

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35468
Docket No. SG-35783
01-3-99-3-768

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claims on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation (Conrail):

Continuing claim on behalf of M.S. Long for the right to exercise his seniority and displace a junior employee on position No. 06-046-0725-1119-6 and for all lost wages and benefits, including overtime, at the prevailing C&S Maintainer’s rate, account Carrier violated the current Signalmen’s Agreement, particularly Rule 2-B-1, when on April 14, 1998, it did not allow the Claimant to exercise his seniority right to displace the position of C&S Maintainer at Trenton, Michigan. Carrier’s File No. SG-1018. General Chairman’s File No. RM3204-28-0898. BRS File Case No. 11090-CR.”

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 in this case was assigned to a position of Maintainer C&S when on or about May 5, 1994, he sustained an on-duty personal injury. Because of his injury, the Claimant was off duty until September 1997, when he requested reinstatement to service. In compliance with his request to return to service, the Claimant was examined by at least six different physicians between September 1997 and April 1998. There was a critical lack of unanimity among the opinions expressed by the several physicians. Because of the opinion expressed by the most recent Carrier-appointed examining physician to the effect that the Claimant should not perform repetitious overhead work and should not lift more than 25 pounds, his request to exercise unrestricted seniority to a Maintainer C&S position was denied by the Carrier.

On May 5, 1998, the Organization initiated a penalty claim on the Claimant's behalf alleging a violation of Agreement Rule 2-B-1 when the Carrier refused to permit the Claimant to exercise his seniority to the position of his choice. The claim was progressed through the normal grievance procedure steps on the property during which consideration was given by the Carrier to the placement of the Claimant under the terms and conditions of Agreement Rule 3-E-1. When no position was found to accommodate the type of restrictions indicated by the final examining physician, no placement was made under Rule 3-E-1. During the remainder of the on-property handling of this dispute, the parties continued with their original respective positions, i.e., the Organization argued that the Claimant should have an unrestricted exercise of seniority and the Carrier argued that there were physical restrictions placed on the Claimant by the Carrier's examining physicians which precluded his unrestricted return to service. The final position document found in the case file is the Organization's letter dated July 19, 1999, in which its position of unrestricted exercise of seniority by the Claimant was reiterated. No further discussion of this case is evidenced in the case file. Rather, the Organization moved the dispute to the Board on October 7, 1999.

The Agreement Rules applicable to this dispute are as follows:

"Rule 2 - SELECTION OF POSITIONS

* * *

2-B-1. After absence due to leave of absence, jury duty, vacation, sickness, disability, suspension or other cause, an employee must return to his former position, if not abolished or filled by a senior employee in the

exercise of seniority, and/or within ten (10) calendar days, exercise seniority (including right to promotion) to any position advertised during his absence. An employee failing to obtain a position not requiring a change of residence shall forfeit all seniority. If, during his absence, his regular position has been abolished or filled by a senior employee in the exercise of seniority, he shall exercise seniority in accordance with Rule 2-C-1.

3-E-1. (a) By written agreement between the General Chairman and the Manager-Labor Relations a disabled employee holding seniority under this Agreement may be assigned to any position covered by this Agreement, provided he is capable of performing the service. An employee removed to permit such placement shall exercise seniority within ten (10) calendar days from the date removed in accordance with Rule 2-C-1.

(b) A disabled employee placed in accordance with paragraph (a) above shall be compensated at the rate of the position to which assigned and may not exercise seniority."

In addition to the Rules referenced supra, there exists on this property an additional Agreement Rule which is applicable to the consideration of the dispute. That is Rule 8-D-3 which reads as follows:

"8-D-3. When an employee has been disqualified on account of his physical condition and the General Chairman desires the question of his physical fitness to be decided, the case shall be handled in the following manner:

The General Chairman shall bring the case to the attention of the Senior Director-Labor Relations. The Senior Director-Labor Relations and the General Chairman shall each select a doctor to represent them, each notifying the other of the name and address of the doctor selected. The two doctors thus selected shall confer and appoint a third doctor.

Such third doctor shall fix a time and place for the employee to meet him. After completion of the examination the third doctor shall make a full report in triplicate, one copy to be sent to the Senior Director-Labor

Relations, one copy to be sent to the Medical Director, and one copy to be sent to the General Chairman.

The decision of the third doctor setting forth the employee's physical fitness and his conclusions as to whether the employee meets the requirements of the Company's physical examination policy shall be final, but this does not mean that if there is a change in his physical condition a reexamination will be precluded.

The third doctor shall be an expert in the disease or injury from which the employee is alleged to be suffering and shall be located at a convenient point so that it will be necessary for the employee to travel a minimum distance, and if possible not be away from home longer than one day.

The Company and the organization shall each defray the expenses of their respective doctors. At the time the report is made, a bill for the fee and traveling expenses, if there are any, of the third doctor should be made in duplicate one copy to be sent to the Company Medical Director and one copy to the General Chairman. The Company and the organization shall each pay one-half of the fee and traveling expenses of the third appointee."

There is no question but that the Claimant was refused an unrestricted exercise of seniority because of his physical condition. Clearly, the Carrier has the unrestricted right to rely upon the opinions expressed by its own selected medical examiners. Such reliance does not, per se, constitute a violation of Rule 2-B-1. The case record contains probative evidence that the Carrier made a good-faith attempt to accomplish the placement of the Claimant under the terms and conditions of Rule 3-E-1. Such a placement could not be accomplished because of the physical restrictions placed on the Claimant by the Carrier's examining physicians.

[Strangely, there is nothing found in the case file to indicate that any action was initiated by the Organization to access the terms and provisions of Rule 8-D-3. The initiation of action under this Rule 8-D-3 is primarily the responsibility of the party who is challenging the determination of the physical condition. Such absence of action by the Organization in this case precludes the Board from making a definitive determination.] There is obviously a dispute relative to the Claimant's physical fitness. The Board cannot resolve such a conflict. The negotiated Rules Agreement contains the procedures

under which disagreement relative to physical fitness can be definitively resolved. The Rules Agreement provisions must be exhausted before a dispute becomes "ripe" for progression to the Board of final resolution.

Therefore, the Board disposes of this case by remanding it to the parties to fulfill their respective obligations under the terms and provisions of the negotiated Rules Agreement. Any delays attendant to this remand are the responsibility of each party.

AWARD

Claim disposed of in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 22nd day of May, 2001.