

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20620  
Docket Number CL-20576

Joseph A. Sickles, Referee

(Brotherhood of Railway, Airline & Steamship Clerks,  
( Freight Handlers, Express and Station Employees  
( (Formerly Transportation-Communication Div. BRAC)

PARTIES TO DISPUTE: (

(Norfolk and Western Railway Company (Lake Region)

STATEMENT OF CLAIM: Claim of C. E. Barr for one day's pay at pro rata rate for each Friday, beginning April 17, 1970, for as long as the violation continues; and claim for the difference in the time and one-half rate and pro rata rate for each Sunday, beginning April 18, 1970, also for as long as the violation continues, under Rules 7, 15, 17, 26 and related rules, and the agreements of January 10, 1965, and March 21, 1966.

OPINION OF BOARD: Claimant's non-contract position was discontinued. He asserts that he refused to accept another non-contract position and attempted to displace under Rule 26. Carrier states that Claimant accepted the non-contract position, and then resigned same, so that he was only allowed to establish himself on the extra board; which he did, under protest. Thereafter, he bid for (and was awarded) an assignment which was then under advertisement.

This dispute appears to be solely factual, inasmuch as the parties are in agreement regarding the application of Rule 26. If Claimant did not accept the non-contract position, the claim should be sustained; however if he voluntarily relinquished the position, he was properly required to be placed on the extra board.

We have carefully scrutinized the record as developed on the property and note a sharp dispute as to Claimant's status. The Organization repeatedly asserted that Claimant never accepted the position, and the Carrier steadfastly insisted that he accepted it and then resigned.

Carrier states that Claimant accepted the wage scale for the new position for a period of time (while he was training an employee for his prior position) although it is conceded that he never physically commenced the duties of the new position. The Organization counters that by stating that Claimant had no control over the amount of money Carrier paid him.

The Organization forwarded, as an attachment to its Ex Parte Submission, a two page letter from the Claimant to his General Chairman, which relates to the issue in dispute. Carrier states that the document was never presented to it while the matter was under consideration on the property, and there is no indication in the record which suggests to the contrary.

This Board has long held that we may not consider material which was never presented to the opposing party on the property. See, for example, Award 20214. Accordingly, we must disregard the letter.

As noted above, the record which was developed on the property contains a series of assertions and denials concerning Claimant's status. For the Board to conclude that Claimant refused the position in question, or that he accepted it and then resigned, we would be required to engage in speculation and conjecture. The burden of proof is on Petitioner, and under this record we are unable to find that he has carried that burden. Accordingly, we will dismiss the claim for failure of proof.

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 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 the claim be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. W. Pauls  
Executive Secretary

Dated at Chicago, Illinois, this 21st day of February 1975.