

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20419
Docket Number MW-20340

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (**Brotherhood** of Maintenance of Way **Employees**
(Norfolk and Western Railway Company (A&P Regions)

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood that:

(1) Section Laborer **John** Block was improperly withheld from service March 28, 1972 to July 19, 1972 (System File **MW-FG-72-7**).

(2) Section Laborer John Block shall now be reimbursed for all wage loss suffered (both regular and overtime) from March 28, 1972 until he was returned to service as a section laborer.

OPINION OF BOARD: Claimant had been on **an** authorized leave of absence due to illness (a **pulmonary** infection) since July 23, 1971. On March 27, 1972 Claimant made application to **return** to duty, having **been** released by his own physician. Carrier required him to report to its local physician for a return-to-work examination **on** March 28, 1972. Carrier's Regional Medical Director, upon receipt of the **local** doctor's report, required further information from **Claimant's** personal physician as to diagnosis **and**, prognosis before determining whether or not Claimant could be released for service. After a release was secured from Claimant, Carrier sought the **re-**quired information from Claimant's physician **which** was obtained **on** July 10, 1972. Carrier asserts that a determination to restore Claimant to duty subject to periodic re-examination was made by the Medical Director on July **13**, and he was finally returned to duty on July 19th.

Carrier argues first **that** it has the right and duty to assure itself of the physical condition of its **employees** and hence in the **instant case** had the right to require a physical examination by its own doctors. As a concomitant it was necessary for the Carrier's medical staff to **have** the history and prognosis from Claimant's personal physician. It is contended that Carrier's physician "**..made** prompt and repeated requests of the **claimant's** personal physician for such a history and prognosis, but it was not forthcoming. Thus, the delay in returning **claimant** to service was for cause beyond the control of the Carrier." Further, Carrier asserts that Claimant's unavailability after July 13th (until July 19th) is directly chargeable to him and would under no circumstances be payable by Carrier.

Petitioner points out that Claimant was not advised of the findings of the Carrier physician after the March 28, 1972 examination **nor was** he allowed to return to work. Petitioner states that Claimant did not know for over two months that further medical information was required **from** his physician

with respect to his condition **in** order to go back to work. The **Organiza-**tion argues that since Carrier's defense is based on the alleged failure of Claimant's physician to respond promptly to the request for medical data, it must support this argument with evidence; this it has failed to do. Petitioner concluded that Carrier was not diligent **in** its efforts to secure the medical information relevant to the qualification of Claimant for duty.

At the outset we **must** reaffirm the well established principle of the National Railroad Adjustment Board in its various Divisions that this Board's consideration is limited to the issues raised and the evidence contained in the record made on the property (Award 5847, Second Division). We shall adhere to this principle in the instant dispute.

We find no fault with Carrier's well dot-ted and logical **argu-**went that it has the right to assure itself of the physical condition of its **employees** after a prolonged illness such as was the case in this dispute. We also agree that this right includes Carrier's privilege of requiring a physical examination by its own medical staff as well as, upon appropriate circumstances, the right to obtain additional medical data from an **employee's** personal physician. A **concomitant** of this prerogative, however, is the obligation to proceed in a diligent manner with the medical investigation so as not to jeopardize an **employee's** right to return to work or to unduly hold an **employee** out of **service** for administrative reasons.

An examination of the record of the dispute on the property does not reveal any medical explanation for withholding judgment on the **return** to duty of Claimant; in fact there is **no** medical data whatever in that record. In Carrier's letters of June 27, 1972 and October 16, 1972, as well as **in** Carrier's submission, we find contradictory assertions with respect to the various requests for medical information from Claimant's physician, but no widence whatever relating to such requests. Based on Carrier's assertions it would be reasonable to **expect** at least a copy of the letters allegedly sent to the Doctor.

In a **number** of Second Division Awards, it was held that five days was a reasonable **time** for Carrier to make a medical determination based on **examination** in order to decide whether an **employee** could return to work (Awards 6331, 6278, 6363 and 6629). In Award 12410 we found that Claimant was deprived of work for about two weeks but there was no evidence of dilatory or capricious actions by **Carrier's** medical staff. In Award 18797 we found that Claimant was out of **service for** twenty five days for appropriate extensive medical examinations and Carrier's actions were dilatory; the examination should have been completed within ten days. In this dispute 113 days elapsed from the first medical **examination** until restoration to service. It should also be noted that there was no evidence or even issue raised on the property with respect to Claimant's alleged unavailability from July 13th to July 19th.

We must conclude, based on the evidence in the record made on the property, that no medical basis was established justifying withholding Claimant from service for 113 days. **Furthermore** we have no **evidentiary** support for Carrier's contention **that** the long delay was **caused** by Claimant's physician's unresponsiveness. It is our judgment, based on the facts **made** available to us, that the medical evaluation in this case, including both physical **examination** and securing information from Claimant's physician should have been accomplished, had there been due diligence, by April 15, 1972; hence we will honor the claim from that date forward. An employee's seniority and **contractual** right to employment **must** be **scrupulously preserved** particularly **under** circumstances such as these.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral **hearing**;

That the Carrier and the Employees involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained for the period from April 15, 1972 to July 19, 1972.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

ATTEST:

A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1974.