

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

(David R. Tournear
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of my intention to file an ex parte submission on Feb. 7, 1986 covering an unadjusted dispute between me and the Burlington Northern Railroad involving the question; junior employee was recalled to a B&B Gang as a helper in Galesburg, Il."

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 employees 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 waived right of appearance at hearing thereon.

Claimant has a seniority date of April 25, 1977, on the Carrier's LaCrosse Seniority District. In September and October of 1984, a Carrier B&B Supervisor needed personnel for the AFE Gang in Galesburg, Illinois. On September 19, 1984, H. J. Arnold, who is junior to the Claimant on the La-Crosse Seniority District, was called to fill a position on the AFE Gang in Galesburg.

On November 13, 1984, the Local Chairman presented a Claim for the time worked by Mr. Arnold at Galesburg on the basis that both Claimant and Mr. Arnold had submitted requests to fill any openings in that area and that since Claimant was senior to Mr. Arnold, he should have been called first. Carrier declined the Claim, noting that Claimant had never requested to fill the vacancy.

On January 25, 1985, the Organization appealed the Claim, contending that the Claimant had made a proper request per Rule 19A of the Agreement and therefore should have been called ahead of Mr. Arnold. Attached was a

copy of handwritten letter to B&B Supervisor Scott, dated September 7, 1984, in which Claimant requested to be called for work under the provisions of Rule 19.

Carrier declined the appeal, asserting that it never received the letter allegedly written by the Claimant to Mr. Scott.

The Organization declined to pursue the matter further. Accordingly, Claimant filed his own Ex Parte Submission and the dispute now comes before the Board.

In his Submission, Claimant argues that the instant Claim is meritorious because he was clearly the senior employee and should have been given preference for the position. However, his seniority is not at issue herein. The crux of this dispute centers on whether Carrier violated the Agreement when it did not call the Claimant to perform work on a seniority district for which Carrier claims he made no written request to be called. The relevant provision of the Agreement is Rule 19A, which states as follows:

"A. A new position or vacancy of thirty (30) calendar days or less duration, shall be considered temporary and may be filled without bulletining. If such vacancy or position of foreman or assistant foreman in the Track or B&B Sub-department is to be filled, the 'eligible list' referred to in Rule 18 will be used. If such vacancy is on any other position and is filled, preference will be given to the senior qualified employee who is not assigned in the rank in which the vacancy occurs and who has on file a written request to fill such vacancy. Such employee will assume all the working conditions of the assignment just as if regularly assigned thereto."

The third sentence of the above Rule is controlling. The senior qualified employee, in order to be given preference for a new position or vacancy, must have on file a written request to fill the vacancy. In this case, Claimant asserts that his September 7, 1984 letter constitutes the prerequisite notification. Carrier denies receipt of said letter.

Third Division Award 11505 discussed the general principles to be applied in resolving disputes of this nature:

"It is a general principle of the law of agency that a letter properly addressed, stamped, and deposited in the United States Mail is presumed to have been received by the addressee. But, this is a rebuttable presumption. If the addressee denies receipt of the letter then the addressor has the

burden of proving that the letter was in fact received. Petitioner herein has adduced no proof, in the record, to prove de facto receipt of the letter by the Carrier."


In this case, while Claimant asserted that Carrier was notified in writing, the specific method of notification was never identified even after Carrier repeatedly denied receipt of notice. Based on the documents in the record, the Board cannot ascertain whether or not the notification was even placed in the United States Mail, and Claimant chose not to elucidate the Board on this crucial point. The burden of proof is on the Claimant to prove de facto receipt of the letter by Carrier, and under the circumstances presented by this record, we must conclude that Claimant has not met that burden. Accordingly, we will dismiss the Claim for failure of proof. See, Third Division Awards 20293, 15789.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1989.