

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12903
Docket No. 12710
95-2-93-2-50

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists
(and Aerospace Workers
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(Norfolk & Western Railway Company

STATEMENT OF CLAIM:

"(1) That the Norfolk & Western Railway Company violated the controlling Agreement, when they unjustly recalled to active service from furlough junior Machinists and by doing so bypassed senior Machinist W. L. Sink, thereby violating Rule 26, but not limited thereto.

(2) That accordingly, the Norfolk & Western Railway Company be ordered to recall Machinist W. L. Sink to active service, with all rights unimpaired and pay him for all lost time - (8) hours per day, - (5) days a week for a total of (40) hours per week, beginning March 9, 1991 and ending upon the date he is returned to active 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 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 were given due notice of hearing thereon.

The Claimant established seniority as a Machinist and as a Welder in 1979. He was furloughed as a Machinist on September 4, 1987; continued in service as a Welder; marked off service for medical reasons on November 10, 1987; and, while out of service for medical reasons, was furloughed from his Welder position on July 22, 1988.

The Claimant initiated a suit under the Federal Employers' Liability Act alleging Carrier negligence in relation to foot injuries which had caused him to leave active service. The record makes it entirely clear that in 1989, testimony and statements by the Claimant and by his physicians were to the effect that the Claimant was permanently disabled from resuming his regular work with the Carrier. Subsequent to the court action involved in this suit, the Carrier received no mitigating medical information from the Claimant.

Beginning in February 1991, the Carrier started recalling Machinists from furlough. When the Claimant's name was reached on the seniority list, the Carrier wrote to the Claimant as follows:

"Our records indicate that you have not worked for the Carrier since November 10, 1987, due to a foot injury and subsequent surgery on same. Although you were furloughed as a machinist on September 4, 1987, you continued to work as a welder until November 10, 1987, when you departed for foot care. While off due to this injury and postliminary surgery, you were, on July 22, 1988, furloughed as a welder.

Although your name has been reached on the Roanoke Locomotive Shop Machinists' Roster for recall, our most current information concerning your situation is that which was generated during court proceedings involving your personal injury lawsuit against the Norfolk and Western Railway Company. Those records indicate that you are incapacitated and cannot perform the duties you previously performed for the Carrier. For that reason, your status on the roster is indicated as disabled."

This claim arose when the Organization contended that the Claimant should have been recalled in seniority order as of March 8, 1991, the date an employee junior to him was recalled. The Organization contends that the Claimant was "... currently physically able to perform his duties as a Machinist and was entitled to be recalled to service in accordance with the Agreement and if needed, given a return to work physical." However, no medical documentation was provided to support this assertion as to the Claimant's physical condition.

The Board finds the claim without merit. Clearly, the Carrier was fully entitled to rely on the medical information provided by the Claimant's physicians and himself, as indicated in the Carrier's letter quoted above. No further obligation rested on the Carrier in this regard. In the event the Claimant's condition subsequently changed, it is entirely reasonable to find that it would have been the Claimant's responsibility to so advise the Carrier through medical documentation. There is no indication that the Claimant did so.

The Carrier argues that, even if such information were to be provided, there is firm basis to determine that the Claimant still would not be eligible to resume work. Since this situation is not here before the Board, however, there is no need for a resolution of this aspect of the matter.

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 16th day of August 1995.