

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31849
Docket No. CL-32166
96-3-94-3-574**

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

**(Transportation Communications International Union
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (AMTRAK)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-11107) that:

(a) The Carrier violated the Agreement, particularly Rules 5-C-1, Appendix E and others, when it failed to call and work Claimant, Extra Assistant Train Director T. Tringali, for position ATD-1, K Tower, 7:00 a.m. - 3:00 p.m., on Tuesday, August 11, 1992 and instead used junior extra employee Pingley to work the aforementioned position on that date at the punitive rate.

(b) Claimant was qualified, available, senior, and should have been called and worked for position ATD 1 on August 11, 1992.

© Claimant Tringali now be allowed eight (8) hours pay at the appropriate pro rata rate, on account of this violation.

(d) This claim has been properly filed in accordance with the Agreement and should now be allowed as presented.

(e) Claim is further made that Carrier violated Rule 7-B-1 when the foregoing claim was not timely denied at the initial level.”

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 employee 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 were given due notice of hearing thereon.

On August 11, 1992, Position ATD #1, Assistant Train Director, 7:00 A.M. to 3:00 P.M., located at K Tower was vacant and needed to be filled off the Extra List. On that date, Claimant and Z. Pingley were on the Washington, DC, Extra Board List. Claimant was senior to Pingley. The Carrier assigned the position to Pingley. This claim dated August 14, 1992, followed.

With respect to the procedural argument by the Organization that the Carrier violated Rule 7-B-1 by failing to timely respond to the claim, the Carrier defends on the basis that it never received the claim. According to the Carrier, it first learned of the claim when the Organization appealed to the Division Manager-Labor Relations by letter dated October 27, 1992.

We find that the Organization has not demonstrated a violation of Rule 7-B-1's requirement that the Carrier deny the claim within 60 days from the date the claim was filed. The Carrier denied receipt of the claim dated August 14, 1992. Given that denial, it was therefore incumbent upon the Organization to demonstrate that the claim was, in fact, mailed. See Third Division Award 15395 ("We are persuaded that the prevailing view adopted by this Board places the burden of proof on the party who allegedly mailed the letter to so prove, if the other party denies receipt thereof."). Such a rule protects against the individual who purposely does not file a claim and then asserts that full relief as stated in the claim is required because the claim was not denied by the Carrier in a timely fashion. While the Organization is correct that nothing in the Agreement requires that the claims be filed in a fashion which demonstrates mailing (for example, through the use of certified mail with a return receipt) where, as here, a denial of receipt of the claim is made, unless the Organization can somehow affirmatively demonstrate mailing, the Organization's burden of proof that the claim was mailed has not been met. Here the Carrier denied receipt of the claim and there is no demonstrative proof of mailing. We therefore find no violation of Rule 7-B-1.

With respect to the merits, we need not resolve an apparent dispute between the parties on the property over whether a first-in, first-out (as asserted by the Carrier) or

call by strict seniority (as asserted by the Organization) procedure prevails. We need not address that issue because even assuming the Organization is correct and that Claimant's superior seniority entitled him to be called first, the record evidence shows that Claimant was not available. The official call record sheet shows that Claimant was not home for the 7:00 A.M. vacancy of August 11, 1992, which is in dispute in this case. Therefore, even assuming that strict seniority applies for calling purposes as the Organization asserts, the Organization has not demonstrated that Claimant was available for call.

The claim will therefore be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 4th day of March 1997.