

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 27500
Docket No. SG-26860
88-3-85-3-626

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Southern Pacific Transportation Company (SPTC):

On behalf of L. J. Hickman for restoration to service account of Carrier violated Rules 43, 48, 64 and 72 of the current agreement, as amended, when it refused him employment account of medical restrictions. Carrier File: 011-221-(H)."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

On December 30, 1982, the Claimant injured himself while on duty when he fell off a truck. He was off duty for a period of eight months and returned to limited service with the Carrier in September, 1983. After his return to work, the Claimant worked at various assignments within the Signal Department, some on which he performed regular duty and others on which he performed light duty. On all the assignments, the Claimant was working under medical restrictions while undergoing various treatments and rehabilitation in the Oregon Rehabilitation Clinic at Good Samaritan Hospital in an effort to remove the current restrictions. In May, 1984, he bid on, and was awarded, the position of Lead Signalman at the Brooklyn Signal Shop. He continued on his position at the Brooklyn Signal Shop until bidding on and receiving a new position in the Portland Signal Office, effective September 5, 1984. The duties of that position were such that they could be performed by the Claimant within the scope of his physical limitations. At the end of September, 1984, the position was abolished.

Thereafter, the Claimant attempted to displace on positions on a Signal Gang and on the lead Signalman position at Brooklyn Signal Shop (Portland, Oregon); notably, the position he vacated at the end of August, 1984. The Carrier denied both bumps because there was no work available with the Claimant's medical restrictions.

It should also be noted that on June 28, 1984, the Claimant's physician advised the Carrier that the Claimant could not return to regular duties and recommended continued light duty. In other words, it is undisputed that as of this date his restrictions were considered permanent.

The Organization contends the Carrier's refusal to allow the Claimant to continue to work with restrictions was arbitrary. It notes the Carrier's justification for refusal to allow the Claimant to return to his former position in the Brooklyn Shops centered around two points: 1) The lifting restriction and 2) The supposed unavailability of a position which could be performed with restrictions. However, the Organization stresses that the Claimant's restrictions were unchanged since his return to work. Moreover, it cites the Carrier's own letter of November 20, 1984, to show that work was available. The letter stated in part:

"He cannot be returned to a position in the Brooklyn Signal Shop since his lifting restrictions eliminate this option. Mr. J. P. Walton, who currently holds the position of Signalman in the Brooklyn shop, has for several months been working under similar medical restrictions...."(emphasis added)

It also argues that regardless of whether the restrictions were permanent or temporary, the Claimant was qualified for, and had performed service on, the position which he attempted to displace. In fact, he attempted to displace on a job he held up to one month earlier. The Organization also believes that Awards 9 and 10 of Public Law Board 3402 are relevant.

The Carrier takes the position that it did not violate the current Controlling Agreement in any manner since there are simply no jobs existing in the Carrier's Signal Department that the Claimant, within his seniority, can perform given his medical restrictions. It contends it has fulfilled its good faith obligation to rehabilitate the Claimant including the fact that the Carrier has sponsored the Claimant's attending Clackamas Community College in connection with the Carrier's rehabilitation program.

The Carrier also questions the relevance of Awards 9 and 10 of Public Law Board 3402 since they were not intended to direct the Carrier to provide certain work at specific locations. It also addresses the Organization's contention that the Claimant should be allowed to "bump" Walton and place himself on the position of Lead Signalman at the Brooklyn Signal Shop. The Carrier states that Walton was allowed to work the Lead Signalman's position, as was the Claimant, during an adjustment period to allow him to gradually condition himself to perform the full duties of a Signalman. Walton was successful in

so doing, contrary to the experience of the Claimant, and was ultimately able to perform the work with no restrictions or limitations on his services. In short, the Carrier argues that it had no obligation to create a position that might conform to the Claimant's medical restrictions. It argues under the current economic conditions it is very difficult for it to find a position for an employee with the extremely limited work restrictions such as those placed on the services of the Claimant.

After considering the arguments of the Parties in light of the facts properly before the Board, we have reached the following conclusions: First of all, the Carrier is not obligated by the Agreement to make work or create a position to fit the Claimant's restrictions. Moreover, the fact that it accommodated the Claimant during the period of time he was under therapy to remove the restrictions does not obligate it to accommodate him forever. In other words, its good faith efforts in the short run does not obligate it to accommodate the Claimant after the period of time it became apparent that he would not be able to work out of the restrictions and that his restrictions were permanent. None of the rules cited by the Organization would so obligate the Carrier; nor does Award 9 or 10 of Public Law Board 3402. If economic circumstances or other conditions dictated that the nature of available work could not be performed with his restrictions, the Carrier was within its rights not to allow the Claimant to work.

This brings to a head the Organization's contention that there was work available that he could perform since J. P. Walton, a junior employee, was employed as such. The Board notes that as of the date of its November 20, 1984, letter, Walton had returned to work without restriction. Certainly the Claimant's greater seniority would not entitle him to displace Walton once Walton had fully recovered. If economics forced the Carrier to employ only fully able persons then it is entitled to do so. However, it is disturbing why Walton was able to work with "similar medical restrictions" for a certain period of time and not the Claimant. There simply is not any reasonable explanation for this curiosity in the record properly before the Board. Obviously, there was light duty work available between the time the Claimant attempted to displace Walton and the time Walton returned to unrestricted service. Thus, under the general precepts of seniority the Claimant had greater standing for this class of service for this period of time.

Accordingly, the Carrier is directed to check its records and pay the Claimant for time lost between the date the Claimant's bump of Walton was denied and the date Walton was able to work without medical restriction.

A W A R D


Claim sustained in accordance with the Findings.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September 1988.

CARRIER MEMBERS' DISSENT
TO
AWARD 27500, DOCKET SG-26860
(Referee Vernon)

Simply to satisfy the Referee's question concerning the Carrier's failure to allow the Claimant to displace Walton in September, 1984, the record indicates that restrictions placed on Walton had been removed on June 7, 1983. Thus, under the Referee's very well-reasoned analysis of the issues, the Carrier had no obligation under the Agreement to allow Claimant to displace Walton. There will not, of course, be any backpay due to the Claimant.

M. W. Fingerhut

M. W. FINGERHUT

Robert L. Hicks

R. L. HICKS

Michael C. Lesnik

M. C. LESNIK

P. V. Varga

P. V. VARGA

James E. Yost

J. E. YOST