, supposedly on the recommendation of the Carrier's Medical Department.

2. That accordingly, the Burlington Northern Railroad Company be ordered to compensate Carman Terrel McColez eight (8) hours at pro rata rate of \$13.29 per hour for each work day commencing April 16, 1984, and each work day thereafter until he was restored to service on May 20, 1984. Further, that he be compensated for all overtime pay he would have made and that he be made whole for all vacation qualification and all other benefits accruing to his position in a normal flow of circumstances had this discriminatory action not occurred.

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 Claimant is employed as a Carman by the Carrier at its West Quincy, Missouri repair and inspection facility. Beginning December 8, 1983, Claimant was absent from work due to his physical condition. In a medical report dated April 16, 1984, Claimant's personal physician notified Carrier that Claimant was able to return to work. Claimant had a return-to-work

examination from Carrier's physician on April 11, 1984. Carrier's Assistant Chief Medical Officer approved Claimant's return to work on May 15, 1984; Claimant was advised of the approval on May 16 and returned to service on May 20. The Organization subsequently filed a Claim on Claimant's behalf, charging that Carrier excessively delayed Claimant's return to service.

The Organization contends that Carrier withheld Claimant from service for an excessive time following his personal physician's releasing Claimant for duty, thus causing Claimant an excessive monetary loss. The Organization asserts that Claimant's personal physician issued the release on April 7, and post-dated it to April 16 to allow Carrier's Medical Officer time to review the report. Claimant reported for work on April 8, but was sent to a Carrier physician that day for an examination. The Organization contends that Carrier never gave Claimant an explanation for its subsequent delay of more than forty-two days in returning Claimant to work. The Organization points out that because of the delay, Claimant lost 30 days of work, totalling 240 straight-time hours, plus any overtime that he might have worked during that period.

The Organization asserts that this Board previously has held that five days is a reasonable time to return an employee to work following a physical examination. The Organization argues that Claimant was deprived of earnings as a direct result of Carrier's excessive delay in returning him to service. The Organization contends that the Claim should be sustained.

The Carrier contends that the Organization has not cited an Agreement Rule that supports this Claim. The Carrier asserts that nothing in the Agreement supports the Organization's argument that Carrier should have returned Claimant to service within five days of his physical examination. The Carrier contends that this Board has held that to sustain a Claim, there must be a violation of a specific Rule; if an Organization does not cite a Rule violation during the handling on the property, the Claim will be dismissed. Because the Organization did not cite a supporting Rule during handling on the property, Carrier argues that the Claim should be dismissed.

Carrier next asserts that its action was proper. Carrier argues that the release issued by Claimant's personal physician gave no details as to Claimant's condition. Carrier points out that on April 18, only seven days after Claimant was examined by a Carrier physician, Carrier requested additional information from Claimant's personal physician; Carrier did not receive a response until May 14. Carrier's Medical Officer approved Claimant's return to service on May 15, Claimant was notified the next day, and Claimant then chose not to return until May 20, 1984. Carrier therefore contends that the delay was caused by Claimant's personal physician, and there is no basis for this Claim.

The Carrier also argues that the Board Awards cited by the Organization do not apply to this dispute; those Awards did not involve these parties, or fact situations similar to the instant dispute. The Carrier asserts that in a decision involving the parties, this Board held that the time frame for

returning an employee to service depends on the facts of the case. Moreover, this Board has held that delays caused by an employee's treating physician will not be charged to the Carrier. Carrier asserts that under the facts of this dispute, it was reasonable for Carrier's Medical Officer to write Claimant's personal physician within seven days of Claimant's examination by a Carrier physician. Carrier further asserts that its request for additional information was properly handled between the doctors, so Carrier was not in error by not advising Claimant that additional information was required.

Carrier finally asserts that the Claim for compensation is improper because there is no showing that Claimant would have worked overtime during the Claim period. Moreover, because Claimant could have worked on May 16, but chose not to return until May 20, the Claim for compensation for May 16, through 19, also is improper. The Carrier therefore contends that the Claim should be denied.

This Board has reviewed the evidence in this case, and we find that there was no legitimate reason for the Carrier to withhold the Claimant from service once it received the return-to-work notification from Claimant's physician on April 16, 1984. Although the Carrier contends it needed additional information from the Claimant's treating physician and was unable to obtain it for nearly one month, the fact remains that the Carrier had the Claimant's physician's report, as well as the results of the examination of its physician long before April 16, 1984. It also had the ability to require the Claimant to come in for further examination. Instead, the Carrier merely waited around and did not return Claimant to work or further examine him until May 14, 1984, when it finally received Claimant's personal physician's follow-up report.

This Board recognizes the desire of the Carrier to not return employees to work if they have not fully recovered from their disability. However, it is clear that the Claimant's own doctor examined him and released him to work on April 16, 1984; and Carrier's doctor examined the Claimant on April 11, 1984. Once the examinations are completed and the reports received, the Carrier is under an obligation to move quickly to return the employee to work. Although there may be no specific contract language requiring a quick return to work, this Board has ruled on numerous occasions that five days is a reasonable amount of time to conduct an examination and do the other evaluations after a request to return to work is received. (See Second Division Awards 10816, 7131, and 7474.) The action of the Carrier in this case was unreasonable. There is no legitimate reason why the Claimant was not returned to work on April 16, 1984.

A W A R D

Claim sustained.

Form 1
Page 4

Award No. 11275
Docket No. 11065
2-BN-CM-'87

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 10th day of June 1987.