Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25034
Docket No. 44609
99-1-97-1-S-6736

The First Division consisted of the regular members and in addition Referee William E. Fredenberger, Jr. when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claims for basic penalty day in behalf of Yard Service Employee M. L. Duzan account not allowed to exercise his seniority to the Guaranteed Extra List (G.E.L.) at the Twin Cities' Terminal for various dates ranging from September 22, 1994 through May 5, 1995 (see Attachment 'A')."

FINDINGS:

The First 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.

On October 31, 1991 Claimant sustained an injury to his back while on duty. For the next two years Claimant worked intermittently. On November 9, 1993 Claimant's doctor issued the following work restriction: "Due to his work related medical problems, Mr. Duzan should only work an eight hour shift." For approximately ten months thereafter the Carrier allowed Claimant to exercise seniority to any and all assignments in the Twin Cities Terminal including the Guaranteed Extra List (G.E.L.). However, when Claimant attempted to mark up for a G.E.L. assignment for September

22, 1994, the Carrier denied the attempt and instructed him to mark up on another assignment. Claimant did so. The Carrier's action generated the claim in this case.

The Carrier denied the claim. The Organization appealed the denial to the highest officer of the Carrier designated to handle such disputes. However, the dispute remains unresolved, and it is before this Board for final and binding determination.

The Organization maintains that the Carrier wrongfully denied Claimant his seniority rights by refusing to allow him to mark up to a position on the G.E.L. for September 22, 1994 and for various dates thereafter through May 5, 1995. The Organization contends that once the Carrier allowed Claimant to exercise seniority to any and all assignments including those on the G.E.L. after Claimant had been placed under medical restriction, the Carrier obligated itself to continue allowing Claimant to do so.

The Organization alleges that every yard switching and transfer assignment in the Twin Cities Terminal has potential overtime because Yardmasters have the managerial discretion to decide on a day-to-day basis whether yard assignments will work overtime. The Organization further alleges that, after Claimant's medical restriction but before the Carrier's work restriction, when Claimant worked an assignment which might involve overtime, the Yardmaster was informed in advance of Claimant's eight hour restriction whereupon the Yardmaster made arrangements to cover the overtime with another employee. Moreover, urges the Organization, the Carrier has allowed a coworker of Claimant who had an identical restriction to exercise seniority to a G.E.L. assignment at the same time the Carrier denied Claimant such right. Additionally, the Organization avers, the Carrier even has accommodated an employee under a four hour work restriction while denying Claimant the same accommodation for a lesser restriction.

The Organization relies upon Article 100, Section (a) (Application of Seniority) of the applicable schedule agreement which provides that "[T]he right to preference of work and of promotion shall be governed by seniority in the service where ability is equal to service requirement." The Organization maintains that the Carrier's action violated Article 100 as well as specified provisions of other applicable agreements providing for seniority to govern in the selection of assignments. Moreover, urges the Organization, the claim for a basic penalty day in this case is appropriate as a device to police the collective bargaining agreement (CBA).

The Carrier too relies upon Article 100, Section (a) of the applicable schedule agreement to justify its actions in this case. The Carrier argues that Claimant was not permitted to exercise his seniority to the G.E.L. because he had a medical restriction which precluded him from working in excess of eight hours on a shift or tour of duty. The Carrier emphasizes that the G.E.L. protects all yard jobs in the Twin Cities Terminal, including a significant number that are known to work consistently in excess of eight hours per shift. Thus, the Carrier urges, an employee must possess the fitness and ability to perform all work protected by the G.E.L., and because Claimant could not do so, his ability was not equal to the requirements of the service as provided in Article 100, Section (a).

The Carrier maintains that inasmuch as the G.E.L. guarantees payment to employees who hold positions on it, should the Carrier be forced to allow Claimant to obtain and hold a position on the list, not only will the Carrier be forced to pay Claimant his guarantee but also a guarantee to another employee it would be forced to maintain on the list to cover any work in excess of eight hours on a shift Claimant worked. This, the Carrier urges, places an undue financial burden upon it.

