

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 31934  
Docket No. MS-32165  
97-3-94-3-595**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(G. J. Wirfel

**PARTIES TO DISPUTE:**(

(Consolidated Rail Corporation

**STATEMENT OF CLAIM:**

**"G. Wirfel MW-3104A Time Claim**

**The Carrier violated Amendment 4 to Rule 3, Section 3(c) when it failed to recall Mr. Wirfel in each of the 1989, 1990, 1991, 1992, and 1993 MW working seasons. Although the Claimant was released by the Carrier's physician to return to service on May 15, 1989, the Carrier instead awarded trackman's position to junior employees."**

**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 involved herein.**

**Parties to said dispute were given due notice of hearing thereon.**

**At the outset, the Carrier asserts that the instant claim was not filed in a timely manner, and is not properly before this Board. Upon a review of the events**

precipitating this case, the Board finds that the claim was apparently filed as soon as the Claimant knew that he was listed as "disabled/sick," even though he had passed his physical exam in 1989. It is not clear from the evidence on the record why Claimant did not suspect he was improperly listed before 1993, but there is nothing on the record to suggest that he was "sitting on his rights," between the time he passed his physical and the time he filed his claim. (See Third Division Award 30974.)

With respect to the merits of this case, the Claimant maintains that he passed the physical exam permitting him to return to work in 1989, but that the Carrier erroneously retained him on the "disabled/sick" list. As a result of that error, on several occasions over the next four years, Carrier recalled employees junior to him. Claimant seeks full compensation for lost wages, unemployment pay, subpay, vacation time and pay, months of service, hospitalization expense, contract signing bonus, and proper advancement on rosters.

The Carrier points out once Claimant passed the physical exam in 1989, he was obliged to return the signed MD-40 form to the Carrier. Claimant failed to return that form and also failed to exercised his seniority in accordance with Rule 5 of the Agreement. Thus, he remained on the "disabled/sick" list until his union representative notified the Carrier of Claimant's availability for work. Claimant's listed status was changed by Carrier the following month. The Carrier maintains that it acted with reasonable promptness to schedule another "return from disability" medical evaluation on June 25, 1993. Based upon the results, the Carrier listed Claimant on the "furloughed, subject to recall" list, and he was subsequently returned to work.

Rule 5 of the Agreement is clear with respect to the matter before this Board:

"(a) An employee returning to duty after leave of absence, vacation, sickness, jury duty, disability, or suspension shall return to his former position and may, within five (5) days after his return to his former position, exercise displacement to any position advertised in his absence or may displace any junior employee promoted during his absence, subject to Rule 3, Section 2.

\* \* \*

**"(b) An employee, failing to exercise seniority within the five (5) days specified in paragraph (a) of this Rule will forfeit the right to exercise seniority."**

**It has been clearly established on this record that Claimant failed to return the required form after his first return-to-service physical in 1989. In addition, he failed to attempt to bid into positions for which he was eligible between 1989 and 1993. Thus, Claimant's own inaction prevented Carrier from being aware of the need to change Claimant's status. Once it became aware of Claimant's alleged availability for work, it acted with reasonable speed to return him to service. Under the circumstances, Claimant is not entitled to any remedy for the four-year hiatus in his employment.**

**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 4th day of March 1997.**