

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36395
Docket No. MW-35736
03-3-99-3-712

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 the Carrier refused to allow B&B Mechanic E.A. Henry to displace junior employe R. Sears at Lebanon, Indiana on May 26, 1998 (System Docket MW 5238).
- (2) The claim referenced in Part (1) above, as appealed by Assistant General Chairman M.D. Flowers on June 9, 1998 to Manager Labor Relations L. Ross, shall be allowed as presented because said claim was not disallowed by Manager Labor Relations L. Ross in accordance with Rule 26.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant E.A. Henry shall now be "****compensated for all wages he could earn from May 28, 1998 and until his return to work and all pay claimed days to be paid as time worked to apply to all applicable benefits, and reimbursed for all expenses incurred on May 25 and 26, 1998."

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 May 26, 1998, the Organization filed the instant claim, contending that the Carrier violated the Agreement when the Claimant was not permitted to exercise his seniority by displacing a junior employee on that same date. The claim was denied by the Carrier by letter dated June 8, 1998.

On June 9, 1998, the Organization appealed the declination. The letter was sent by certified mail and by fax. According to Rule 26(a), the Carrier had 60 days to render a decision.

On September 4, 1998, the Organization requested that the claim be allowed as presented because the Carrier had failed to decline the claim within the time limits required under the Rule. The Carrier responded by letter dated September 11, 1998, contending that an "understanding existed between the parties extending the Carrier's time limit for responding to this case." In the Organization's next correspondence on September 21, 1998, the Carrier's statement was flatly denied. The Organization asserted that there was never any discussion or understanding regarding the extension of time limits.

Based on the foregoing record, the Board must sustain the claim on procedural grounds. Once the Organization established that it did not receive a timely claim declination, the burden shifted to the Carrier to prove as an affirmative matter that the parties agreed to extend the time limits. The evidence on that point, which consists of the parties' conflicting assertions and counter assertions, is insufficient to meet that burden. Accordingly, the claim will be sustained as presented.

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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 18th day of February 2003.