



Award No. 17270

Docket No. MW-18038

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Robert C. McCandless, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
NORTHERN PACIFIC RAILWAY COMPANY**

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

- (1) The Agreement was violated from the seniority of Sectionman F. W. Dures was cancelled and he was withheld from service.
- (2) Sectionman F. W. Dures be reinstated with all rights unimpaired and, beginning on May 29, 1967, be allowed eight (8) hours' pay at his straight time rate for each work day the violation referred to in Part (1) of this claim continues to exist."

EMPLOYEES' STATEMENT OF FACTS: Claimant F. W. Dures, who holds seniority in the Rocky Mountain Division as a sectionman dated from July 5, 1967, was furloughed effective January 5, 1967. Upon being furloughed, he filed his name and address with the Carrier in accordance with the provisions set forth within Rule 22 which reads:

"(a) An employe who has acquired seniority and who is laid off by reason of force reduction, or an employe who is laid off in force reduction and who does not exercise seniority under Rule 21, shall retain and accumulate seniority provided he files his name and address, in writing, within ten (10) calendar days thereafter with the officer of the subdepartment and promptly notifies the officer of the subdepartment, in writing, of any change in address. Such an employe who fails to so file his name and address, or who fails to give prompt notice of any change in address, will forfeit all seniority rights.

NOTE: An employe who has complied with Rule 22 (a) and who is subsequently returned to service on a temporary position or on a temporary vacancy and who does not exercise seniority under Rule 21 within ten (10) calendar days after completion of service on such temporary position or temporary vacancy must file his name and address in writing in accordance with Rule 22 (a) within ten (10) calendar days after completion of service on such temporary position or temporary vacancy.

(b) When new positions of forty-five (45) calendar days' or more duration are established, or when vacancies of forty-five (45) calendar days or more duration occur, employes who have complied with Rule 22 (a) will be called back to service in the order of their

seniority of other employees who received identical notices and who also failed to report for service. Unlike the remainder of the employees, the offer was not accepted in behalf of Mr. Dures due to his insistence and it was agreed the issue would be submitted to the National Railroad Adjustment Board for decision.

(Exhibits not reproduced)

OPINION OF BOARD: Claimant, F. W. Dures, a Sectionman for the Northern Pacific Railway Company off and on for a total of about two years, was furloughed from his job on January 5, 1967.

Employees contend that the Agreement was violated as to its provisions of recalling such furloughed employees for work when available. Carrier contends that Claimant forfeited his seniority and rights to be recalled by not answering the notice they allegedly sent to him in compliance with the Agreement.

Rule 22 of the Agreement, which covers furlough and recall procedures, is set forth below:

"(a) An employee who has acquired seniority and who is laid off by reason of force reduction, or an employee who is laid off in force reduction and who does not exercise seniority under Rule 21, shall retain and accumulate seniority provided he files his name and address, in writing, within ten (10) calendar days thereafter with the officer of the subdepartment and promptly notifies the officer of the subdepartment, in writing, of any change in address. Such an employee who fails to so file his name and address, or who fails to give prompt notice of any change in address, will forfeit all seniority rights.

NOTE: An employee who has complied with Rule 22(a) and who is subsequently returned to service on a temporary position or on a temporary vacancy and who does not exercise seniority under Rule 21 within ten (10) calendar days after completion of service on such temporary position or temporary vacancy must file his name and address in writing in accordance with Rule 22(a) within ten (10) calendar days after completion of service on such temporary position or temporary vacancy.

(b) When new positions of forty-five (45) calendar days' or more duration are established, or when vacancies of forty-five (45) calendar days or more duration occur, employees who have complied with Rule 22(a) will be called back to service in the order of their seniority. An employee who fails to return to service within ten (10) calendar days after date of notice sent to his last known address, unless an extension has been granted, will forfeit all seniority rights.

(c) Employees who on account of reduction in forces perform no service covered by this agreement for a period of twenty-four (24) months will forfeit all seniority rights."

The key question involved in the instant case is: "Who had the burden of proof as to whether the notice was mailed to or received by Claimant?" We think that clearly Carrier had this burden.

Nowhere in the record is it disclosed that Carrier ever brought forth a copy of the notice or any registration slip to show that they had complied with the Agreement—that notice of a work opportunity had been mailed to Claimant. The record is replete with written requests by Employees and of Carrier to furnish such proof. It is too late for Carrier to come forward to this Board now with a copy of such notice to Claimant, alleging it to be a true copy of that notice. One, if such notice had been sent, it should have been produced by Employees back on the property. And two, although not required by the Agreement, prudence would seem to dictate that such notices go out by registered mail to avoid the conflict now presented to this Board.

This Board has said in Award 15395 that "we are persuaded that the prevailing view adopted by this Board placed the burden of proof on the party who allegedly mailed the letter to so prove, if the other party denies receipt thereof." This opinion has been reconfirmed in Awards 16000 and First Division Award 20491.

We find that the Carrier did not sustain his burden of proof, and we therefore hold for the Claimant.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1969.