

The Second Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States  
( and Canada A.F.L.-C.I.O.  
(  
(Burlington Northern Railroad Company

Dispute: Claim of Employee:

1. That the Burlington Northern Railroad without justifiable cause, withheld Car Inspector T. H. Tapp from service following a medical leave of absence.
2. That Car Inspector T. H. Tapp be compensated five (5) days, forty (40) hours at the car inspector's rate of pay at the time he was withheld of \$12.67 per hour.

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Claimant is a Car Inspector who was off work commencing October 1982, as a result of having Open Heart Surgery. On or about April 20, 1983, Claimant's personal doctor informed Claimant that he could return to work effective May 1, 1983. On April 21, 1983, Claimant met with his General Car Foreman about returning to work. On April 22, 1983, Claimant was examined by Carrier's physician in Memphis, Tennessee who stated that he could return to work. Claimant's papers were then sent to Carrier's Medical Department in St. Paul, Minnesota. Those papers were not received by the Carrier's Medical Department in St. Paul until May 2, 1983. On or about May 3, 1983, having heard

nothing from St. Paul concerning the Claimant, the Carrier's Officer at Memphis called the Medical Department in St. Paul to find out the status of Claimant's file. At that point a request was sent from the Medical Department seeking further information concerning the results of Claimant's Cardiovascular Surgery. By letter dated May 3, 1983, the additional information was forwarded to the Medical Department in St. Paul, which information was received on Friday, May 6, 1983. The information was reviewed on May 9, 1983, by the Medical Department and Claimant was cleared on that date to return to work. Claimant returned to work on May 10, 1983.

The Organization argues that the approximate nineteen days from April 22, 1983, when the Carrier's doctor released Claimant to return to service, until May 10, 1983, when he was in fact permitted to return amounted to an unreasonable delay and that he should have been returned to work on May 3, 1983, at the latest. Claimant seeks five days' pay as a result of the delay.

The Carrier, on the other hand, asserts that the Organization has pointed to no specific rule provision that has been violated. In any event, since additional information was needed about Claimant's medical condition which was not received until May 6, 1983, the length of time that passed to review that information (three days) was not unreasonable, especially in light of Claimant's condition and the strenuous nature of the work to which he was to be returned.

The Rule followed in these kinds of cases is set forth in Second Division Award No. 8733 and cases cited therein:

"It is the opinion of the Board that in deference to the principle of stare decisis the following axioms should apply in the instant case:

- (1) The carrier has the inherent right unless restricted by Agreement, to require employees to be examined by a physician of its choice and has the right to have those results reviewed by its chief medical officer before allowing an employee to return to service.
- (2) Unless dictated by Agreement, the Carrier must exercise its prerogative to examine and approve an employee within a reasonable time. Usually five days is accepted as a reasonable period.
- (3) The five-day period under most circumstances begins to toll after the date of the employee's examination by a Carrier physician.
- (4) In counting the five-day period, the five days does not normally include Saturdays and Sundays,

which are usually rest days of the Carrier's Medical Officer. The Carrier is also liable for Claimant's established rest days."

The Carrier focuses upon the short period of time that elapsed from the point it received the additional medical information (May 6, 1983) until Claimant was approved to return to work (May 9, 1983). However, the ten day delay from the date that the Carrier's doctor in Memphis examined Claimant (April 22 1983) until the date that original information was received by the Carrier's Medical Department in St. Paul (May 2, 1983) is unexplained. We find nothing in this record to attribute such delay to the Claimant. At that time, after the April 22, 1983 examination by the Carrier's doctor in Memphis, we believe the responsibility for prompt transmission of the records to St. Paul must lie with the Carrier. The Carrier did act promptly after receiving the additional information, once it reviewed Claimant's papers; however, such prompt action does not overcome the initial delay the burden for which, in these circumstances, must be borne by the Carrier. Claimant anticipated a delay in the examination process and conscientiously began the process well in advance of the May 1, 1983, return to work date set by his physician. Claimant can not be penalized for the Carrier's delay.

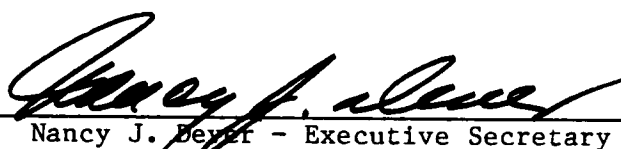
Based on the Rules set forth in Award No. 8733, we find that the request for five days pay to be within the guidelines of those Rules.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois this 15th day of October 1986.

DISSENT OF CARRIER MEMBERS  
TO  
AWARD 11042, DOCKET 10667  
Referee Goldstein

The Majority in this case has concluded at Page 3 of the Award  
that:

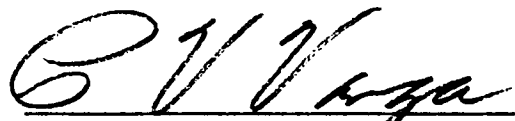
"We find nothing in this record to attribute such delay to  
the Claimant."

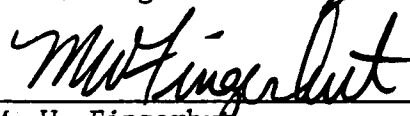
They should have made the same statement concerning the Carrier.  
There was no demonstrable delay attributed to the Carrier established in the  
record. The delay from April 22 to May 2 is "unexplained" by all parties.

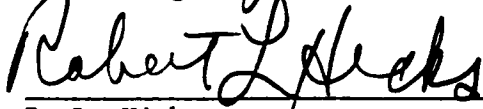
Yet, absent evidence that Carrier did something wrong, the Majority  
concludes that there was no justifiable cause to withhold Claimant for  
medical review.


Such is not supported by the record, nor is it supported by the  
precedent of this Board.

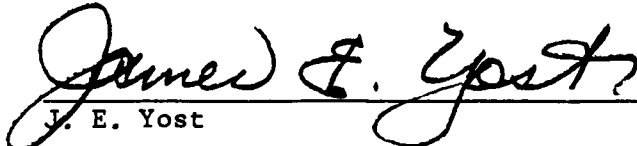
We Dissent.

  
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P. V. Varga

  
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M. W. Fingerhut

  
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R. L. Hicks

  
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M. C. Lesnik

  
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J. E. Yost