

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32712
Docket No. MW-32171
98-3-94-3-597**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly disqualified and then failed and refused to allow Mr. D. Stepp to exercise his seniority from August 17, 1993 to September 13, 1993, when he was allowed to report for service (System File C-87-93-D090-01/8-00151 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. D. Stepp shall be compensated for:**

' . . . seventeen (17) days' earnings and one and one-half (1 1/2) hours' pay totalling \$1987.23 as a result of the Carrier's arbitrarily discharging him from his assignment on August 17, 1993 at 2:00 p.m. prior to the completion of his regular daily assignment.'"

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.

In 1992 Claimant sustained an on-duty injury. He was cleared to return to duty with restrictions in May 1993. Claimant's restrictions precluded him from lifting, laboring and working down on the tracks. On July 26, 1993, Claimant was awarded the position of Speed Swing Operator. He worked that position from August 3, 1993 until an incident on August 17, 1993. On August 17, 1993, Claimant's Foreman told him that the Roadmaster had advised that Carrier could not accommodate Claimant's restrictions and that Claimant was to go home and keep Carrier advised of any change in his restrictions. On August 23, 1993, the Roadmaster wrote Claimant advising that due to the lack of sufficient time to observe his performance on the speed swing, Claimant was disqualified from that position.

The parties are in dispute over what occurred on August 17, 1993. Organization contends that Carrier arbitrarily ordered Claimant off the speed swing and sent him home. Carrier maintains that it had no problem with Claimant's ability to operate the speed swing but that Claimant stated that he could no longer operate the machine due to his medical condition. On several occasions this Board has recognized that, as an appellate tribunal, we are unable to resolve irreconcilable disputes in the evidence and therefore must dismiss such claims as turn on those disputes. See, e.g., Third Division Awards 31868 and 31831.

During handling on the property, the Organization submitted a signed statement from Claimant attesting that:

"While I was operating the Speed Swing, I never complained to anyone about operating the Speed Swing. I never had any problems with men or the foreman on that job. I enjoyed operating the Speed Swing."

At all levels of handling on the property, the responding Carrier officials asserted that Claimant maintained that he was unable to operate the speed swing due to his medical condition. However, Carrier presented no evidence from individuals with personal knowledge, such as the Foreman or the Roadmaster, in support of this assertion. Had Carrier done so, the result we reach may have been different. However, as the record now stands, the only evidence is Claimant's unrefuted signed statement that he voiced no complaints about operating the speed swing. The assertions of Carrier's officials to the contrary, unsupported by probative evidence, cannot create a conflict in the facts. See Third Division Awards 21224, 21222, 18870. Based on the record developed on the property, the claim must be sustained.

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 19th day of August 1998.