

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(The Atchison, Topeka and Santa Fe Railway Company

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

(1) The Carrier violated the Agreement when it improperly closed the service record of Mr. Alex Kee (System File 170-2-8518/11-960/40-61).

(2) Mr. Alex Kee shall be returned to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

Prior to July 1, 1985, Claimant held seniority as a trackman in the Carrier's System Steel Gang. He had been assigned to a position on the Carrier's Albuquerque Division until that position was abolished before the events pertinent to this Claim. When the events giving rise to this Claim occurred, Claimant was in furlough status.

On June 7, 1985, the Carrier's Employment Supervisor at Gallup, New Mexico wrote Claimant as follows:

"In accordance with Rule 2, Section (c), you are being recalled to service at Moline, Kansas on the Eastern Division effective June 24, 1985. Please report to Gallup, New Mexico on Saturday, June 22, 1985 at 7:00 P.M. (MDST), for departure to Moline, Kansas.

Failure to report as indicated above will result in loss of seniority. Please acknowledge this letter when copy is received by contacting the Employment Office as 505/863-5061."

The recall notice was addressed to Claimant's last known address and was in accordance with Rule 4-(b) of the Agreement. Rule 4-(b) states:

"Recall of System Gang Employees. System Gang Employees retaining seniority rights under Rule 2-(c), shall be recalled to service in the order of their seniority to fill vacancies or new positions on System Gangs."

In the event of such a recall, Rules 2-(c) and 4-(c) apply and provide as follows:

"Rule 2-(c) - Retention of Seniority

Failure to meet any of the requirements as above specified, failure to report on the date indicated in the notification of recall, not to exceed fifteen (15) calendar days from date of notification of recall forwarded to the employe's last known address, without a satisfactory reason, will result in forfeiture of seniority in the class where recalled. When an employe forfeits seniority under this provision, he will be notified thereof, in writing, with copy to the General Chairman.

Rule 4-(c)

Failing to Return to Service when Recalled. Employees failing to report to work when called without having satisfactory reason for not doing so will forfeit seniority in the class where recalled, as provided in rule 2-(c). When an employe forfeits seniority under this provision, he will be notified thereof, in writing, with copy to the General Chairman."

On July 1, 1985, the Carrier sent Claimant a letter to the same address as that to which the notice of recall had been sent, with a copy to the Organization's General Chairman. The letter advised Claimant that, as a result of his failure to report to work within 15 days after his notice of recall, his name had been removed from the Group 11 System Steel Gang seniority roster. Claimant signed a certified mail return receipt acknowledging receipt of that letter on July 12, 1985.

On August 29, 1985, the Organization filed this Claim on behalf of Claimant, protesting the negation of his seniority. The Organization argues that the Carrier has failed to prove that Claimant in fact received the recall notice of June 7, 1985. The Organization cites precedent holding that, in such cases, the Carrier bears the burden of proving that in fact it mailed the recall notice to the employee. See, e.g., Third Division Award 16537; First Division Award 20491; Second Division Award 8445.

However, in each of those cases the alleged recipient of the notice expressly denied having received it, thereby rebutting the presumption that a document properly mailed to a person has reached him. In the present case, Claimant has not denied receipt of the recall notice. By not denying receipt, Claimant never shifted to the Carrier the burden of actually proving receipt. Moreover, the Carrier asserted on the property, without contradiction, that after Claimant was notified that he had forfeited his seniority, he told the Carrier's official that he had not responded to the recall notice because he thought he would just get bumped if he did. Thus, the presumption that Claimant received the notice is not dispelled, rather it is corroborated.

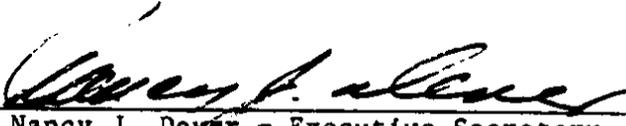
In these circumstances, the Claim cannot be sustained. The plain language of the Agreement establishes that Rules 2-(c) and 4-(c), concerning forfeiture of seniority, are self executing. If an employee fails to comply with a proper notice of recall, he forfeits his seniority automatically, by operation of the rules, without any further action being necessary by the Carrier. See, e.g., Third Division Award 25837. The Carrier's evidence of having mailed the notice to Claimant, the evidence of Claimant having received the later notice mailed to the same address, and Claimant's having implicitly admitted receipt of the recall notice, provide a more than sufficient basis for the Board to presume that Claimant did indeed receive it. It is undisputed that he did not comply. Consequently, the Claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 15th day of May 1991.