

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31888
Docket No. MW-30408
96-3-92-3-148**

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(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 failed and refused to allow Track Repairman J. E. Bradley to exercise his seniority in the displacement of a junior employee on the Mobile Subdivision on January 21, 1991 [System File 14(3)(91)/12(91-423) LNR].

(2) As a consequence of the violation referred to in Part (1) above, Track Repairman J. E. Bradley's seniority shall be restored to the appropriate roster standing on the Mobile Subdivision with all benefits unimpaired and he shall be compensated for all wage loss suffered beginning January 21, 1991 and continuing until the violation ceases."

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.

Prior to the date of this dispute, the Claimant, holding seniority in the Track Subdepartment, was furloughed from the Pensacola Subdivision. Thereafter, he was allowed work on the Mobile Subdivision, where he worked for several months, at which time the Carrier abolished the gang to which he was assigned.

At the time of the gang abolishment in 1990, the Claimant states he and three other employees were advised by their Foreman that the Roadmaster had advised that the "cut-off forms" were unavailable, but that the employees should sign a "piece of yellow legal pad." According to the Claimant, the Foreman stated this would be "forwarded to the office," in place of cut-off forms, which are required if employees are to retain recall rights. This was attested to by a written statement signed by the Claimant and four other employees (including the Foreman).

On January 21, 1991, a Mobile Division Tie Gang was established. An employee junior to the Claimant, who had been cut off at the same time as the Claimant, was recalled for this newly created Tie Gang. Under Rule 22(b) the Organization argues that the Carrier improperly failed to recall the Claimant.

The Carrier denied the claim by stating (a) the Claimant failed to complete the necessary cut-off form; (b) the recalled junior employee had done so; and © the Roadmaster denied that he had ever authorized the use of the yellow legal pad in place of the usual procedure.

The Carrier urges that this varying allegation of fact is sufficient to require the Board to dismiss the claim, based on an irreconcilable conflict as to what occurred. There is ample precedent for this position, assuming the absence of any additional facts. The Carrier, however, must be faulted on two bases. In its response during the claim handling procedure, the Carrier stated:

"... our investigation included a copy of a handwritten statement by [the] Roadmaster ... wherein he emphatically refutes these contentions. [The

Roadmaster| states that a cut-off notice was issued to the employees and they did in fact sign that cut-off notice."

The record shows, however, no copy of such "handwritten statement." Certainly, it was the obligation of the Carrier to provide such statement to support its otherwise undocumented contention. In addition, even if the Carrier's characterization of the Roadmaster's view is accepted, it simply states "the employees" (including the Claimant?) did sign cut-off forms, which would have qualified the Claimant for recall.

Second, the Carrier states that the recalled employee signed a cut-off form, but again it provided no proof of this by producing a copy of the form.

On this basis, the Board is clearly entitled to accept the Claimant's version, particularly in view of the Foreman's signature on the written statement submitted by the Claimant and the other employees.

In sum, if the Carrier makes an affirmative defense, it is obligated to provide more than a mere allegation without documentation. Because the Claimant's seniority was disregarded, the Board must sustain the claim.

AWARD

Claim sustained.

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 4th day of March 1997.