

Award No. 2303
Docket No. MW-2235

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert B. Rudolph, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
THE DELAWARE AND HUDSON RAILROAD**

STATEMENT OF CLAIM: (a) That the Carrier violated the provision of the agreement in denying Edward Donais, Pumpman, Plattsburg, New York, Champlain Division, the right to displace James G. Reardon, who was junior in service to Donais as pumpman; and

(b) That Donais be paid the pumpman's rate of \$100.00 per month for all time lost, retroactive to June 6, 1940, during which time a junior man was required and permitted by the Carrier to hold position of pumpman at Plattsburg.

EMPLOYEES' STATEMENT OF FACTS: Edward Donais entered the service of the Carrier November 1, 1915 as a stationary fireman. On September 27, 1926 he was assigned as a pumpman. The pump to which he was assigned is in operation for the summer months.

Donais operated the pump in 1926, 1927, 1928, 1929 and 1930.

As a result of force reduction in 1930 Donais' position as pumpman was filled by a senior man.

On August 16, 1936 Donais was again assigned to the position of pumpman at Plattsburg, and also served in that capacity in 1938.

During the interim that the pump at Plattsburg was not in operation Donais was employed as stationary fireman.

The big boilers at Plattsburg are in operation, usually, only from October until June. When the boilers are shut down the pump at Plattsburg goes into operation.

June 1, 1940 the Carrier assigned James G. Reardon to the position of pumpman at Plattsburg. Reardon had been employed by the Carrier as clerk and track supervisor for approximately 35 years prior to the time he was furloughed on May 31, 1938 and he held no seniority in the classification of pumper.

An agreement is in effect between the parties bearing effective date of July 1, 1939, which, by reference, is made a part of this Statement of Facts.

POSITION OF EMPLOYEES: It is the Employes' position that the Carrier failed to comply with the provisions of the agreement when it deprived Edward Donais of the right to hold the position of pumpman at Platts-

Prior to the Carrier's assigning Reardon as a pumpman Donais held a position as pumpman during the summer months. When the roster of 1939 was compiled Donais' name was omitted. The Employes contend that his name was omitted by the Carrier from the 1939 roster for the express purpose of denying Donais the right to displace Reardon. The Carrier's action is in violation of the provisions of the agreement of July 1, 1939.

The request of the Employes in behalf of Donais is justified and supported by the provisions of the agreement; and we respectfully ask your Board to sustain it.

CARRIER'S STATEMENT OF FACTS: On June 6, 1940, temporary position of pumpman in the Maintenance of Way Department at Plattsburg was established and James G. Reardon, the only employe appearing on the pumpmen's roster, was assigned to the position. The same position had been established during the summers of 1938 and 1939 and filled by Mr. Reardon. Edward Donais, the claimant in this case, had no seniority as pumpman and was not entitled to the position.

POSITION OF CARRIER: Agreement covering this class of employees became effective July 1, 1939, and first rosters were posted November 20, 1939. Copy of roster, insofar as this case is concerned, is submitted, marked Exhibit "A", and reads as follows:

PUMPMEN

Name	Date of Employment	Rank
James G. Reardon	6-1-38	1

STATIONARY FIREMEN

Name	Date of Employment	Rank
Edward Donais	2-27-26	1
William H. Falcon	2-1-38	2
James G. Reardon	2-1-38	3

During the protest period, which at the request of the employes' representative was extended to March 20, 1940, the Carrier received no protest from Edward Donais relative preparation of roster covering pumpmen. During handling of this case by the Local Chairman with the Division Engineer and by the General Chairman with the Chief Engineer, it was never mentioned that Edward Donais had entered protest relative preparation of this roster. It was not until this case was being discussed by the General Chairman with the Supervisor of Wage and Working Agreements on December 10, 1940, that the General Chairman stated he had a copy of protest which had been addressed to the Division Engineer under date of December 28, 1939. This alleged protest was never received by the Division Engineer. Copy of this alleged protest was later furnished the Management on January 14, 1941.

The Carrier contends that position was properly assigned to James G. Reardon on June 6, 1940, as he was the only employe holding seniority as pumpman at the time.

OPINION OF BOARD: The facts disclose that on November 20, 1939, the seniority roster here involved was posted. Rule 7 of the Agreement provides that unless protested within ninety days after being posted, such roster will be permanently established. It appears from the record that this protest period was extended by agreement to March 20, 1940. Claimant contends that he sent a letter on December 28, 1939, protesting the failure to give him seniority as a pumpman. The Carrier contends that it never received this letter of protest. There is nothing in the record which would support a finding by the Referee, contrary to either contention. Claimant, however,

knew that the roster remained as originally posted, and failed to have the roster corrected in conformity with his claimed rights either before or after March 20. It was not until June 6, 1940, and after the assignment of Reardon to the position of pumpman that claimant asserted that his seniority was prior to that of Reardon. Acting in accordance with the seniority established by the roster, the Carrier had assigned Reardon to the position. Under these circumstances we are of the opinion that insofar as concerns any right to the position of pumpman here involved, it must be held that claimant, by his failure to act before the assignment was made, waived his right to such position based upon his seniority.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employee involved in this dispute are respectively carrier and employee 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 claimant has waived his right to the position.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of September, 1943.