

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23013
Docket Number CL-22958

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and
Steamship Clerks, Freight Handlers,
Express and Station Employees
{ Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8783) that:

1. Carrier violated the agreement between the parties when on March 10, 1977, Mr. E. W. Spencer was arbitrarily held out of service.
2. Carrier shall now pay Mr. Spencer for all time lost, up to January 3, 1978, when he was restored to his former position.

OPINION OF BOARD: Claimant was an extra board clerk at carrier's Bellevue Terminal. On March 16, 1977, claimant was disqualified from service for not being able to perform heavy work because of a back problem. As the result of an examination of claimant by company doctors on September 27, 1976, claimant had been classified as "clerk inside only." Due to the small number of clerks on the extra board and the fact that claimant could only accept limited assignments, his medical record was reviewed and he was disqualified.

Claimant and the organization protested this action and filed for medical arbitration under Rule 65 of the agreement. After a considerable delay, the arbitration took place and on November 11, 1977, the neutral doctor informed carrier's medical department that claimant was fit to go back to work at that time. On December 19, 1977, claimant was notified by registered mail of the neutral doctor's decision and was authorized to return to work. He returned to work on January 3, 1978. Immediately upon return to work, the organization filed a claim on behalf of clerk Spencer requesting pay at pro rata rate for all days held out of service from March 10, 1977, to January 3, 1978. The claim was denied at every step and has progressed to this board for resolution.

The organization argues that claimant was unjustifiably declared unfit for service on March 16, 1977; therefore, claimant, after being returned to work, had a legitimate claim for all days off because of carrier's actions. He should be paid for those days.

Carrier argues that claimant was not fit for service in March when he was disqualified. It relied on medical reports to support this position. Carrier also argues that claimant and the organization were responsible for delaying the choosing of a neutral doctor and that carrier should not be held responsible for that delay. Claimant's personal doctor had suffered a heart attack. The claim was not timely filed and should be dismissed by this board.

From a review of the record, the board is not persuaded that this claim should be dismissed on procedural grounds. It will therefore be decided on the merits. A review of the record also reveals that carrier had ample justification for examining and subsequently declaring claimant unfit for laborious work. He had been placed on restricted duty on a prior occasion. Carrier had a legitimate interest in his ability to cover any job to which he was assigned.

Once claimant was examined by his doctor and declared fit for duty, a legitimate conflict existed and medical arbitration was called for by the organization. The delay between the filing for arbitration on March 31, 1977 and its completion on November 11th cannot be solely attributed to either side. Carrier's medical department attempted to contact claimant's doctor. He, however, was incapacitated with a heart attack.

This board, however, is of the opinion that carrier did not act with appropriate diligence to inform claimant that he was qualified to return to work. From a review of the record, it is the opinion of the board that claimant should have been notified properly that he was qualified to return to work on December 21, 1977. Carrier knew on November 11th of the neutral doctor's decision. Claimant, however, only learned that he could return to work on December 21, 1977. He did not choose to report until January 2, 1978. The fact that claimant did not work between December 22, 1977, and January 2, 1978, is not due to a delay by carrier, but is rather the result of claimant's own decision not to do so. Carrier cannot be held responsible for this lost time.

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 Employee involved in this dispute are respectively Carrier and Employee 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 carrier did unreasonably delay in notifying claimant that he was qualified to return to work.

A W A R D

Claimant shall be paid at the pro rata rate for the time lost for the period from December 1, 1977, to and including December 21, 1977.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulina
Executive Secretary

Dated at Chicago, Illinois, this 17th day of October 1980.