

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30807
Docket No. MW-31202
95-3-92-3-855

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation
((Amtrak) - Northeast Corridor

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier capriciously and improperly disqualified and withheld Mr. E. Brown from the foreman's position on Gang A-232 headquartered at Perryville, Maryland on July 19, 1991 (System File NEC-BMWE-SD-2980 AMT).

(2) As a consequence of the violation referred to in Part (1) above, the disqualification shall be immediately rescinded and Mr. Brown shall be compensated for all wage loss suffered."

FINDINGS:

The Third 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 herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was employed as a Track Foreman, assigned to Gang A-232. The weekend gang was assigned to open the Bush River Drawbridge on the Carrier's Northeast Corridor. From May to October, the bridge must be opened regularly to allow boat traffic to pass. To accomplish the opening, four rails, eighteen feet each in length, each weighing 800 pounds, must be unbolted and manually carried from the bridge. To close the bridge after boats pass, the

process must be reversed. The work of the gang must be accomplished quickly so as minimize the time the main line tracks are closed.

Ten employees, including the working Foreman, are assigned to the gang. To move the rails, each must lift eighty pounds, assuming a full complement and all employees lifting. The absence of any employee, or the inability of any employee to lift an equal share of the weight, increases the weight other employees must lift.

Claimant had returned to service in March 1988 from a medical leave of absence, during which he was diagnosed as diabetic. His return to work included medical documentation of his diabetes. His return was subject to a lifting restriction of 20-25 pounds. Following Claimant's return to service, he was medically examined every three months, and he furnished copies of the medical reports to the Carrier.

On September 7, 1990, Claimant had been questioned by his Supervisor concerning his physical condition. He responded that his medical condition had remained stable for the preceding two and one-half years. The Carrier was not persuaded that Claimant was qualified to perform the duties of the Track Foreman position on Gang A-232. It thereupon withheld Claimant from service and subjected him to several medical examinations.

By letter dated November 8, 1990, the Supervisor disqualified Claimant from holding the Foreman position in question from May through October each year, because of the heavier schedule and lack of additional help. Insofar as the record indicates, the Claimant was not furnished with a copy of the letter and did not know of his partial disqualification.

The Organization protested in writing the Carrier's action withholding him from service under Rule 75 (Unjust Treatment). The Carrier did not respond to the claim, but, in March 1991, reinstated Claimant to service and paid him back wages of \$7,482.84. The Carrier also reconfirmed his lifting restriction. It subsequently notified the Organization that the payment had been made in error.

The Carrier awarded Claimant the Gang A-232 Track Foreman position on July 15, 1991, but announced four days later that the award had been in error and awarded the position to an employee junior to Claimant.

In February 1992, the Carrier offered Claimant placement in a

position consistent with his medical restrictions, pursuant to Rule 9 of the Agreement, which provides, in part, that "... positions that can be taken by permanently disabled employees preference will be given to such employees as are capable of performing the service." Claimant did not accept the offer, and the Carrier withdrew it. The Claim was progressed in the usual manner, without resolution, and was brought before this Board.

The Organization argues that the Carrier failed to produce any evidence of Claimant's medical disqualification or disability for the position. It asserts that the Carrier's determination to ignore Claimant's seniority in the absence of such proof was arbitrary and capricious. The Organization points out that Rule 2 (a) allows the Carrier to require of employees a practical demonstration of their qualifications to perform the duties of a position, but that it did not require Claimant to make such a demonstration, presumably because it knew he had been performing the duties of the position. It asserts that Claimant was fully qualified for the position and possessed sufficient and adequate ability.

The Organization argues that, since disqualification from a position is tantamount to dismissal from the position, Rule 2 (c) of the Agreement requires that the Carrier must afford employees a Hearing before taking such action. It asserts that the Carrier's failure to afford Claimant an Investigation violates its obligations under that Section. The Organization also asserts that Supervisor Beuchler's November 8, 1990 letter was improperly placed in his file.

The Organization concedes the Carrier's right to determine qualifications, but argues that it must do so on the basis of bona fide reasons and not for mere pretext. It asserts that the Carrier failed to rebut the Organization's evidence that Claimant had, in fact, performed the duties of the position and was qualified for it.

It urges that the claim be sustained.

The Carrier argues that it is entitled to have its employees able to perform the work of the position and to disqualify employees who are unable to do so. It contends that the undisputed record establishes that the Foreman position on Gang A-232 is regularly required to lift and carry 80 pounds and that Claimant is medically restricted from lifting more than 20-25 pounds. The Carrier argues that Claimant is, therefore, unqualified for the position. It also contends that Claimant's inability to carry his share of the load places greater burden on other employees and presents operational and safety problems.

The Carrier denies the Organization's contentions that

additional employees are available to open the bridge, thereby rendering Claimant's lifting unnecessary. It points out that all other employees have other assignments not involving lifting the rails and that the lack of complaints by other employees in the gang are irrelevant in the determination whether Claimant can safely perform the work.

The Carrier also points out that Claimant pursued his disqualification through the Maryland Human Rights Commission and his complaint was rejected, the Commission finding no probable cause to believe that the Carrier had discriminated against him.

The Carrier rejects the Organization's argument that its offer of placement under Rule 9 was made in bad faith. It points out that maintenance of way work is, by its nature, physically demanding and that the Carrier's offer was an attempt to match his limitations to a position.

The Carrier argues that Claimant's claim for compensation is improper under Rule 75 and that the proper procedure under which to advance such a claim is Rule 64 (Claims for Compensation). It contends that the claim for compensation must be rejected on that basis. The Carrier argues, in addition, that Claimant had an obligation to mitigate his losses but failed to do so, therefore limiting its liability to May 1992, when Claimant failed to appear for an examination to qualify on a Truck Driver position.

The Carrier urges that the claim be denied and that, in any event, it not be held liable for lost wages.

It is undisputed that the Track Foreman position for Gang A-232 is a working position and that the duties of the position, at least during the summer months, regularly require lifting and carrying 80 pounds as part of carrying the bridge rails. It is also undisputed that Claimant's lifting is medically restricted to 20-25 pounds. The Board is not persuaded that Claimant can escape the lifting requirements of the position by assuming the availability of employees outside the gang or by relying on the other employees in the gang. Neither can he disregard the lifting restrictions. The conclusion required by the facts is that Claimant is not qualified for the position.

Of the Organization's argument that the Carrier's failure to require Claimant to give a practical demonstration of his qualifications means that the Carrier accepted his prior performance the Board is not persuaded. The nature of this particular disqualification is self-establishing and required no demonstration. Neither does the apparent acceptance of Claimant's limitations by previous supervisors preclude the Carrier from determining, prospectively, that Claimant does not meet the legitimate requirements of the position. Finally, the Board is

not persuaded by the statements of other employees on the gang that Claimant performed bridge openings from 1988 to 1992. The statements do not establish what Claimant did in connection with those openings; and the facts dictate that, when he participated in such openings, Claimant either did not pull his weight or that he violated his lifting restrictions.

The Board notes that the Carrier made Claimant the required offer of a position pursuant to Rule 9, but that Claimant failed to accept it. He did so at his peril.

The Board also reviewed the Organization's procedural arguments. We do not find them to be a basis upon which to set aside the Carrier's actions.

The Board has also reviewed the Maryland HRC decision. That proceeding serves different purposes than the dispute resolution procedures of the Railway Labor Act and operates under different rules. The Board does not rely for its conclusion on that decision.

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 Third Division

Dated at Chicago, Illinois, this 6th day of April 1995.