

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33409
Docket No. CL-34503
99-3-98-3-99

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

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-11945) that:

(a) The Carrier violated the Northeast Corridor Rules Agreement, particularly Rules 1-B-1, 2-A-1, 2-A-5, 2-A-7, 2-B-1, 3-D-1, 8-D-1, and others, when, on August 1, 1996, the Carrier failed to allow Claimant to exercise his seniority on position TO-25 (Tractor Operator, Loco Shop). Claimant is returning from an on-the-job injury and has been cleared for full duty by his personal physician, with no restrictions or medication. On July 24, 1996, the Carrier's physician also released Mr. Calvert for full duty with no restrictions or medication.

(b) Claimant should now be allowed eight (8) hours at the pro rata rate of pay commencing August 1, 1996, and continuing for each and every day until Claimant is rightfully placed in this position.

(c) Claim filed in accordance with Rule 25 and should be allowed as presented.”

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.

The Organization asserts Carrier violated several rules of the Northeast Corridor Rules Agreement when it allegedly failed to allow Claimant Arnie Calvert to exercise seniority on a Tractor Operator position. Carrier maintains their decision was based on the Claimant's own admissions in Federal Court and his own physician's assessment of his (Calvert's) physical limitations with regard to lifting.

Claimant returned to work after passing the standard return-to-duty physical on July 24, 1996, after a medical leave for an on-the-job injury. Claimant's personal physician documented, in a report dated April 10, 1996, "he is capable of light duty work provided he does not have to do any lifting of more than 25 pounds on a regular basis; and Claimant could not work as a forklift operator if he would be subject to "bouncing or irregularity."

The Organization acknowledges in their submission of disputes, "in court Claimant testified his injury disabled him from his former baggageman position and also from lifting more than 35 pounds." Carrier denied his exercise of seniority on a Tractor Operator position based on the physical requirements of the position which include, as stated in the Amtrak Agreement Standards and Qualifications:

"Physical Requirements: ...The job is classified as requiring heavy lifting (Carrier notes this is more than 35 pounds)."

Carrier added "Claimant would be also be required to operate the fork truck over irregular terrain throughout the Maintenance Facility."

In regards to the Claimant's FELA claim and denial of fitness, the Board stated its position on this issue in Second Division Award No. 1672, referenced in Award No. 7976:

"It is not a violation of the agreement to bring suit against the carrier to recover damages against the carrier. But when the employee alleges permanent disability resulting from the injury and pursues that claim to a final conclusion and obtains a

judgement on that issue, he has legally established his permanent disability and the carrier is under no obligation to return him to service.”

Third Division Award No. 6215, also referenced in Award No. 7976, states:

“The basic philosophy underlying these holdings is that a person will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same subject matter in relief from an adversary by asserting and offering proof to support one position may not be heard later, in the same or another forum, to contradict himself in an effort to establish against the same party a second claim or right inconsistent with his earlier contention. Such would be against public policy.”

We concur with the holdings above. The Organization has not offered evidence of a significant change in the Claimants health status that would warrant Carriers consideration of Claimant exercising his seniority on a more physically challenging job. The Organization has failed to meet the burden of proof.

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 13th day of July 1999.