

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32762
Docket No. MW-32133
98-3-94-3-496**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Louisville &
(Nashville Railroad Company)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly withheld Mr. W. J. Hess from service beginning September 8, 1992 and continuing [System File 11(8)(92)/12(93-0264) LNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. J. Hess shall:**

'Be paid 8 hours straight time, for each work day from September 8, 1992 and continuous until claimant is allowed to return to work.'

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.

Claimant established and holds seniority as a Track Repairman on the Louisville Division. Prior to the time this dispute arose, Claimant was on a medical leave of absence due to an on the job injury.

On August 21, 1992, Carrier's Chief Medical Officer sent Claimant the following letter:

"Upon review of recently received medical information I now find you medically qualified to perform railway service without restrictions, effective 9/08/92.

If you have not returned to work, please contact your supervisor if he has not already contacted you.

If you have any questions, please do not hesitate to contact me or the Associate Chief Medical Officer."

According to Carrier, on or about September 8, 1992, Claimant telephoned the Assistant Roadmaster at Owensboro, Kentucky, and informed him that he had received notification from Carrier's Chief Medical Officer that he was medically qualified to return to work effective September 8, 1992. The Roadmaster at Owensboro advised Claimant that there were no junior employees presently working on the Louisville, Henderson, and St. Louis Subdivision, and advised Claimant to contact the Roadmasters responsible for staffing on the Henderson Division for a possible displacement. [Claimant did not request an opportunity to return to work on the Henderson Division where junior employees were working.]

According to the Roadmaster, during that same interchange Claimant stated that he had injured his back just two weeks earlier, and because of the recent injury, he was "uncertain" if he would be able to successfully perform the work. Claimant also stated that he was "fearful" about returning to work because he was afraid that he would

further injure himself. However, on Claimant's behalf, the Organization maintains in its Submission that a far different set of events occurred:

"After receiving the aforementioned clearance to return to service, the Claimant contacted Roadmaster J. Taylor and informed him that he would be displacing Mr. Johnson. Under date of September 8, 1992, the Claimant reported for duty and attempted to displace junior employee Johnson. Despite receiving documented evidence that Claimant had been released for service, Roadmaster Taylor advised the Claimant that he would have to call the Carrier's Chicago office to confirm that Dr. Thomasino had actually found him physically fit for service and had been released for duty. Roadmaster Taylor called the Chicago office for assistance and was told that the Claimant should not be allowed to return to duty."

Based upon its understanding of the facts, the Organization contends:

- "1. The Claimant had been given medical clearance by the Carrier's Chief Medical Officer, under date of August 21, 1992, to return to work on September 8, 1992.**
- 2. Both the Claimant and Mr. Johnson possess Track Repairman seniority on the Louisville Division.**
- 3. The Claimant is senior to Mr. Johnson.**
- 4. The Claimant was/is fully qualified to fill the position in question.**
- 5. The Claimant, who was deemed medically fit to perform service effective September 8, 1992, properly attempted to displace junior Track Repairman Johnson from said position on September 8, 1992, but such displacement was disallowed then and continually thereafter."**

There are two areas of unresolved conflicts of material facts in this case: 1) Claimant denies that he informed the Roadmaster that he had re-injured his back when he slipped on some rocks while getting out of his vehicle and he did not think he could

handle the work and may injure himself again, and 2) the Organization refutes Carrier's assertion that there were no junior employees presently working on the LH&STL Subdivision whom Claimant could have bumped. The burden of proving all material facts to support a sustaining award is upon the Organization, as the moving Party. The record before the Board is void of persuasive probative evidence that would permit the Board to make an informed determination of the conflict in material facts. Thus, we must dismiss the claim for failure of proof. See Third Division Awards 20236, 25952 and 28794.

AWARD

Claim dismissed.

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 23rd day of September 1998.