

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12736
Docket No. 12559
94-2-92-2-103

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

PARTIES TO DISPUTE: (Brotherhood Railway Carmen Division/TCU
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(Atchison, Topeka & Santa Fe Railway Company

STATEMENT OF CLAIM:

- "1. That the Atchison, Topeka & Santa Fe Railway Company violated the controlling Agreement, specifically Rules 19 and 110, when the company denied Carman Andrew M. Perez his contractual right to transfer to another location under the provisions of Rule 19 and granted the vacancy positions at Kansas City (Argentine), Kansas to three junior furloughed Carmen from Topeka.
2. That, accordingly, the Atchison, Topeka & Santa Fe Railway Company be ordered to compensate Carman Andrew M. Perez eight (8) hours per day, five (5) days per week, at the pro rata rate of pay for Carmen, retroactive to August 30, 1991 and to continue in like amount until October 1, 1991, at which time the Claimant was recalled to his Carman position at the Topeka SMT."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 parties agree on the following facts. The Claimant was furloughed on August 7, 1991 from his Carman position at Topeka, Kansas. The Claimant fulfilled his Agreement obligations under Rule 19(b) by requesting a transfer in writing within seven days of the notice resulting in his furlough. Claimant requested a transfer which specified anywhere, but indicated a preference for Kansas City. Claimant was passed over for transfer while three junior furloughed Carman from Topeka were transferred to the Kansas City (Argentine) facility.

The Organization maintains that the Carrier violated Rules pertaining to the application of seniority under Rules 19(a) and 110 in that Claimant was the senior furloughed Carman. In pertinent part Rule 19(a) states that:

"While forces are reduced, furloughed men... will be given consideration in seniority order for transfer to other points..., providing they can qualify after reasonable trial to handle the work of the vacant position."

The Memorandum of Agreement dated March 1, 1977 and Letter of Understanding dated September 16, 1981 state in part that:

"... the employe who is senior in point of seniority... who has application on file on the date the position is to be filled shall be assigned to the vacancy."

Additionally, the Organization points to Rule 110 which clearly states that when recalling furloughed carmen, that recall shall be in seniority order. Therefore, as the Claimant was performing all the duties of a Carman at Topeka; was the senior Carman; did properly request transfer; and was denied his seniority rights, the Organization maintains that the Carrier has violated the Agreement.

The Carrier has denied this instant Claim on the basis that the Claimant was unable to perform his full job responsibilities. The Carrier pointed out on property that a review of Claimant's record indicated he had an existing weight lifting restriction of eighty-five pounds. The Carrier argued that the Claimant could not meet the physical qualifications of positions available at the Argentine facility in Kansas City. The Carrier argued that:

"... regardless of what work was available to him in Topeka, there was no position available in Argentine with such a restriction."

This Board has carefully reviewed the Awards that have been brought to our attention and in particular Second Division Awards on this property (Second Division Awards 11986, 12025 and Dissent, 12139 and Dissent). Our review is centered upon the language of the Agreement, the burden of proof and this Board's consistent position that the Carrier has a responsibility to take reasonable actions to protect the Claimant, other employees and its property within the Agreement.

Herein, the burden of proof lies with the Organization. After the Carrier denied the Claimant's transfer on medical grounds stemming from a lumbar injury, the Board finds no probative evidence that Claimant was or could have qualified for a position at Argentine. The Board finds no statement from the Claimant that he was capable of safely lifting whatever might be required at Kansas City. The Organization provided no proof that the restriction was invalid. The Board has reviewed the record for any evidence that either positions existed at Argentine that could have provided Claimant with restricted duties or in the absence thereof, with proof that the positions which the junior Carmen transferred to Argentine never lifted in excess of the Claimant's restrictions. There is no probative evidence in this record.

We have reviewed the Organization's numerous statements on property about the Claimant's abilities. Our finding is that the Organization never directly rebutted the Carrier's assertions that Claimant was medically unqualified for any position open at the Kansas City (Argentine) facility. Lacking rebuttal and evidence, the Organization's assertions cannot establish proof. The Claim must be denied as there is no evidence of record that Claimant had the ability to perform the duties of positions available at Argentine.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 13th day of September 1994.