

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 32328  
Docket No. MW-31978  
97-3-94-3-345

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(CSX Transportation, Inc. (former Louisville  
( and Nashville Railroad Company)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it improperly withheld Mr. B. K. Stiefel from service beginning February 22, 1993 and continuing [System File 20(37)(93)/12(93-384) LNR].
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. K. Stiefel shall be allowed eight (8) hours' pay at his straight time rate for each workday beginning February 22, 1993 and continuing until he is returned to service and said days shall be credited toward his 1994 vacation.”

**FINDINGS:**

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

Public Law Board No. 5328, Award 2, dated January 22, 1993, directed Carrier to return Claimant to work with seniority unimpaired, but without backpay and on a last chance basis. It did not specifically state a date of return. By this claim the Organization alleges that Carrier unduly delayed Claimant's return to work for 87 days, and should be held financially responsible.

The record reflects that Carrier wrote to Claimant on February 19, 1993 directing him to take a physical examination on March 9, 1993, which he did. For some unexplained reason, a drug/alcohol screening was not performed although it is required of all employees held out of service 90 days or more. Claimant was instructed to undergo additional testing to obtain such information. Carrier's Medical Department evaluated the results of Claimant's medical testing and medically qualified him to return to work on March 31, 1993. Claimant was returned to work on April 19, 1993.

The Organization contends that this claim is not a request for enforcement of the Public Law Board Award returning Claimant to work. Rather, it argues that this is a separate claim for Carrier's undue delay in medically qualifying Claimant and returning him to work. The Organization cites numerous prior Awards in support of its contention that five working days is a reasonable period of time for Carrier to determine an employee's physical fitness to return to work, and that it should be held liable when it is solely responsible for excessive delay. See Public Law Board No. 2960, Award 134; Third Division Awards 31470, 29925, 28780, 24856, 23260; Second Division Awards 12491, 11557, 6363; Fourth Division Award 4561.

Carrier argues that this claim is an attempt to have this Board enforce the prior Public Law Board Award, which it has no jurisdiction to do, citing Interpretation No. 1 to Third Division Award 28269; Third Division Awards 31655, 27575. With respect to the merits, Carrier contends that there was no date for implementation contained in such Award, and that it was entitled to consider Claimant's fitness and to review medical information before releasing him as fit to return to work. It notes that the Organization failed to sustain its burden of proving its allegation that Carrier arbitrarily delayed Claimant's return to work.

There is no doubt that this Board has no jurisdiction or authority with respect to enforcement of an Award, which the statute leaves to the purview of the Courts. Interpretation No. 1 to Third Division Award 28269; Third Division Awards 31655, 27575. The Board carefully reviewed the record in this case and concludes that the instant claim is not a request for enforcement of Public Law Board No. 5328, Award 2.

That Award directed that Claimant be returned to work on a last chance basis without backpay. Such direction was complied with by Carrier on April 19, 1993. Unlike the cited cases, there is no question being raised herein concerning whether Carrier complied with the language and intent of an Award by its actions in placing Claimant in a particular position or on a designated seniority roster. As pointed out by Carrier, Referee Zumas' Award did not have a designated time for return to work, nor did it note that his return was to be accomplished within a "reasonable period of time." Thus, any question as to undue delay in finding Claimant fit to return to work and ultimately returning him may properly be the subject of a separate claim founded upon principles firmly established in this industry.

The applicable principles have been clearly enunciated by the Board in Second Division Award 12491 involving the instant Carrier:

"Arbitral precedent establishes that Carriers have an '...inherent managerial right to withhold employees from employment until the question of their physical qualifications has been clarified' (See PLB 3898, Award 22; also Second Division Award 7230; Third Division Award 14127). However, such precedent also holds that Carriers are liable for '...undue and unwarranted delay(s) in ascertaining a returning worker's physical fitness' (Third Division Awards 26263, 21560; and Second Division Awards 6758, 6704, 7247). A number of Awards suggest that a maximum of 5 days to process papers in return-to-work cases, comparable to the instant one, is sufficient time to get an employee back to work (See Second Division Awards 5537, 6278, 6331)....."

Applying those principles to the instant case, there do not appear to be any special circumstances necessitating a lengthier time frame than that generally deemed reasonable. There is no evidence that the results of Claimant's testing left any doubt as to his medical condition requiring further information. In fact, there is no explanation in this record as to why Carrier waited almost one month to contact Claimant concerning a return-to-work physical, and another 18 days before he was scheduled for such exam. Further, while the Board agrees with Carrier's right to require Claimant to undergo a drug/alcohol screening in this case, there is no explanation as to why it was not part of the routine physical exam conducted by its referred physician on March 9, 1993, because Carrier admitted that such screening is required of all employees out of service for 90 days or more. Thus, the Board is unable to find that the lengthy delay between the January 22 Award and the March 31, 1993 medical qualification by Carrier's Chief

Medical Officer was in any part caused by Claimant's actions or conduct. This record does not support the conclusion that a proper medical assessment of Claimant could not have been conducted by Carrier within the five day period of time found presumptively reasonable in this type of case.

While the record is not totally clear, the Organization accounts for the delay between March 31 and April 19, 1993 by stating that Claimant did not receive his medical qualification to return to work until April 5, 1993 and could not make arrangements to return to work through Carrier supervisors until April 19, 1993. Thus, the Board is unable to attribute such period of delay to the fault of Carrier, and concludes that the Organization failed to sustain its burden of proving that the delay between March 31 and April 19 was unreasonable under the circumstances. The Organization's requested remedy will be adjusted accordingly.

The Board concludes that Carrier was dilatory in processing Claimant's return to work, and that his medical assessment should have been completed by January 30, 1993. We award Claimant pay for time lost for the period between January 31 and March 31, 1993.

### **AWARD**

Claim sustained in accordance with the Findings.

### **ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of November 1997.