The Carrier also argues that the Organization did not raise on the property any argument with respect to other employees having the same restriction as Claimant being accommodated by allowing them to secure positions on the G.E.L., nor did the Organization make below the allegation that an employee with a four-hour restriction was accommodated with respect to another type of assignment. Accordingly, the Carrier urges, this Board may not consider the arguments with respect to those matters now raised by the Organization.

The Carrier additionally argues that should it be found to have violated the agreement as the Organization alleges, the penalty payment sought in the claim is excessive. The Carrier maintains that any award should be limited to actual loss suffered by Claimant.

First, we must address the status of the Organization's arguments that the Carrier allowed employees having the identical medical restriction as Claimant to mark up to the G.E.L. and allowed another employee to mark up to an assignment not involving the G.E.L. where such employee was restricted to four hours work during a shift. We have reviewed the record in this case carefully. While the record reveals documentation as to the existence of such accommodations by the Carrier, it does not

substantiate that during the handling of the claim herein such accommodations were drawn to the Carrier's attention by the Organization or that it argued to the Carrier any inconsistency in treatment of Claimant based upon such accommodations. Inasmuch as the arguments were not raised below, we are precluded from considering them. This is a proposition too well established to require citation to authority.

Turning to the merits of the claim, we find that Article 100, Section (a) of the applicable schedule agreement more supports the Carrier in this case than it does the Organization. That provision clearly conditions the right of an employee to exercise seniority to a position upon his or her ability to perform the work of the position. As the Carrier emphasizes, in view of Claimant's medical restriction he could not exercise seniority to a position which is known to work in excess of eight hours per shift. It follows that Claimant should not be allowed to place himself upon the G.E.L. which protects vacancies in such positions.

The Third Division in Award 29008, involving this Carrier addressed a situation similar to the one in this case. There the Board found that the Carrier did not violate applicable seniority provisions when it declined to allow an employee to place herself on an extra board which protected assignments on three shifts, one of which Claimant had been restricted from working by her personal physician. The Board made the following pertinent ruling:

> "As this Board has held on numerous occasions, the Carrier has the right to protect itself and its employees by assuring that its active employees are physically able to perform their duties. In the instant case, the Claimant was a member of an Extra Board. One of the requirements of the Extra List is that the employees on such a list make themselves available for all shifts."

We find that ruling instructive and persuasive with respect to the claim in this case. The rationale of the ruling squarely fits Article 100, Section (a) of the applicable schedule agreement.

The Organization argues that the language of Article 100, Section (a) relied upon by the Carrier applies only to the term "promotion" used therein and not to the term "work." The wording of the provision does not support the Organization. The language relied upon by the Carrier applies to ". . . preference of work and of promotion . . . ."

The Organization also argues that the language relied upon by the Carrier is no longer in effect by virtue of the parties' October 8, 1985 agreement implementing the consolidation of the Minneapolis/St. Paul Terminal and coordination of seniority rosters. Our review of that agreement has revealed nothing therein to support the Organization's argument.

The Organization vigorously maintains that once the Carrier allowed Claimant to place himself upon the G.E.L. with knowledge of his medical restriction the Carrier thereafter was precluded from disallowing him from exercising seniority to that board. Without question Claimant was allowed to exercise seniority to the G.E.L. for several months before the Carrier precluded him from doing so. However, despite the Organization's insistence that Yardmasters easily accommodated Claimant's medical restriction to the needs of the service, the Carrier, as noted above, makes compelling arguments to the contrary. The fact that it was several months before the Carrier acted to correct what apparently had become an unsatisfactory situation more indicates the Carrier's tolerance and desire to accommodate Claimant, which it ultimately was not able to do, than it indicates the Carrier's acknowledgment of Claimant's unbridled right to exercise seniority to any yard job. We do not believe that during such period Claimant developed a vested right to exercise seniority to a G.E.L. position without regard to his medical restriction.

In the final analysis we find no basis for the claim in this case.

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 First Division

Dated at Chicago, Illinois, this 21st day of June 1999.