

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32440
Docket No. MW-31250
98-3-93-3-187

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when, on June 20, 24, July 2 and 9, 1991, the Carrier assigned Pittsburgh Seniority District employees S. Smiley and/or M. Berryman to perform vehicle operator's work distributing track materials for the rail gang in New Galilee, Pennsylvania, instead of assigning Youngstown Seniority District Vehicle Operator L. Knepp to perform the work (System Docket MW-2392).**
- (2) As a consequence of the aforesaid violation, Youngstown Seniority District Vehicle Operator L. Knepp shall be allowed thirty-two (32) hours' pay at the vehicle operator's pro rata rate of pay."**

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.

On the dates involved in this claim Carrier used a Pittsburgh Seniority District employee to perform work of distributing track material on the Youngstown Seniority District. Its only two defenses against payment of the time equivalent to the Youngstown Seniority District employee that lost the work opportunity are; 1) a basic conflict in the factual record exists, and it is well settled that the Board is without authority to resolve such disputes, thus a dismissal award is required; and 2) the named Claimant was furloughed at the time, thus he was an improper Claimant, and this, too, requires a dismissal award.

Carrier will not prevail on either point. In this record the Board is not faced with a conflict in facts. All that we are faced with is a Carrier allegation that the facts are in a hopeless state, thus unable to be reconciled. This is not the record. The record conclusively demonstrates that a driver from the Pittsburgh Seniority District performed work on the Youngstown Seniority District. And Carrier has submitted nothing persuasive to indicate that this is not factual. Simply because one party is unwilling to accept that facts as stated by the other party, even though these statements of facts may be completely accurate, does not create a situation of irreconcilable differences that must be dismissed. If this were considered an acceptable standard then a party could prevail before this Board simply by confusing the facts and then argue irreconcilability, and obtain a dismissal award. The Board does not believe that Section 3 of the Railway Labor Act was intended to operate in this fashion.

With regard to Carrier's contention that Claimant was unavailable for service on the claim dates, thus, he is not entitled to be to be compensated, the Board notes that the Agreement was violated when the wrong employee was used for work on Claimant's seniority district. The Organization is privileged to name any Claimant it chooses to be compensated for this Agreement violation.

The claim will be sustained as presented.

AWARD

Claim sustained.

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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 21st day of January 1998.