SPECIAL BOARD OF ADJUSTMENT NO. 1048

Award NO. 78

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

Norfolk and Western Railway

Statement of Claim:

Claim of C. E. Spain for 66 hours lost time, plus mileage and medical expenses, for removal from service pending medical review.

[Carrier File: MD-5, Spain, C. E.]

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.

This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

AWARD

After thoroughly reviewing and considering the transcript and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claim is sustained in part. There is no question the Carrier had the right to determine Claimant's fitness for duty and is entitled to a reasonable amount of time in which to do so. The evidence calls for a reduction in the amount of the time claimed. Claimant should receive 40 hours of pay.

Gerald E. Wallin

Dissent Attached.

D. D. Bartholomay
Organization Member

E. N. Jacobs, Jr.
Carrier Member

Issued at Norfolk, VA on February 26, 1998

Dissent to Award No. 78, SBA 1048

The language in this Award is contradictory, in that on the one hand it states, "There is no question the Carrier had the right to determine Claimant's fitness for duty and is entitled to a reasonable amount of time in which to do so." The time to do so in this case was nine days, not at all an unreasonable period in which to obtain an important cardiac measure and make a medical decision based on such a tool. The Carrier's Associate Medical Director in fact did not receive the test until it was faxed by the Claimant's physician on April 1, 1996; thus, five days out of the nine are directly attributable to a delay in the office of the Claimant's physician in providing the information to the Carrier.

The Neutral then stated, "The evidence calls for a reduction in the amount of the time claimed. Claimant should receive 40 hours of pay." How the Neutral thus decided that 26 hours, or roughly 2-1/2 work days, was "reasonable" for the Carrier to obtain the results of that test (especially in light of the 5-day delay by the Claimant's physician), make a medical decision based on its results, then recall Claimant to service, is beyond understanding.

As determined by the Second Division in Award 5974, involving a case on this property, extenuating circumstances (including delays by the Claimant's physician in providing information to the Medical Director) may extend the "reasonable time" for a Carrier to act:

> "In the instant circumstances, in making due allowances for (1) the delays in exchange of mail between Roanoke, Virginia, and Columbus, Ohio; (2) the intervening Labor Day Holiday, and (3) that reply from Claimant's personal physician was not received until September 20, it cannot be said that the time consumed between September 1 and September 25, 1967, in obtaining and reviewing Claimant's medical data, proved that Carrier procrastinated in returning Claimant to work."
>
> 2NRAB, Award 5974, RED (Carmen) v. NW (Gilden)

The dispute before SBA 1048 involved similar circumstances, yet required considerably less time than the 25 days noted in Award 5974.

The Award is also seriously out of step with prior Awards within the industry. For example, the Second Division opined on this subject as follows:

"Third Division Award 14762 (Ritter) states:

In view of prior awards concerning this same issue, we are unable to find that the time consumed in allowing this Claimant to return to work was arbitrary or unreasonable. Award 8535-Bailey, involved a delay of 14 days; Award 13528-O'Gallagher, involved a delay of 29 days; and Award 10907-Moore, involved a delay of 6 days.

We cannot find that the Carrier's handling of this matter was arbitrary or capricious."

2NRAB, Award No. 6048, RED (Carmen) v. SCL (Harr)

In the dispute before SBA 1048, the Neutral did not suggest that the Carrier's actions were arbitrary or capricious, and he failed to explain how he determined 26 hours to be an appropriate period for this case.

The Carrier firmly believes, and the Neutral did not dispute, that it has the right to ensure that its employees are capable of safely performing the essential functions of their positions, and to require medical evidence to substantiate their fitness for service. The Carrier further believes that this Award is inconsistent with other Awards on this property and within the railroad industry that define a reasonable time period for accomplishing such medical decisions. Consequently, this Award is considered without value as precedent and I therefore dissent.

E. M. Jacobus Jr.
Carrier Member

March 17, 1998
Date