Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11224
SECOND DIVISION Docket No. 10945
2-EJ&E-MA-'87

The Second Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Elgin, Joliet, and Eastern Railway Company

Dispute: Claim of Employes:

1. Under the current agreement, the Elgin, Joliet, and Eastern Railway Company violated Rule 82 but not limited thereto, when they improperly severed the seniority and employment of Machinist Louis Thomas effective May 2, 1984.

2. That accordingly, the Carrier be ordered to reinstate Machinist L. Thomas to service with all benefits and rights restored and recovery of all wages lost commencing May 2, 1984 up to and until the date reinstatement is accomplished.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

On October 16, 1981, the Claimant was furloughed from service with the Carrier. By a letter dated and sent April 19, 1984, the Claimant was notified that he was being recalled for service as a Machinist, effective that date. The Notice also carried a statement that:

> "Not hearing from you within ten (10) days, your name will be removed from seniority roster."

The Notice was sent by Certified Mail "return receipt requested."

The postal records show that the Claimant received the letter on May 1, 1984. He reported to the Carrier that day, but the Carrier already had removed him from the seniority roster effective April 30, 1984, the eleventh day after the Notice was sent. On May 31, 1984, the Organization submitted a Claim on behalf of the Claimant, requesting reinstatement and the restoration of wages lost since the termination of his seniority on May 2, 1984. The Carrier declined the Claim.

The applicable Rule in the instant case is:

"Rule 82
Increase in Force

> In the restoration of forces senior men laid off will be given preference in their respective crafts, if available. Ten (10) days' notice will be considered sufficient time to report for work. Men not reporting in ten (10) days will have surrendered their rights to re-employment unless a request in writing, for an extension of time shall have been approved by mutual agreement of the Carrier and the Local Committee."

The crucial issue in this case is when the Notice of Recall became effective: upon posting, as the Carrier claims, or upon receipt, as the Organization claims. The Carrier claims that past precedent holds that the date of mailing controls, and this appears to be the case. The Carrier has submitted several decisions covering various situations in which this Board and others have held that the Carrier cannot be held to be an insurer of the receipt of Notice by the addressee. (Third Division Award Nos. 13757, 15007, 15575, 24348; Second Division Award No. 9845.) Therefore the Carrier's duty to notify is fulfilled when the Notice is sent to the last recorded address given by the employe, and the period begins to run on that date. (Third Division Award No. 24348.)

It is clear that this principle results in sometimes harsh consequences, as in this case. The rationale behind it, however, is stated in Public Law Board No. 2067, Award No. 392:

> "The Board finds that Carrier's burden under Rule 6-A-4(c) is not to prove that Claimant received the notice, but rather its burden is to show that it sent the notice. This it did. If the burden were the former, all an intended recipient thereof need ever do is to refuse to accept certified mail and, thus, according to such specious conclusion, Carrier could never prove that it had properly served notice to attend a trial. The use of certified mail is a means of proof that a communication was sent, not that it is received. It is also proof of receipt."

In the instant case the Carrier has suggested that the Claimant purposely avoided receiving the letter until May 1st, presumably by refusing receipt. There is no dispute that the letter was sent to the Claimant's correct address. This suggests that he simply neglected or refused to pick it up from the Post Office after Notice of its arrival was delivered to his address.

The Organization has argued, however, that the Claimant's reporting to work on the day he received the Notice demonstrates that he did not purposely attempt to avoid its receipt. But the Organization offers no reason why he did not receive the Notice for so long, e.g. that he was out of town when attempted delivery was made.

Therefore, it seems more likely than not that he was either attempting to avoid it, or that he was simply negligent in obtaining it. In either case, and especially in view of the considerable precedent holding that Carrier mailing constitutes Notice, the Board will deny the Claim.

In doing so the Board is aware of Second Division Award No. 5929, in which as part of the section entitled "Carrier's Statement of Facts," there is a passing reference to a period in which to accept a bid, which began when the employee received the letter, rather than when it was sent. The interesting thing about that opinion is that it involved the same Carrier involved here. Nevertheless, the reference to that period is not part of the actual holding of the case, and therefore does not control the outcome here.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 18th day of March 1987.