

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 29799  
Docket No. MW-30070  
93-3-91-3-486

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(CSX Transportation, Inc. (former  
(Chesapeake and Ohio Railway Company)

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

- (1) The Agreement was violated when the Carrier assigned junior employe Mr. A. Lambert instead of Mr. A. Meade to fill a flagman vacancy at Huntington, West Virginia from June 9 through June 22, 1990 [System File C-TC-7076/12(90-878) COS].
- (2) As a consequence of the aforesaid violation, Mr. A. Meade shall be paid six (6) days, all that is allowable under the time limits, at the foreman's rate of pay."

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 employe 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.

In this claim, a cut-off Assistant Foreman asserts a violation of his seniority rights under Rule 2 and his recall rights under Rule 5, because Carrier recalled and used a junior Assistant Foreman to perform flagging work at Huntington, West Virginia during the period June 9-22, 1990. Carrier denied the claim on grounds that Claimant was not available when telephoned at the last

listed telephone number which he had filed with Carrier on a written form he filled out on June 18, 1979.

It is not disputed that Carrier did try unsuccessfully to locate Claimant and that only after failing to reach him did Carrier recall and use the next employee on the list. Nor is it disputed that as of the recall date, Claimants correct telephone number was not on file. Claimant insists that he personally came to the Engineering Office in early April 1990 and updated his telephone number listing with the Chief Clerk. Carrier countered Claimant's written statement to that effect with its own statement from the Chief Clerk, declaring that Claimant never updated his telephone number until several days after learning that he had missed the recall which is the subject of this claim.

The record before us is in a state of irreconcilable conflict on the critical material fact which would be dispositive of this claim: ie, When and how did Claimant advise Carrier that his listed telephone number had been changed? Without clear and persuasive evidence on that most important material fact, this Board is unable to make any informed judgement whether Carrier violated Claimant's rights under Rule 2 and 5, or not. It is well established that this Board is an appellate tribunal and that the failure of proof on such a material fact must fall against the Party with the burden of proof: in this case the Organization. See Third Division Awards 28794, 28790, 20408 and Second Division Award 10946.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Catherine Loughrin  
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 29th day of September 1993.