

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(International Association of Machinists and
(Aerospace Workers
PARTIES TO DISPUTE: (
(Southern Railway Company

STATEMENT OF CLAIM:

1. That the Southern Railway Company violated the controlling Agreement, Rule 24, but not limited thereto, when they wrongfully refused to recall furloughed Machinist R. K. Perrin to active service, beginning on June 1, 1988 and recalled another Machinist with less seniority.

2. That accordingly, the Southern Railway Company be ordered to recall Machinist R. K. Perrin to service, with all rights unimpaired and pay him for all lost time wages, beginning June 1, 1988 and continuing until he is returned to full service.

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.

The Organization asserts that the Carrier violated Rule 24, Paragraph D, when a junior employe was recalled instead of Claimant. Essential facts are presented that Machinist J. M. Wheeler with seniority date of November 11, 1982, was recalled out of seniority order and ahead of Claimant.

The Carrier does not deny that it by-passed Claimant on the Seniority Roster. The Carrier contends that its actions were justified in that Claimant had testified in court that he was incapable of performing his railroad duties and was currently listed in sick status. Carrier asserts that Claimant swore under oath that he could not and would not return to railroad service in any capacity. Carrier argues that under the doctrine of judicial estoppel, Claimant, having previously pleaded permanent and disabling injuries, cannot now contend he has a right to employment.

In our review of this case we note that Rule 24 protects senior laid off employees in the event of recall. The Organization has argued on behalf of the Claimant that he was entitled to proper seniority recall and a return to work physical. The Organization refutes the Carrier's estoppel position noting that Claimant never testified he could not return to work because of permanent disability and then attempted to return. The Organization notes that Claimant "never requested to return."

Rule 24 states that "in the restoration of forces, senior laid off men will be given preference to reemployment and shall be notified in writing at their last known address by their employing officer to return to duty." Carrier admits it failed to follow the Agreement. The Agreement obligates the Carrier to recall in accordance with the Rule and this it did not do. We have carefully studied the long line of Awards on the Carrier's doctrine of estoppel defense (Second Division Award 11464; Public Law Board No. 3510; No. 3897, Award No. 5; and Lewandowski v. Nat. R.R. Passenger Corp. (Amtrak), USCA, 882 F2d 815 3rd Cir. 1989). Herein, there is no showing that the Claimant is asserting inconsistent or mutually contradictory positions. The Board is convinced that the doctrine of estoppel does not apply.

This Claim however will not be sustained due to Carrier's understanding that Claimant could not exercise his seniority by returning to work. Claimant had clearly informed Carrier that he would not return to work due to disability. This notification was both behavioral and verbal. Claimant had alleged an on-duty accident January 14, 1986, to which he filed suit for Carrier negligence requesting future earnings due to permanent disability. He was offered positions in both March and October of 1987, and he did not accept those positions. He further testified under oath on March 22, and 28, 1988, that he was so disabled as to be unable and unwilling to return to the Carrier's employ in any position. Just a few months prior to the June 1, 1988 recall giving rise to this dispute, Claimant gave the following testimony.

On March 22 1988, Claimant testified under oath:

"Question: '..if the railroad were to call you and offer you a job as a diesel mechanic.. are you saying you would turn the job down?'

Claimant's Answer 'Yes, I would.'"

Claimant went on to testify that because of his injury he would not go back to work for the railroad. When further asked about reassignment to a non mechanic position, he stated he would not return as indicated:

"Question: 'To do any kind of job at the railroad?'

Claimant's Answer: 'That's right.'

Question: 'Even a clerical job?'

Claimant's Answer: 'That's right.'"

On March 28, 1988, Claimant again testified under oath:

"Question: '.. If the railroad called you today and offered you a job as a diesel mechanic, would you take it?'

Claimant's Answer: 'No I would not.'

Question: 'And why is that?'

Claimant's Answer: 'I don't feel that I am capable of doing that type of work again.'

Question: 'If the railroad were to call you to offer you any type of job with the railroad, say, for instance, a clerical job, would you take a clerical job?'

Claimant's Answer: 'No, I would not.'"


This Board's reading of the full transcript amply supports the un rebutted Carrier assertion that Claimant's "status on the roster indicates that he is 'sick' and unable to perform duties to which his seniority entitled him." The transcript documents the Carrier's position that Claimant had by recent actions removed himself from service due to permanent disability. Absent any showing in this record that Claimant attempted to reverse his clear act of removal from service, this Board holds that there has been no Carrier violation under these very limited circumstances.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1991.