

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40854
Docket No. SG-41131
11-3-NRAB-00003-090468**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of M. D. Sanders, to be granted his requested transfer and placement onto District 4507 and Zone 8502 Seniority Rosters on January 31, 2008, account Carrier violated the current Signalmen’s Agreement, particularly Rules 40, 42, and 52, and Implementing Agreement Section 2(A), when it denied the Claimant’s request to transfer from the Sedalia Signal Shop to a Signalman position in the District and Zone listed above. Carrier’s File No. 1503149. General Chairman’s File No. S8-UP046. BRS File Case No. 14242-UP.”

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.

This claim protests the Carrier's refusal to grant the Claimant's request to transfer from the Sedalia Signal Shop to District 4507 and Zone 8502 seniority rosters. In the written settlement of his 1993 personal injury claim, the Claimant agreed that he had incurred "permanent and progressive" injuries, had permanent physical restrictions including: (1) lifting 75 pounds up to waist high occasionally (2) lifting up to 30 pounds overhead rarely, and (3) working overhead rarely, and that he will never be physically capable of working in any of the eight specific Signal Department jobs listed, including: Maintainer, Inspector, Technician, Assistant Signalman and Foreman. The Carrier denied the Claimant's request to transfer to a Signalman position based upon the fact that it could not accommodate his restrictions, the Settlement Agreement restricts the Claimant to the Signal Shop, and that roster transfers can only be done by agreement of both parties and is a prerogative of management. The Claimant underwent a Functional Capacity Evaluation and submitted an updated medical record indicating that he could return to work without restrictions. This claim is based upon Rules 40 (Seniority) 42 (Seniority Rights) 52 (Assigning Positions) and Implementing Agreement, Section 2(A).

The Organization argues that the Settlement Agreement does not restrict the Claimant to the Signal Shop and does not prevent him from becoming a Signalman. It takes issue with the Carrier's contention that the reason that job classification was not listed with all of the others is because he was occupying it in the Signal Shop, asserting that he was working as a Signal Shop Technician at the time. The Organization contends that the Carrier's denial of the Claimant's transfer request constituted disparate treatment, which cannot be upheld, citing Third Division Award 10122. It maintains that Section 2(A) of the Implementing Agreement gives the Claimant the right to a one-time opportunity to return to the service of UP, and that such provision must be applied as written, relying on Third Division Awards 10888, 12632 and 20687.

The Carrier contends that the Organization failed to prove that there is an Agreement right for employees to transfer from one seniority district to another, noting that Rules 40, 42 and 52 do not address this issue. It points to the fact that Section 2(A) of the Implementing Agreement gives employees who voluntarily

transferred to the Sedalia Shop the option for a one time transfer back to UP, and sets forth required procedures that must be followed. The Carrier asserts that the Claimant failed to follow the proper procedures, and chose to request a transfer. It stresses that past practice (since 1975) clearly demonstrates that roster transfers can only be done by agreement of both parties, providing examples of such situations, and citing Third Division Awards 32143, 31976 and 29057. Finally, the Carrier submits that the Claimant is medically estopped from transferring since it cannot accommodate his permanent restrictions in the requested position, relying on Third Division Award 29818 and Public Law Board No. 6205, Award 5.

A careful review of the record convinces the Board that the claim must fail for two separate reasons. First, this dispute is covered by a Waiver Agreement the Claimant signed in relation to the settlement of his 1993 accident/personal injury claim, acknowledging that he had permanent restrictions which prevent him from obtaining the job he sought. We are unable to accept the Organization's unsupported assertion that it was never the parties' intention to restrict the Claimant to the Signal Shop or exclude him from a Signaller position, since his acknowledged restrictions make accommodation in such a position impossible. The fact that the Claimant submitted a current medical record releasing him to work without restrictions does not change the fact that the prior Agreement he signed in exchange for a substantial monetary award specifically states that the Claimant "is not physically capable now, and will not be physically capable in the future. . . ." of performing work associated with similar positions. He is medically estopped from being granted a transfer to the Signaller position he seeks herein. See Third Division Award 29818 and Public Law Board No. 6205, Award 5.

Additionally, the Board concludes that the Organization failed to establish any Agreement right to transfer from one seniority district to another without mutual agreement, as per established past practice. The Rules relied upon do not grant the Claimant such right. Despite the fact that the Carrier and the Organization have agreed to other transfer requests, there is no proof of disparate treatment, because the Claimant's acknowledged permanent restrictions and medical condition, juxtaposed with the job requirements, are a reasonable basis upon which the Carrier could refuse to agree to such transfer request. For these reasons, the claim must be denied.

**Form 1
Page 4**

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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 11th day of January 2011.