

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25935

Docket Number MW-25712

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Consolidated Rail Corporation
(former Penn Central Transportation Company)

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

(1) The Carrier violated the Agreement when it failed and refused to allow Mr. G. T. Vickers to exercise his seniority to a Repairman Helper position advertised during his absence (System Docket CR-115).

(2) Mr. G. T. Vickers shall be afforded proper placement on the M. W. Repairman's Roster and compensated for all wage loss suffered because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: This is a contract interpretation dispute brought by the Organization on behalf of Claimant G. T. Vickers. In the case at bar, the Claimant, with seniority date of September 7, 1976 as a trackman was injured on November 27, 1978 and returned to service May 15, 1979. During Claimant's medical disability junior trackman had qualified and attained seniority in separate classes of Repairman and Repairman Helpers. Upon return to service Claimant quickly qualified for Repairman Helper and protested roster assignment of seniority in accordance with Rule 3-D-5 which reads in pertinent part:

"Rule 3-D-5. Returning to duty after leave of absence, sickness, etc.--Exercise of Seniority. An employe returning to duty after leave of absence, vacation, sickness, disability or suspension, shall within five days after reporting as ready for duty, return to his former position or exercise seniority to any position advertised during his absence."

The Organization maintains that Claimant was entitled to such claim because the rule states "exercise seniority to any position advertised during his absence." The positions were indeed advertised while the Claimant suffered disability and Claimant would have been able to qualify if he were not disabled. The Carrier in denying the claim stated that the rule "does not permit an employe to "exercise seniority" in a class in which he does not possess same...." It is important to note before ruling that discrepancies and additions found in the record between lines of arguments presented on property and those presented to this Board in ex parte submission by either party have been dealt with here, by treating the latter as inadmissible.

This Board has carefully reviewed the record as developed on property in its intent to arbitrate the central issue at bar, the interpretation of Rule 3-D-5. It lies with the moving party to document by clear and convincing evidence that its position should be sustained. In the instant case such evidence is lacking and a careful review of the record supports Carrier's position. While we may be sympathetic to the Claimant, in the absence of any other language of clarification, Rule 3-D-5 must be interpreted as returning a disabled employee to the same seniority he had when he became disabled, and allowing his time lost with disabling absence to be counted as service, so he does not lose his seniority by virtue of his injury. It does not allow an increase in seniority to other classes retroactively in terms of what "might have been" or "could have been," had the employee actually applied and been qualified. There is nothing in Rule 3-D-5 that protects the disabled employee against the central elements of this Claim, in which a junior employee did apply and did qualify for promotion. If the Rule applied to such conditions it would be so stated and documented. Absent clear and convincing evidence to substantiate the Claim with respect to Rule 3-D-5, this Board has no alternative, but to deny the Claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

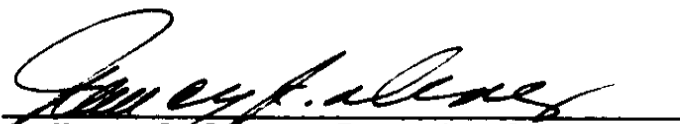
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1986.

