

*Borden & P. A.
conflicting evidence
irreconcilable conflict*

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30771
Docket No. MW-29982
95-3-91-3-378

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc. (former Louisville
(and Nashville Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of
the Brotherhood that:

(1) The Carrier violated the Agreement when it prevented Track Repairman R. C. Kissick from exercising his seniority in the displacement of a junior employee on the E. K. Seniority District on April 23, 1990 [System File 2(12)(90)/12(90-705) LNR].

(2) Track Repairman R. C. Kissick shall be allowed eighty (80) hours of pay at the track repairman's straight time rate of pay because of the violation referred to in Part (1) of this claim."

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 waived right of appearance at hearing thereon.

Claimant is a Track Repairman. On April 21, 1990, Claimant was displaced by a senior employee. Claimant asserts that on April 23 he telephoned the Division Engineer's office to inquire about the availability of positions for which he could exercise his seniority. Claimant also asserts that he spoke with Clerk E. W. Rich on that date, who informed him that there were no junior employees working on the seniority district where he held seniority. Claimant further asserts that he then filed his name in accord with the Agreement in order to protect his seniority.

The Organization argues that the information given to Claimant by the Clerk was in error in that there was a Track Repairman (Sparks) working on the district with less seniority than Claimant. According to the Organization, Claimant could have displaced the junior employee had Claimant been given accurate information by the Clerk. Therefore, according to the Organization, Claimant should be compensated for the lost work.

The Clerk disputes Claimant's version of the conversation. According to a statement submitted by the Clerk:

"My records indicate that Mr. Kissick voluntarily filed his name & address telling me he had to be off a few days acct. Union Business, this was on or about 4/23/90.

I did receive a letter from Mr. Kissick on May 2, 1990 saying he was filing his name because I had told him he could not hold a job. This is completely false, he never asked to displace Mr. Sparks at Lexington, Ky, when he filed his name & address by phone."

In this case, the Organization bears the burden of demonstrating the elements of its claim. The Organization's theory is that Claimant was effectively misled by the Clerk when he allegedly told Claimant that there were no junior employees working in the district where Claimant held seniority so that Claimant could exercise his seniority for displacement purposes. In his statement, the Clerk emphatically denies that assertion - "This is completely false."

We are of the opinion that there is insufficient basis in this record upon which to reconcile the conflicting assertions. Because the burden in this case rests with the Organization, the irreconcilable conflict in the critical evidence concerning the conversation between the Clerk and Claimant on April 23, 1990 requires a finding that the Organization's burden has not been met. The claim must therefore be denied.

AWARD

Claim denied.

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O R D E R

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 6th day of April 1995.