PUBLIC LAW BOARD NO. 4093

Parties to Dispute:

United Transportation Union - Yardmasters Department	)	Case No. 8
vs	)	Award No. 8
Chesapeake and Ohio Railway Company	)	

STATEMENT OF CLAIM:

Yardmaster O. T. Nicely claiming one day's pay each for October 1, 2, 3 and 4, 1983 account held off awaiting results of physical examination required by Company. Violation of Rule 5, paragraph 4, Sect. (c), Yardmasters' Agreement.

OPINION OF THE BOARD

Claimant O. T. Nicely occupied the position of Yardmaster and had marked off due to illness on May 17, 1983. After a period of over four months, Claimant was informed by his personal physician on September 27, 1983 that he could return to work without restrictions. On that same day, Claimant presented himself to the Company physician and took the required physical examination. Although he tried to mark up on September 30, 1983, he was informed that his return to work required approval by the Carrier's Medical Department. That approval was not given until October 5, 1983.

During the progression of this claim on the property the Organization maintained that the Claimant had followed the Carrier's guidelines and had been denied the right to return to work under the conditions of Rule 5, Paragraph 4(c). It further argued that the Carrier failed to determine physical fitness and approve Claimant's return to work within a reasonable amount of time. It was the Organization's position that the Carrier's delay caused the Claimant an unnecessary loss of earnings. In support of its claim the Organization makes reference to sustaining Awards which found no objection to the Carrier requiring a medical examination, but found that the Carrier had to act in an

expeditious manner (Third Division Awards 20674, 24146 and Fourth Division Award 2948). The Organization argues that there, as here, the Carrier's actions were slow and improper.

The Carrier denied any violation of the Agreement or undue delay in finding the Claimant fit to return to work. As for Rule 5 Paragraph 4 (c), the Carrier denies that the Rule has any application to the claim at bar. It points out that the results of the examination of September 27, 1983, taken at Clifton Forge, Virginia were sent to the Chief Medical Officer in Baltimore, Maryland for further review. It notes that the Claimant improperly attempted to return to work on September 30, 1983, before the medical decision was made that he was qualified to return to duty.

The medical results were evaluated, and at 8:50 AM on October 5, 1983, Baltimore advised Clifton Forge that Claimant was approved to return to his position. Claimant was notified at 9:00 AM that day. The Claimant marked up at 1:00 PM on October 7, 1983 and "immediately requested two (2) weeks' vacation". The Carrier denies any violation of the Agreement and points to Awards in support of its action (Third Division Awards 8535, 13523, 14761).

A review of Rule 5, Paragraph 4 (c) shows that Rule to be a Seniority Rule which holds that "yardmasters in all cases marking up after laying off, must give at least three (3) hours' notice of desire to exercise seniority or return to work." There is no evidence of record that such Rule was contractually created with the intent to apply to physical examinations and such is refuted by the Carrier. The Rule is not specifically applicable to the case at bar.

As to the dispute over the time lag in returning results of a physical examination, each case must stand on its own merits. The requirement of a physical examination following long illness is not unreasonable and has long been held as a legitimate Carrier action.

A review of the record as developed on property finds that the Organization asserted a number of points that go unrefuted by the Carrier and as such stand as fact. There is no evidence that the Carrier refuted the Organization's assertion that the

September 27, 1983 examination was immediately sent to Maryland. Nor is it refuted by the Carrier that the Baltimore office did not have the records on October 3rd or 4th as the Organization stated.

In addition, there is no evidence on property that any of the days under dispute were days when the Carrier's Medical Department was closed. Carrier's unrefuted assertion that the Claimant could have returned to work on the evening of October 5 and the fact that the Claimant marked up on October 7 and then asked for his two weeks' vacation is irrelevant to the issue at bar.

The issue at bar is the reasonableness of the Carrier's action. There can be no question but that the Carrier has a responsibility to assure that there is not an undue delay in the process of determining fitness to return to duty. In the instant case the record indicates that the physical examination was taken on September 27, 1983 and the decision was rendered on October 5, 1983. The Organization is requesting compensation for October 1,2,3, and 4, 1983, because Carrier was dilatory in permitting the Claimant to return to service.

The Carrier notes Awards with delays of nearly two weeks or more (Third Division 14761, 13523, 8535). This Referee has also issued such Awards when the interests of both parties and the unusual circumstances of the record so indicated (Third Division 24933). However, in such cases the record on property indicates that the Carrier had necessary medical reasons for delay or exceptional or unusual circumstances existed. Herein, the Carrier has offered no such defence. A review of this record finds reference only to the Carrier's rights to require a physical examination before Claimant's return to duty and the Carrier's administrative procedures. This Board agrees that the Carrier has a right to be certain that the Claimant is medically fit to return to his position. The Carrier's administrative procedures are not in dispute. However, such procedures must be balanced against the employees right to promptly return to work. Neither procedures,

nor the right to require and review a physical examination can justify the loss of an employee's earnings. In the facts and circumstances of this case, we find no evidence that the transmission of information to the Baltimore Chief Medical Officer and his decision should not have been completed in an appropriate period of time.

What constitutes an appropriate time frame must be determined upon the conditions and circumstances of each particular case. Herein, we find no evidence that the Claimant's medical condition necessitated any serious concern or delay. It is this Boards determination that Carrier delayed action in this case beyond acceptable limits. Previous Awards have held that a delay of five days is appropriate. As such, the determination should have been completed within five days after the Claimant reported for duty on September 27, or by October 2, 1983. There is no evidence presented by the Carrier on the property that would allow this Board to consider any of these days as reasonable exceptions. We will therefore allow compensation for Claimant for October 3, and October 4, 1983, as such time must be considered as unreasonable delay.

FINDINGS

Public Law Board No. 4093 upon the whole record and all the evidence finds that:

the Carrier and the Employee involved in this dispute are respectfully Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

That the Agreement has been violated.

AWARD

Claim sustained to the extent indicated in the Opinion.

Marty E. Zusman, Chairman
Neutral Member

Mr. R. L. McAtee
Employee Member

Mr. E. R. Norton
Carrier Member

Date 9/21/87.