

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32942
Docket No. MW-32180
98-3-94-3-614**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier allowed junior employees L. A. Siler and A. J. Bland to work on SPG Force 5X12 between December 13, 1993 and January 1, 1994 [System File X-9054/12(94-69) CSX].**
- (2) As a consequence of the violation referred to in Part (1) above, G. L. Howard shall be allowed compensation at the SPG trackman's rate of pay ' . . . for ten (10) hours each of the following dates December 13, 14, 15, 16, 20, 21, 22, 23, (Holiday 24 and 25) 27, 28, 29, 30 and Holiday 31, 1993 and Holiday January 1, 1994. . . ."**

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.

This claim alleges a violation of Claimant's seniority by Carrier retaining two junior employees to work on SPG 5X12 while furloughing him in December 1993. There is no dispute that the two named employees are junior to Claimant.

The record on the property contains a statement from Claimant that he was told by Foreman Powell twice on December 8, 1993 that he was to be furloughed at the end of the workday but that junior employees Siler and Bland had "home boy" status and would be retained. Claimant states that after he left on December 8, 1993 he was never contacted to come back and continue working on the gang.

The record also contains statements from Foreman Powell and Manager-Administration B. B. Smith, Engineering indicating that Claimant and the other two junior employees were working as extras on the gang and were all informed on the morning of December 8, 1993 that this was their last day because the gang was being reduced to its original size. Powell checked further during the day to see what he could do for them and was told that he could keep them for the following week. Both statements indicate that Powell called the gang together at the end of the day, called roll, and informed them that they were all to report back the next Monday and until further notice of force reduction. Powell states that Claimant never reported back while the other extra employees did, and he assumed Claimant went elsewhere.

The Organization argues that Carrier violated the seniority provisions of the Agreement by retaining junior employees while furloughing Claimant. It notes that Claimant's admitted senior status entitled him to remain working on the SPG gang rather than Siler or Bland. The Organization also contends that Claimant's statement clearly refutes Carrier's position.

Carrier contends that this case must be dismissed because there exists an irreconcilable conflict in facts which the Board is not empowered to resolve, citing Second Division Awards 6856, 7051; Third Division Awards 13330, 16450, 16780. It notes that the Organization failed to sustain its burden of proof by a mere assertion that the Foreman is not telling the truth and Claimant is.

A careful review of the record convinces the Board that this claim must be dismissed because the record presents irreconcilable disputes of fact which are central

to the disposition of the claim. Claimant said he was told not to report back after December 8, 1993 and Foreman Powell and Administrator Smith both indicate that the original directive was rescinded and that all gang employees were present when they were later informed to report back to work until further notice. The Board has no way of resolving this conflict. Under such circumstances, the Board must find that the Organization failed to satisfy its burden of proof, and the claim must be dismissed. Second Division Awards 6856; Third Division Award 13330.

AWARD

Claim dismissed.

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.