

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39936
Docket No. MW-39166
09-3-NRAB-00003-050661
(05-3-661)**

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier removed all of Mr. T. C. Schultz’ seniority dates from the 2005 Seniority Protest Roster (System File RJ-0517-202).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now restore all of Claimant T. C. Schultz’ seniority dates as they were listed prior to the aforesaid removal.”**

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.

Claimant T. Schultz had, prior to the time of the instant dispute, established seniority on various rosters. He was on furlough during the summer of 2004. The record shows that on September 22, 2004, the Carrier sent the Claimant a letter by certified mail, to the post office box address listed on his employee record. The letter informed the Claimant that he was recalled to service as a Sectionman on Gang 5323, that he had seven days from receipt of the letter to report, and that his failure to do so would result in the loss of his seniority. The Carrier obtained a U.S. Postal Service certified mail record, which indicates that the letter was unclaimed at the Claimant's post office box until it was returned to the Carrier on October 14, 2004. The Claimant contended, in a written statement, that he checked his post office box weekly, and his mailbox daily, and he never received notice of the Carrier's letter.

When the Claimant failed to report, the Carrier terminated his seniority. The Claimant and the Organization were apparently unaware of this action until the Carrier issued revised Maintenance of Way seniority rosters.

On April 22, 2005, the Organization submitted a protest on the Claimant's behalf, stating that his seniority dates had been omitted from the 2005 Seniority Roster. The record shows that the parties exchanged correspondence and discussed the matter on the property, and the Carrier held to its position that the Claimant had forfeited his seniority.

The Carrier contends that the case before the Board is patently defective, because the Organization never properly filed a claim as required by Rule 49(a) of the parties' Agreement. Under the circumstances present here, we cannot make a finding that the claim is not properly before the Board. On the merits, the Carrier demonstrated that it mailed the recall notice to the Claimant's address of record. Postal Service records show that the Claimant did not claim it, and the letter was returned to the Carrier. To overcome the presumption of delivery, known as the "mailbox rule," the Organization must provide more than the Claimant's self-serving statement. Under these circumstances, the Claimant must be deemed to

**Form 1
Page 3**

**Award No. 39936
Docket No. MW-39166
09-3-NRAB-00003-050661
(05-3-661)**

have received proper notice, and his failure to respond justifies the Carrier's decision to terminate his seniority.

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 31st day of August 2009.