NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20293
THIRD DIVISION Docket Number MW-20468

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Norfolk and Western Railway Company (Lake Region)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to recall furloughed Track Laborer B. J. Binnion to service on December 21, 1971 but instead recalled junior Track Laborer Joe Ball. (System File MW-DEL-72-1)

(2) The Carrier shall pay to B. J. Binnion the amount of monetary loss suffered by him beginning December 21, 1971 until the date he is returned to service.

OPINION OF BOARD: On November 10, 1971, Claimant was displaced as an Assistant For-. Thereafter, he requested and received vacation from November 11 through November 19. On November 19, there were no junior employees for Claimant to displace, and he was placed in a furlough status.

Claimant asserts that on November 23, 1971 he notified the appropriate Roadmaster, in writing, of his desire to retain his seniority, and gave notification of his address.

Carrier didnotrecall Claimant to service on December 21, 1971 when junior employees were recalled.

Carrier states that it never received any notification from Claimant of his desire to retain seniority and accordingly, Claimant forfeited his seniority under Rule 5(a):

> "Employees laid off by reason of force reduction desiring to retain their seniority, must file with their seniority officer, a written statement indicating their desire, and setting out their address. This statement must be filed within ten days after being laid off. They must immediately notify their superior officer of any change of address. Employes failing to comply with these

"provisions or to return to service within ten days for a regular bulletined position after having been notified in writing by their superior officer will forfeit all seniority unless a leave of absence is obtained under the provisions of this agreement."

Further, Carrier states that even if a notfficatim was given, it was not filed within ten (10) days after the lay off (November 10, 1971).

Claimant disputes that November 10 is the date when time limits started to run, because he was not laid off on that date, but was merely displaced. It was not until November 19, when Claimant was unable to displace, that Rule 5(a) became operative. While it does not appear that such a distinction was raised while the matter was considered on the property-in those specific terms, the Board feels it is unnecessary to consider that asserted distinction because, regardless of which date (November 10, 1971 or November 19, 1971) is considered as bringing Rule 5(a) into operation, the Claimant has failed to establish the fact of notification.

On at least four occasions while the matter was being considered on the property, the Claimant insisted that on November 23, 1971 he notified the Roadmaster, in writing, of his desire to retain his seniority. The alleged notification is a hand written document, quoted here in its entirety:

" November 23, 1971

G. P. Vickery

I wish to hold my rights and Seniority.

My address is

Billy Joe Binnion
Box 615
Venedocia, Ohio 45894 "

In reply to each assertion that the Claimant had notified the Carrier in writing, the Carrier stated that it had no record of ever having received such notice. In Award 11505 (Dorsey), this Board noted:

> "It is a general principle of the law of agency that a letter properly addressed, stamped, and deposited in the United States mail is presumed to have been received by the addressee. But, this is a rebuttable presumption. If the addressee denies receipt of the letter then the addressor has the burden of proving that the letter was in fact received. Petitioner herein has adduced no proof, in the record, to prove de facto receipt of the letter by the Carrier.
>
> The perils attendant to entrusting performance of an act to an agent are borne by the principal."

In Award 11568 (Sempliner), the Board cited Award 11505 and, in addition, noted that the method of presentation is the choice of the Claimant, and with that choice goes the responsibility that it is adequate. The Award concluded that the burden of proving presentation is on the petitioner. See also, Awards 15496 (House) and 16537 (McGovern).

A petitioner is required to prove de facto receipt of a letter which is properly addressed, stamped and deposited in the United States mail, when the addressee denies receipt. But, we find that the facts of record in this dispute do not raise as strong au initial presumption as in the situation cited above. While there is a suggestion in the documents submitted to this Board that the notification was placed in the kited States mail and was never returned to the sender, the record developed on the property fails to show use of the United States mails.

The Claimant asserted that the Roadmaster was notified in writing. The specific method of notification was never identified even after Carrier repeatedly denied receipt of the notice. The responsibility of notification is upon the Claimant under the cited Rule. See Award 17596 (Gladden). l'he burden of proof is on petitioner and under this record, we are unable to conclude that he carried that burden.. Accordingly, we will dismiss the claim for failure of proof.

FINDINGS: l'he Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are rexpectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claim be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Panke
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.