

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39364
Docket No. MW-39587
08-3-NRAB-00003-060390
(06-3-390)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal (seniority termination) of Mr. A. G. Stellpflug on November 5, 2004 was in violation of the Agreement [System File C-05-R030-1/10-05-0070(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. G. Stellpflug shall now be returned to service with all seniority and other rights restored and he shall be compensated for all wage loss.”**

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.

The Claimant established and held seniority in various classes including Trackman and Truck Driver. During October 2004, the Claimant was on furlough status because of force reductions, and was ready for written recall to service in accordance with Rule 9, which states in relevant part:

“When an employee is laid off by reason of force reduction, he must advise the carrier in writing of any change of address, and telephone number, receipt of which will be similarly acknowledged. When new positions of more than thirty (30) calendar days' duration are established, or when vacancies of more than thirty (30) calendar days' duration occur, employees who have complied with this rule will be called back to service in the order of their seniority. Failure to return to service within ten (10) calendar days, unless prevented by sickness or unless satisfactory reason is given for not doing so, will result in loss of all seniority rights. . . .

NOTE: 1. Employees called back to service in accordance with provisions of Rule 9 must report at starting time of shift to which called within ten (10) calendar days.”

On Tuesday, October 19, 2004, the Carrier sent a certified letter of recall to the Claimant. The letter advised him that he was being recalled, and that “Failure to report on 10/20/2004 or within 10 (ten) calendar days of notification may result in the loss of your seniority.” The letter also directed the Claimant to contact the Carrier to notify it of the exact date he would report. The Postal Service attempted to deliver the letter to the Claimant on Friday, October 22, 2004, but no one was home to receive the letter, so a notice of attempted delivery was left. The Postal Service attempted delivery again on Tuesday, October 26 and the Claimant received and signed for the letter that day.

The Claimant understood from the letter that he had ten calendar days from October 26, when he received the notification of his recall, or until November 5, 2004, to report for duty. He reported for duty prior to the designated starting time on Friday, November 5. At that time he was told that he had forfeited his seniority by failing to timely respond to recall. A timely grievance was filed and after due processing is now properly before the Board.

The question presented is when was the "notification" of recall from which the Claimant's time to report under Rule 9 must be measured. Without citing any authority, the Organization contends that notification was not given until the Claimant actually received the letter on October 26, 2004. The Carrier contends that "notification" occurred either on the date that the Postal Service left a notice of attempted delivery (October 22, 2004) or on the date of the letter itself (October 19, 2004). On-property precedent (Public Law Board No. 4148, Award 72) supports the former calculation, while precedent from a different property (First Division Award 25925 and Public Law Board No. 5908, Award 7) supports the latter.

In light of these precedents, the Board cannot agree with the Organization. Under its interpretation, an employee could delay his reporting date by simply delaying acceptance of the recall letter. More important, the Organization offered no evidence of a past practice or other precedent to support its interpretation. On the other hand, it is unnecessary to select here between the two approaches suggested by the Carrier, because under either, the Claimant's November 5, 2004 appearance for work did not occur within ten calendar days of the notification. Pursuant to the self-executing terms of Rule 9, he thereby forfeited his seniority rights, unless prevented by sickness or having given satisfactory reason for not reporting as required. The Claimant failed to satisfy either of these exceptions. There is no evidence that the Claimant was ill. Contrary to the instructions in the letter, the Claimant made no contact with the Carrier prior to showing up late, and even then offered no reason for his delay. In other words, the Claimant neither complied with Rule 9, nor presented an appropriate affirmative defense.

As a result, through his own actions, the Claimant forfeited his seniority rights, and his claim must therefore be denied.

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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 21st day of October 2008.