

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23130
Docket Number MW-23056

James F. Searce, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ The Chesapeake and Ohio Railway Company (Southern Region)

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

(1) The Carrier violated the Agreement when it failed to recall furloughed Track Laborer C. D. Bentley to service on April 3, 1978 (System File C-TC-596/MG-2302).

(2) Because of the aforesaid violation, Track Laborer C. D. Bentley shall be compensated at the track laborer's applicable rate for all time lost from April 3, 1978 through April 24, 1978, both dates inclusive."

OPINION OF BOARD: Claimant was furloughed from service on December 30, 1977. According to the applicable Rule (5a) he was required to advise the Carrier of his desire to retain his seniority by filing his name and address "... not later than ten days from date (being) cut off." The record indicates that such "notice" was not received until January 18, 1978. Nonetheless, on April 3 of that year when the Carrier found the need to re-organize and enhance its track forces, the appropriate supervisor purports to have attempted "on numerous occasions" to contact the Claimant by his last known telephone number to return to duty. With the press of recalling a total of 45 such furloughed employees, further efforts to contact the Claimant were apparently abandoned. When the Claimant contacted the Carrier on or about April 24, 1978, he was advised to return to work. The Claim herein is for pay for the intervening work days between April 3 and April 24, 1978.

According to the Carrier, the Claim is improper since the required time limits were exceeded in filing the 5 (a) Notice of Retention. This Board finds that such defense to the Claim was forfeited by the Carrier when it gave credence to the Notice filing, as evidenced by its call to the Claimant on April 3, 1978. Restated, had the Carrier wished to adopt this position, it would have considered the Claimant without seniority due to his delinquent filing in the first place; choosing to overlook this shortcoming, the Carrier may not now resurrect such defense.

As to the matter of the Carrier's obligation to contact employees, this Board takes note of the explicit language of the Agreement, at Rule 5 (a), which refers to the furnishing of "name and address" as obligations which issue to furloughed employees, as well as the need to provide "any change in address" - both to be done in writing. The record also reflects that the form used to transmit such information requires only such data. In contrast, the Carrier asserts a longstanding practice of contacting furloughed employees by telephone relative to returning to duty. It is well-established that even where a past practice is proven, it cannot offset clear and unambiguous language drafted by the parties to the contrary. In this case, while it may have been the Carrier's practice to contact furloughed employees by telephone - and obviously it is more convenient, this does not relieve the Carrier or its contractual responsibility to do so formally. Such approach as espoused by the Carrier also leaves unanswered the question of the extent of its obligation if a furloughed employee has no telephone. Under the circumstances, this Board concludes that the Carrier (1) recognized the Claimant's right to recall by its action on/or about April 3, 1978 even though his submission of a 5 (a) Notice may not have been timely and (2) failed to meet its obligations to fully issue such recall.

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

The Claimant is entitled to pay for those days he would have regularly worked at the regular rate of pay for the period between April 3, 1978, and his return to service. No other compensation is ordered.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 15th day of January 1981.