

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32376
Docket No. TD-31881
97-3-94-3-209**

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

**(American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Burlington Northern Railroad**

STATEMENT OF CLAIM:

“Claim of C. J. Gingrich for - September 28, 1993 for 8 hours straight time account held off assignment; September 29, October 1, and October 2 for the difference between straight time and overtime account worked off assignment; and October 4, 1992 for 8 hours at the overtime rate could not work account keyboard.”

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.

Dispatcher C. J. Gingrich is assigned at Carrier's Alliance, Nebraska Dispatching office. On July 27, 1992, he was removed from service for medical reasons - tendinitis of the left shoulder. A month later his doctor released Claimant for service, but with restrictions - no reaching out at shoulder height with his arm. This restriction rendered

Claimant unable to work as a Dispatcher unless modifications were made to his dispatching desk. In September 1992, these modifications were made to the desk involved in Claimant's permanent position. Other desks in the office were not immediately modified to accommodate Claimant's medical restrictions. Until the modifications were completed on other dispatching desks Claimant was unable to work certain of the assignments involved.

On September 29, 1992 Claimant made application to work a five-day temporary vacancy, and was the senior qualified applicant. He was not assigned the job because the desk involved in the vacancy had not yet been modified. On October 4, 1992, Claimant was called for overtime, but could not work the assignment because the desk was not modified to accommodate his restrictions. The claims before this Board seek compensation for these lost work opportunities and penalty overtime for being required to work his permanent assignment when his seniority entitled him to work a temporary vacancy.

The Organization mainly argues that this is a seniority case, and the denial of Claimant's exercise of seniority is an egregious violation of the Agreement. Any interference with the exercise of seniority is an erosion of seniority, it says.

Carrier contends that Claimant is not entitled to claim an assignment that he is physically unable to work. In this case Claimant could work certain assignments with modification but he could not work on desks that were not modified to accommodate his medical restrictions. Carrier says that it worked diligently to determine if the accommodations initially made to Claimant's permanent assigned desk were workable, and then it proceeded to similarly alter all of the other desks in the office. It stresses that in this matter it satisfied all requirements imposed upon it by the American with Disabilities Act (42 U.S.C. § 12191 et. Seq.). Also, Carrier notes that several of Claimant's time claims are not properly before the Board because of procedural irregularities in the on-the-property handling.

In resolving this matter the Board must first note that we are doing so strictly under the language of the parties Agreement. As noted in Second Division Award 13090 [citing with approval Second Division Awards 11624 and 12149] "we are not empowered to interpret or enforce state or federal statutes, ... our authority is limited to interpreting or applying agreements between carriers and their employees."

In "interpreting or applying [the] agreement" between this Carrier and this employee, the Board notes that the Organization has cited:

Article 2(e) - Service on Positions Other Than Seniority Choice

Article 4 - Seniority

Article 12(i) - Filling Temporary Positions

and a:

September 1, 1975 Memo of Agreement on posting and assigning temporary positions

as Agreement authority for a sustaining Award. Careful study of the Agreement provisions relied upon by the Organization fails to suggest, in a single instance, that Carrier must assign an employee to a position or vacancy that would involve activity beyond his medical restrictions. There are hundreds, perhaps even thousands, of Awards of all Divisions of this Board that hold that Carrier need not assign an employee to a position or vacancy that the employee is not qualified to work. It is undisputed in this record that Claimant was not qualified to work certain dispatching desks in the Alliance office because these desks had not been modified to accommodate his medical restrictions. Accordingly, it was not a violation of any of the Agreement provisions cited by the Organization when Claimant was not worked on the various jobs on the dates claimed.

The lack of Agreement support requires that the Board deny the claim. In doing so we make no determinations as to whether Carrier was dilatory in effecting modifications to all of the desks in the Alliance dispatching office, or for that matter, that it was even required to do so under the terms of the parties Agreement. The answer to these questions rests elsewhere.

The claim is not supported by the language of the Agreement. It is denied.

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 30th day of December 1997.