

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32926
Docket No. MW-32329
98-3-95-3-162**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (Eastern Lines)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated beginning January 3 through 19, 1994 when the Carrier assigned a junior employee, Machine Operator R. Navarro, to perform machine operator's work on the San Antonio Division instead of recalling and assigning senior Machine Operator C. R. Lapp to perform the work (System File MW-94-133/BMW 94-333 SPE).**
- (2) As a consequence of the violation referred to in Part (1) above, senior Machine Operator C. R. Lapp shall be allowed one hundred four (104) hours' pay at his respective straight time rate and he shall be credited with thirteen (13) days for vacation qualifying 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 Organization here charges that the Carrier's out-of-seniority recall of junior Machine Operator Navarro on January 3, 1994 ahead of the Claimant, who was qualified, willing and available to report, caused him to lose 104 hours of straight time and 13 days of vacation accrual.

Article 8, Section 4 of the Agreement provides that in making assignments to fill bulletined positions, senior employees in the class must be recalled to service prior to assignment of junior personnel. Claimant Lapp was the senior furloughed employee in the Machine Operator class when he received a letter from the Carrier dated December 13, 1993 recalling him to work from furlough. From that point forward, pointed contradictions abound in the recitations of facts set forth by the parties.

The Carrier contends that its Labor Desk Clerk sent Claimant a recall letter on December 13, 1993. When she confirmed that notification by phone the same day, Lapp indicated he was having problems at home and would get back to her. He did not do so. On December 21, Carrier's Medical Department sent the Clerk an e-mail message requesting that she arrange a return-to-work physical exam for Lapp. On January 12, 1994, the Medical Department sent further e-mail clearing Lapp to return to work.

The Claimant acknowledges that he received the Carrier's recall letter dated December 13, 1993. He says that he responded to Carrier's Clerk the next day, advising her that he "would be recalled" after the first of January, and maintains that she said she would get back to him at that time. When he called her on January 5, 1994 she directed him to get a physical exam form from a Carrier office and call her back. He says he did so, and she then arranged for a physical on January 6, telling him she would call him back when the results were received. On January 18, she called and asked him to report to work immediately. He then informed her he could not report until January 20 because of a scheduled court appearance. In the interim, junior employee Navarro performed the available Machine Operator's work from January 3 through 7; 10 through 14, and 17 through 19.

The parties are in apparent agreement that resolution of this dispute turns entirely upon which version of the facts is accepted as the more credible. Work was available for Claimant effective January 3, 1994, yet a junior Machine Operator was assigned to it. Claimant says he was waiting for the Carrier to get back to him. Carrier says she was on hold for Claimant, awaiting further word from him regarding his "problems at home" and in the meantime had to get the work covered.

Quite naturally senior employees are affronted to watch junior people perform their jobs, and this clearly is the rub here. The Agreement reflects that reality in requiring strict compliance with its seniority provisions and forbidding the Carrier from interfering with the operation of those Rules. In this dispute, there is no seniority principle in contention - the Carrier clearly complied with Articles 2, 6 and 8 in attempting to recall to its open position the senior-most qualified employee in the class. The sole question concerns the reasons for the delay in scheduling Claimant's back to work physical exam, and whether Claimant or Carrier should bear the loss caused by that delay.

The record here reflects two highly controverted versions of facts material to the disposition of the claim. Without making credibility findings, the Board has no method of determining which recounting of the facts is correct. But the full compass of the Parties' understandings in a very real sense incorporates not only the Agreement but the well-established precedent interpreting it, and countless Awards recognize that the Board has no power to make credibility findings. Accordingly, and because there is nothing in the present record which establishes that the Carrier's contentions regarding the actions of its Clerk are inaccurate, the claim must be dismissed for failure of proof.

AWARD

Claim dismissed.

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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 November 1998.