

PUBLIC LAW BOARD NO. 6205
AWARD NO. 5
CASE NO. 5

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned junior employees to fill twenty (20) positions or failed to fill eight (8) other positions advertised in Bulletin Nos. NSF00915, NSF00917, NSF00918, NSF00929, NSF00931, NSF00935, NSF00936, NSF00944, NSF00948, NSF00951, NSF00953, NSM01250, NSM01260, NSM01263, NSM01285, NSM01286, NSM01287, NSM01312, NSM01313, NSM01315, NSM01319, NSM01320, NSM01321, NSM01323 and NSM01324 between April 2 and 30, 1992, instead of assigning Mr. J. D. Henderson (System File R-6/920428).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. D. Henderson shall be assigned the position with seniority in the class of system gang assistant foreman and allowed the appropriate rate of pay for all wage loss suffered during the period of April 27 to May 8, 1992, and awarded a roadway equipment operator position with seniority in that classification and compensated at the appropriate rate of pay beginning May 11, 1992 continuing until the violation ceases."

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

As background to this dispute, Claimant was employed by Carrier between June 23, 1980 and September 24, 1990. As a result of an on duty accident on November 3, 1987, Claimant sustained back and neck injuries which formed the basis for his initiation of a lawsuit under the Federal Employers' Liability Act (FELA). During the pendency of this action, Claimant continued to work as a burro crane operator with REO seniority. Litigation commenced in 1990, and both Claimant and his physician testified at trial about Claimant's permanent inability to perform work as a laborer and expressed reservations about his ability to operate a crane. Carrier entered into a settlement of the FELA action on August 6, 1990 agreeing to pay Claimant \$161,250.

On August 13, 1990 Claimant voluntarily bid into a lower paying laborer job and commenced working in that capacity. Carrier removed him from that position in September, 1990 when it discovered this fact and physically disqualified him, an action protested by the Organization. In Third Division Award 29818 the Board, on September 29, 1993, upheld Carrier's actions in physically disqualifying Claimant from working positions for which he held seniority other than the REO on the basis of the doctrine of estoppel, and denied the claim which requested reinstatement to service.

While that case was pending resolution at the Board, the Organization initiated the instant claim, protesting Carrier's denial of work opportunities to Claimant by refusing to award Claimant positions represented by some 25 different job postings in April, 1992 for which he applied. The Organization averred that Carrier filled these positions with junior employees and failed to fill 8 of the posted positions, thereby depriving Claimant of work opportunities as an Assistant Extra Gang Foreman and Track Machine Operator.

As developed on the property, the Organization's position is that the testimony of Claimant and his medical expert at the FELA trial only restricted Claimant from future employment in a laborer's position, and not in any other position. It argues that Third Division Award 29818 only restricts Claimant from holding positions to which he had seniority, and notes that the bid positions encompassed in this claim do not fall within that category. The Organization asserts that a Track Machine Operator position is identical to an REO position, from which Claimant was not disqualified. It points to subsequent medical evidence proffered during the claims processing indicating that Claimant can return as a burro crane operator, but should not return on any type of laboring gang.

The Organization relies upon the following language of Rules 20(e) and 19(b) in support of its position that Claimant was entitled to placement in these jobs:

RULE 20 - BULLETINING POSITIONS - VACANCIES

* * * * *

(e) When no bids are received from employes

retaining seniority in the class, the senior unassigned qualified employe in the class, whether furloughed or regularly assigned in a lower class, will be assigned. In the event there are no qualified employes furloughed or regularly assigned in a lower class, the vacancy or new position may be filled in accordance with the provisions of Rule 19(b). If not filled pursuant thereto, the position may be filled by appointment and assignment bulletin will be issued showing name of employe appointed.

RULE 19 - PROMOTION

* * * * *

(b) Positions of foremen and supervisors will be filled by promotion of available qualified employes. Positions of foremen or supervisors, or other positions that are not filled through bulletining to employes in seniority class, will be filled from available qualified employes in the other classes of the seniority group, and in the event not so filled will be filled from available qualified employes in the other groups of the subdepartment.... the Management to be the judge with respect to positions covered by this section.

The Organization argues that since Claimant was not disqualified from the posted positions, his overall seniority should have prevailed over the junior employees selected to fill the positions and Carrier should have been required to place him in such position, or at least in one of the 8 advertised positions which were not filled. The Organization also contends that this claim is neither procedurally flawed nor duplicative of the claim filed in Award 29818. It also asserts that Carrier's disqualification of Claimant from these positions without giving him an opportunity to show that he could perform the work in question is a willful violation of the

Americans with Disabilities Act (ADA) and public policy.

Carrier initially argues that this claim is procedurally flawed on two grounds. First, that it is duplicative of the one filed by the Organization in Award 29818, since it seeks Claimant's reinstatement to a position after his September, 1990 removal, and, second, that it is untimely since Claimant's removal occurred in 1990 and the claim was not filed until April, 1992. It also notes that the ADA allegation is the subject of a Federal Regulation and not a matter arising out the collective bargaining agreement.

With respect to the merits, Carrier contends that Claimant is medically estopped from returning to work in any position other than REO, and that the doctrine of *res judicata* should be followed with respect to this finding of the Board in Award 29818. It notes that 21 of the bulletined positions were in the Track Subdepartment, from which Claimant was medically disqualified, and argues that the language of Rule 20(e) would not grant a nonqualified employee any rights to a position. Carrier asserts that the remaining 4 REO positions were filled with employees senior to Claimant, noting that under the Agreement Claimant gave up his seniority in the Roadway Equipment Subdepartment when he voluntarily transferred from a higher rated job to a lower rated job in August, 1990.

With respect to the procedural issue, although the effect of this award is to seek reinstatement with Carrier when such was specifically sought in Award 29818, we find that the basis for the instant claim is the denial of specific bid positions in April, 1992 rather than the Claimant's September, 1990 removal from the laborer's position and medical disqualification, and thus is not duplicative or untimely.

However, the finding of the Board in Award 29818 is *res judicata* and directly applicable to the merits of this case. Therein, the Board concluded that Claimant was medically estopped from asserting the right to perform positions for which he held seniority other than REO, based specifically on the medical evidence adduced during the FELA trial that Claimant's condition was permanent and prevented him from safely performing the heavy work associated with an extra gang laborers position. The Board's finding of the applicability of medical estoppel to the facts was clearly supported by the record and precedent and is not palpably erroneous. See Third Division Awards 29408, 28719.

In this case the Organization bears the burden of showing that Claimant was qualified for the posted positions. It failed to meet that burden with respect to the 21 Track Subdepartment positions which Carrier asserted required, at times, heavy labor work on extra gangs, and was covered by Claimant's medical disqualification. Claimant's own medical documentation indicated that he should not return to work on any type of laboring gang. Similarly, the Organization failed to show that Claimant had superior seniority to those employees awarded the four REO positions referenced in the claim. It did not rebut Carrier's assertion that Claimant forfeited his REO seniority under the Agreement when he voluntarily bid into a lower rated position, or show what the nature of Claimant's alleged seniority was in relation to those awarded the position.

Accordingly, the claim must be denied. We do not believe that Carrier's determination in denying Claimant the bid positions under the circumstances of this case or our finding in any way contravenes Claimant's protections under the ADA or public policy.

AWARD:

The claim is denied.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

D. A. Ring
Dominic A. Ring
Carrier Member

Dated: _____

R. B. Wehrli

Rick B. Wehrli
Employee Member

Dated: 7-5-00