

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35627
Docket No. MW-32653
01-3-95-3-584**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Denver and Rio Grande Western Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier recalled and assigned junior employee D. S. Arreola to fill a laborer's position on Littleton Section Gang 8851 on June 24, 1994, instead of assigning senior employee E. J. Atencio (System File D-94-63/BMW 94-684).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E. J. Atencio shall be ‘. . . compensated at the Section Laborer's rate of pay for all days and hours, including applicable overtime, worked by junior employee Arreola in Claimant's place. ****”

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 case involves relative seniority rights of Maintenance of Way Track Department Laborers E. J. Atencio ("Claimant") and his coworker D. S. Arreola, each of whom was recalled from furlough in June 1994. It is not disputed that Arreola had greater seniority in the Extra Gang Laborer seniority or that the Claimant had greater seniority in the Section Laborer classification. On June 6, 1994, Arreola was recalled from furlough as an Extra Gang Laborer and on June 13, 1994, the Claimant was recalled for service to cover a Section Laborer vacancy at Littleton, Colorado. Each of these furloughed employees was scheduled to undergo a return-to-work physical examination on June 22, 1994, including drug screen testing.

Arreola was cleared to return to work on June 24, 1994 but, due to some unspecified problems experienced by the Carrier's contract medical service provider, the Claimant was not cleared to return to work until July 13, 1994. In the meantime, although recalled ahead of the Claimant solely because of his superior seniority as an Extra Gang Laborer, Arreola elected to place on the Section Laborer vacancy at Littleton, Colorado, from which he was displaced by the Claimant on July 13, 1994. [The Organization asserted without proof that the Carrier "instructed" Arreola to take the Section Laborer position and failed to rebut statements from Division Engineer Hernandez and Assistant Division Engineer Mutz stating that Arreola "placed himself" on the Section Laborer position because it was closer to his home.] In this claim, the Claimant seeks the Section Laborer earnings of Arreola for the period June 24 - July 12, 1994 under a theory that "had Carrier exercised managerial foresight and care in making the recall for said position and ensured that the Claimant was recalled and processed in a prompt and timely manner, the Claimant would not have been forced to suffer a loss of twenty (20) calendar days of work opportunity to a junior section laborer."

We find no violation of Rule 13 and no other evidence of mishandling of the Claimant by the Carrier in this record. Contrary to the Organization's bare assertions, there is no showing that the Carrier ordered Arreola to cover the Section Laborer vacancy while the Claimant awaited the results of his return-to-work physical and nothing in the Agreement that would have allowed the Carrier to prevent Arreola from exercising his right to the Section Laborer vacancy prior to the Claimant's availability. Finally, there is no evidence whatsoever that the delay in the Claimant's return to work was attributable to negligence or unreasonable delay by the Carrier or its duly authorized agents. The theory of the Organization, apparently, is that the Carrier intended to require Arreola to take the Section Laborer vacancy when it recalled him

to an Extra Gang Laborer position or that the Carrier should have anticipated the delay in the Claimant's return to service. However, there is no evidence at all to support such speculation and conjecture. Indeed, there is nothing in the record to show the Section Laborer position taken by Arreola on June 24, 1994, was even vacant on June 6, 1994 when he was recalled to service in the Extra Gang Laborer classification. In summary, there is no evidence presented by the Organization that satisfies its burden of proof that the Claimant should have been recalled to the Section Foreman's position on June 6, 1994 when Arreola was recalled or that his return to service was intentionally or negligently delayed.

AWARD

Claim denied.

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 28th day of August, 2001.