

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33457
Docket No. MW-32272
99-3-95-3-88**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier recalled junior employee R.E. Ribet to service, performing Class II Machine Operator duties beginning August 3, 1993, instead of recalling senior employee R. Wilburn and assigning him to the position in question. (System Docket MW-3245).

(2) As a consequence of the violation referred to in Part (1) above, Mr. F. Wilburn shall be compensated for all lost wages at the applicable straight time and overtime Class II Machine Operator’s rate, beginning August 3, 1983 and continuing, and he shall receive credit for day and month for benefit and vacation purposes.”

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 Claimant has, at all material times herein, held seniority as a Class 2 Machine Operator in Work Zone 6 of the Carrier's Track Department.

In October 1985 the Claimant entered into disability status for non-work related reasons and remained in that capacity as of February 1, 1993. At that time the Carrier contacted him and requested that he inform the Carrier of his condition by February 16, 1993 or else he would be placed in furlough status. At some point thereafter, but before the deadline, the Claimant responded and completed, at the Carrier's request, form MD-25. However, the record does not reflect the substance of either of these communications. In reply, the Carrier provided to the Claimant his MW200 card showing his operator qualifications, and asked that the Claimant review the card and notify the Carrier of any errors. Again, Claimant did as requested.

On August 3, 1993 the Carrier recalled to service a junior employee and assigned him as a Class 2 Machine Operator in Gang 423 in Work Zone 6. That employee continued to work in that capacity until August 19, 1993.

In the meantime the Claimant contacted the Carrier which informed him that he was to submit to a return-to-work physical examination. After the Claimant successfully completed the exam, he was qualified to return to work on August 25, 1993 and did so on August 30, 1993.

The Organization contends that the Claimant was willing and fully and medically able to return to work as of August 3, 1993. Thus, when the Carrier failed to call the Claimant for the Class 2 Machine Operator assignment on that date, the Carrier violated the Claimant's seniority rights. The Carrier on the other hand argues that although the Claimant may have been willing to work as of that date, he was not medically able to do so until later in August when he passed his return-to-work physical examination.

On this point the Organization passionately asks the question how many times must the Claimant notify the Carrier that he was able to return to work? We too believe that question controls the disposition of this claim. However, we have carefully searched the record for the evidence that establishes the point at which the Carrier was certain that the Claimant was indeed able to return to work and in doing so we find no record evidence that the Claimant passed his return-to-work physical examination until after the period during which the junior employee worked in the position to which the

Claimant stakes his claim. Accordingly, he was not entitled to that position until he demonstrated his ability to return to work and did not do so during the relevant period. Thus, his claim must fail.

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 23rd day of August 1999.