PUBLIC LAW BOARD NO. 7099

BROTHERHOOD OFMAINTENANCE OF WAY EMPLOYES, DIVISION OF I.B.T. **CASE No. 07**

-And-

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

The Claim, as described by the Petitioner, reads as follows:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it improperly withheld Mr. F. M. Ramirez from returning to service from August 30 until October 22, 2004 (System File 3KB-6869T/1411392 CNW)

(2) As a consequence of the violation referenced to in Part (1) above, Claimant F. M. Ramirez shall now ' . . be made whole all losses, and be compensated all lost time from August 30, 2004 to October 22, 2004 due to the Carrier's failure to allow his timely return to service.'"

The Carrier has declined this claim."

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

AWARD

After thoroughly reviewing and considering the record of this case together with the parties' presentation, the Board finds that the claim should be disposed of as follows:

The record reflects that commencing June 17, 2004, the Claimant began his absence due to a medical leave of absence. On August 23, 2004, Angel Blazquez, M.D., the Claimant's treating physician, released the Claimant to return to service as of August 30, 2004. The Claimant maintains that upon receipt of the return to work note from Dr. Blazquez, he presented such note to his immediate supervisor, Manager of Track Maintenance (MTM) Lubbs, in Sterling, Illinois.

The Claimant further contended that once the note was in Mr. Lubbs hands, Mr. Lubbs indicated that he would in turn fax a copy of the medical release to other Carrier offices. The Claimant maintains that when he did not receive notice that he could return to work within a reasonable period, he made a series of phone calls and faxed copies of his return to work release to several of the Carrier's offices. Ultimately, the Claimant was permitted to return to duty effective October 22, 2004. It is the Organization's position that the Carrier unduly delayed the time it took ato permit the Claimant to return to work As a result, the Organization seeks compensation on the Claimant's behalf from August 30, 2004 until October 22, 2004. The Carrier denies the instant claim maintaining that any delay was caused by the Claimant and not the Carrier.

In seeking to discover whether the Claimant's actions or inactions caused the delay at issue, we find that the responses given by the Carrier to the claim provide insightful guidance. In this regard, once in receipt of the claim filed by the General Chairman on or about October 29, 2004, the Carrier answered by maintaining that the Claimant caused the delay by sending his medical documentation to his supervisor rather than sending it to the Health Services Department. In a subsequent response, the Carrier stated, in words or substance, that the Claimant should have sent his medical release to his Supervisor. On or about January 7, 2005 Mr. Lubbs, the Claimant's Supervisor, left the Carrier's service. Subsequently, during the continued on property processing of this claim, the Carrier noted that the Track Supervisor who works in Sterling, IL advised that Mr. Lubbs' records contained no such medical release as having been received by the Carrier on or about August 24, 2004. Notably missing from the on-property handling of this claim is any credible proof that the Claimant was mistaken in his assertion that he presented Dr. Blazquez's August 24, 2004 release form to Mr. Lubbs, or that Mr. Lubbs had not advised the Claimant that he would in turn fax a copy to the appropriate Carrier officials. In this regard, given the Claimant's desire to return to work on August 30, 2004, there was a natural and realistic incentive for him to present his medical release to his immediate supervisor as he claimed he had. While the Carrier's Law Department may also have received a copy of the medical release faxed from Dr. Blazuez's office, this does not negate the Claimant's assertion that he gave a copy of the release to his Supervisor at or about the same time. Accordingly, we must conclude that the Carrier unduly delayed the Claimant's return to service.

We have reviewed Third Division Award No. 25013 and find that it does not change our conclusion in this matter. In Award 25013, the Organization maintained that the failure by the Carrier's Chief Medical Officer following a return to work release with restrictions by the Claimant's physician unduly delayed the Claimant's return to work. The Organization asserted that the delay could have been reduced and/or eliminated had the Chief Medical Officer examined the Claimant before withholding him from service. The Board disagreed, and relying upon the "well established" right in the railroad industry that "[t]he Carrier has the unilateral right to establish and enforce medical standards for its employes" concluded that noting that nothing in the Agreement required the Carrier to examine a Claimant before withholding him from service. In the instant matter, the Organization does not challenge this "well established" right, but does challenge the undue delay in returning the Claimant to service once it had a bona fide and ultimately unchallenged release from the Claimant's medical provider.

As to the remedy, the Board has reviewed the decision published in PLB 2960, Award No. 134. In that case where a medical determination had to be made, the Board concluded that it was reasonable for the Carrier to take ten (10) days in which to return an employee to service. In the instant matter, where there were ultimately no challenges to Dr. Blazquez's return to work release, we find that a five (5) day period would have been a reasonable time for the Carrier to have reviewed the release with its medical department before ultimately deciding that the Claimant could return to service. Accordingly, we find that the Claimant is entitled to lost wages after this date up to the time of his reinstatement on October 22, 2004.

AWARD

Claim sustained in accordance with the findings herein.

Dennis J. Campagna, Neutral Member

D.A. Ring, Carrier Member

R. C. Robinson, Organization Member

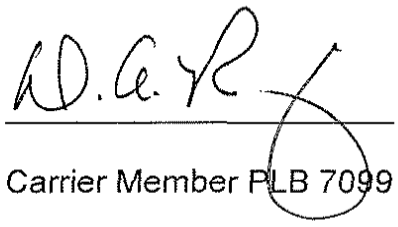
Dated: September 30, 2008

Buffalo, New York

CARRIER MEMBERS DISSENT
TO
AWARD NO. 7 OF PUBLIC LAW BOARD 7099
(Referee Campagna)

Suffice it to say, it is the Carrier's position that the Board has erred in its determination of this case. The delay in the Claimant's return to service was due to the fact that the Claimant did not present the medical information to the Manager of Track Maintenance. As stated on the property, while unfortunately the original Manager of Track Maintenance was replaced, the Carrier Officer replacing him made a search of the Manager's Office at Sterling to determine if there was any paper work from the Claimant or his treating physician. None was to be found and the Organization was advised of this. Ignoring the fact the Carrier Manager did do a search of the Office to attempt to validate the Claimant's assertion without success, the Referee concluded that the Carrier did not show any credible evidence that the Claimant did not turn in a release to the former Manager. What is being implied? There is nothing more that could have been done. In case after case, the Adjustment Board and Public Law Boards have consistently upheld the premise that the burden of proof in a rules case belongs with the Organization. Once the Carrier made the search of the office and advised the Organization there was nothing to be found the burden of proof was then on the Organization to prove conclusively the Carrier had indeed violated the Agreement and Claimant had provided the information to the Manager. No such showing by the Organization was made. Accordingly this Award is simply wrong.

Not only has this Referee erred on the issue of burden of proof but he has also now put his own interpretation on what is considered to be reasonable in medical cases. In this case it was his opinion, that even though other Boards had found ten (10) days to be reasonable for the Medical Department to make an assessment for a return to work, this case only required five (5) days. His Award flies in the face of conventional wisdom on what is reasonable in medical cases and the Carrier deems it does not and should not establish any precedent nor should it be followed.



Carrier Member PLB 7099