

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25178
Docket Number MW-25092

Martin F. **Scheinman**, Referee

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: (**Escanaba** and Lake Superior Railroad Company

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

(1) The claim* as presented by the Assistant General Chairman on February 3, 1981 to the **Carrier** shall be allowed as presented because the **Claim** was not disallowed by President John **Larkin** (appealed to him in a letter dated April 24, 1981) in accordance with Rule 52/a) [System File **ELS-1698**].

'The letter of claim will be reproduced within our initial submission.

OPINION OF BOARD: On January 21, 1981, Carrier furloughed **Trackmen** R. Woods and J. **Halgren** from their respective positions. As a result of Carrier's action, the **Organization** filed this claim, contending that there were less senior **Trackmen** who **should** have been furloughed instead of Claimants.

The Organization's claim was filed on February 3, 1981. Carrier denied it on February 25, 1981. The Organization asserts that it appealed Carrier's denial on April 24, 1981. Carrier, however, maintains that it never received the **Organization's** appeal. In any event, the Organization sent Carrier another letter, via certified mail dated September 16, 1982. It specified a number of claims, including the instant one, which the Organization wished to discuss in conference with Carrier. Thereafter, in April 1983, the Organization appealed the matter to this Board.

The Organization contends that Carrier failed to respond to its appeal of April 24, 1981, in violation of Rule 52(f). That Rule provides that a response to a claim or an appeal must be rendered within sixty days of same. Otherwise, the claim will be presented as allowed. Thus, the Organization reasons that Carrier's failure to timely answer its appeal requires a sustaining Award.

On the merits, the Organization asserts that Claimants were more senior than **Trackmen** J. J. **Broeders** and R. M. Laraby who were retained in Carrier's service after January 24, 1981. Rule 9(a) requires that:

"When forces are reduced the senior **employees** in their respective ranks and gangs will be retained..."

Thus, the Organization reasons that Carrier violated Rule 9(a) when it retained **Trackmen** **Broeders** and Laraby instead of Claimants. Accordingly, the Organization concludes that the claim should be sustained on its merits as well as on procedural grounds.

Carrier, on the other hand, denies that it violated the Agreement, First, it asserts that it never received the Organization's appeal of its denial of the **claim**. Second, it maintains that Claimants and the retained **employees** all had a seniority date of October 1, 1980, the day Carrier acquired the territory on which Claimants worked. As such, Carrier argues, it was free to retain **Trackmen Broeders** and Laraby over **Claimants**. Thus, Carrier asks that the claim be rejected.

A review of the record evidence convinces us that the claim must fail. This is so for a number of reasons. First, the Organization has not met its burden of proving that Carrier received its letter of appeal dated April 24, 1981. Disputes concerning receipt of letters are resolved when certified mail is used. The letter of April 24, 1981 was not sent by certified mail. Thus, the record does not support the Organization's contention that the letter was received by Carrier.

We note that the Organization did send a certified mail letter on September 16, 1982. However, that letter does not prove that the earlier communication was received by Carrier. Thus, the Organization has not proven that Carrier violated Rule 52.

As to the merits, it is axiomatic that the burden rests upon the party who asserts an affirmative fact. Here, the record contains no evidence **as** to the respective seniority dates of Claimants or the retained **Trackmen**. No seniority **lists** or payroll records are contained therein. Thus, the Organization has failed to meet its burden of showing that Claimants are **more** senior than **Trackmen Broeders** and Laraby. Accordingly, the claim must be rejected on its merits as well as on procedural grounds.

FINDINGS: The 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 Employees involved in this dispute are respectively Carrier and **Employees** 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

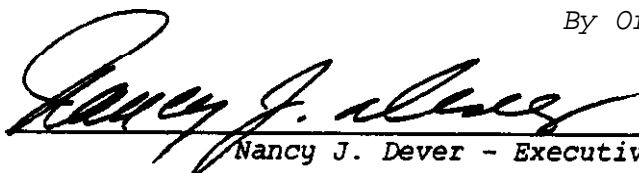
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL **RAILROAD** ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1984.