

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32776
Docket No. MW-32779
98-3-96-3-99**

The Third Division consisted of the regular members and in addition Referee Richard R. Kasher when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Seaboard Coast
(Line Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly terminated the seniority of Mr. W. T. Lewis on March 15, 1994 for alleged failure to timely respond to recall (System File 94-32 SSY).**
- (2) The claim as presented and subsequently conferenced on March 15, 1995 shall be allowed as presented because the Carrier failed to render a decision within sixty (60) days after the date of conference in accordance with Rule 40 and the June 28, 1991 Letter of Understanding.**
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, the Claimant shall be reinstated ‘. . . and compensated, at the appropriate Rank 6, Trackman’s pro rata rate, for all time lost between the effective date of his last return to work physical and the actual date he is returned to service, plus any and all additional loss suffered as a result of this Carrier’s actions.’”**

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.

Rule 13, Force Reduction, of the parties' Agreement establishes the procedure for furloughing and recalling employees represented by the Organization.

The Claimant was in furlough status on March 1, 1993 when the Carrier sent him a recall notice advising that there were vacancies that had gone no bid on the Jacksonville/Tampa Seniority District.

By letter dated March 26, 1993 the Claimant wrote to Division Engineer Dobbs that he was "interested in filling one of the vacancies" and that he would contact appropriate Carrier personnel "immediately."

The Claimant testified that he telephoned the Carrier's Atlanta Division Office and advised Tony Corbitt that he would not be able to return to service immediately, and that they agreed that upon his successful completion of a return-to-work physical examination he would return to work.

When the Carrier did not hear again from the Claimant until late 1993, the Carrier concluded that the Claimant had failed to comply with the 30 day provision of Rule 13, Section 6(b) which provides that employees "will forfeit all seniority rights if they fail to return to work or furnish satisfactory reason for not doing so, within thirty (30) calendar days from date of notification [of recall] by mail or telegram sent to the last acknowledged address."

When the Claimant attempted to return to service, after successfully passing a return-to-work physical examination, the Carrier alleged that his failure to timely respond to the recall notice in March 1993 had resulted in his forfeiture of seniority.

Thereafter, subsequent to the claim being filed, the Organization alleged that the Carrier had failed to follow the prescribed time limits, not only under Rule 13, but in accordance with the June 28, 1991 Letter of Understanding regarding the manner in which claims were to be processed. The Organization argued that the Carrier failed to "render a decision within sixty (60) days after conference discussions," as required by the June 28, 1991 Letter of Understanding. The Carrier responded during the handling of the dispute on the property that it was the Claimant's inaction which initiated the seniority forfeiture provisions, and that there was no evidence of any attempt purportedly made by the Claimant to return to work consistent with the requirements of the recall notice. Insofar as the Organization's claim that the Carrier failed to timely render a decision after conference discussions is concerned, the Carrier argues that subsequent to a December 29, 1994 conference, the Organization was immediately advised that date that the claim was being denied "in its entirety."

The Board concludes that the Carrier did not fail to comply with the claims processing requirements of the Agreement.

On the other hand, the evidence in the record before the Board is not sufficiently probative to establish that the Claimant either did or did not forfeit his seniority. There is some reason to believe that the Claimant was not sufficiently diligent in responding to the recall notice. However, there is also reason to conclude that responsible Carrier personnel were put on notice that the Claimant could not return to service immediately upon being recalled, and agreed that he would be given some leeway in complying with the recall notice.

In these circumstances, it is the Board's view that equity requires a finding that the Claimant have his seniority restored and that he be given the opportunity to fill the next available vacancy to which his seniority would entitle him. However, equity does not require that the Claimant receive any backpay, as he was permitted leeway in responding to the recall notice and then unduly delayed his response.

AWARD

Claim sustained in accordance with the Findings.

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 23rd day of September 1998.