

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO)
DISPUTE) SOO LINE RAILROAD COMPANY

STATEMENT OF CLAIM

That Section Laborer Allan W. Fossell be allowed the benefits of the *Norfolk and Western Railway Company - Trackage Rights - BN*, 354 I.C.C. 605 as modified in *Mendocino Coast Railway, Inc. - Lease and Operate*, 360 I.C.C. 653 (1980).

OPINION OF BOARD

A. Facts

On May 15, 1985, the parties entered into an Implementing Agreement concerning ICC Finance Docket 30595's authorization to the Carrier to acquire trackage rights over the Burlington Northern between Schley, Minnesota and Superior, Wisconsin. As stated in Finance Docket 30595 (Org. Exh. 1):

Acquisition of the trackage rights over BN lines will allow Soo to consider abandoning that portion of its "Plummer" line between milepost 312.8 at Remer and milepost 241.17 at Moose Lake (a distance of 71.63 miles)

Claimant held the position of section laborer with a seniority date of May 2, 1974. Claimant submitted applications for and received protective benefits from dates in 1985 through February 1991 tied to the abandonment of the line between Remer and Moose Lake, Federal

Dam. See Org. Exh. 20.¹

This claim is for benefits for March and April 1991. By letter dated July 29, 1991 (Car. Exh. A) the Carrier's Personnel Coordinator G. F. Hugo denied the claim for March and April 1991 protective benefits stating:

You were not available for work while junior employees were working on your zones.

You may also note that your protection has expired effective 04-19-91.

Claimant was furloughed December 23, 1990.² By letter dated March 14, 1991 from Director-Personnel J. R. Norals (Org. Exh. 9), furloughed Maintenance of Way employees were notified that physical exams would be necessary for those employees out of work for over 90 days and that:

To help facilitate the large volume of physicals needed, please contact the Personnel Office at Minneapolis, Minnesota between the hours of 9:00 A.M. and 2:00 P.M. ONLY during the week of March 18.

* * *

¹ Monthly payments varied. Some months resulted in receipt of no compensation by Claimant. See Org. Exh. 20 at 1-2.

² Due to the seasonal nature of Claimant's position, such action was not unusual.

You will be contacted the following day before 9:00 A.M. or after 2:00 P.M. with your scheduled appointment time.

* * *

The work season is fast approaching and it is imperative that you call to schedule your appointment so you will be physically qualified before the crews start working so you won't miss any available work and we will also be able to meet all of Engineering Department's needs.

The Organization asserts that "Claimant is not certain when, or if, he received this notice, but believes he placed a phone call inquiring about available work to Mr. Hugo from Plummer Section House during the week of March 18, 1991." *See* Org. Exh. 8 (letter of March 13, 1992). Claimant did provide a copy of his phone bill showing a call to Hugo's office on March 28, 1991 with the Organization stating that Claimant "states that he inquired about available work and scheduling his 'return to work physical.' According to the Organization, Claimant's physical was set for April 10, 1991. *Id.*

The Carrier confirms that Hugo spoke with Claimant on March 28, 1991 to line up a physical. However, the Carrier asserts that Claimant did not call in during the week of March 18, 1991 to arrange a physical as required by the March 14, 1991 letter from Norals. *See* Org. Exh. 13.

Hugo states that he contacted Claimant on April 15, 1991 for available

work and learned that Claimant had been off work for more than 90 days and would need a physical and drug test. *See* Org. Exh. 11. Claimant returned to work April 19, 1991. *See* Org. Exh. 5.

The Carrier asserts that employees junior to Claimant had been recalled prior to Claimant's recall on April 19, 1991. Specifically, the following junior employees were working before Claimant's recall: M. Lampson and G. Feigitsch in Zone 4 on February 11, 1991 at Valley City; B. Adams on April 1, 1991; S. File and R. Gange in Zone 5 on April 11, 1991. Further, according to the Carrier, "the March Call List did not have the Claimant's name on it." Additionally, according to the Carrier, a System Bulletin dated January 4, 1991 went out for bid and Claimant did not bid. *See* Org. Exh. 13.

B. Discussion

The Carrier's laches argument (Car. Submission at 3 *et. seq.*) is without merit. This is not a case where a claim is filed many years after an alleged transaction and the Carrier is prejudiced through the passage of time in its efforts to reconstruct the events. Claimant had been receiving benefits from dates in 1985 through February 1991 tied to the abandonment of the line between Remer and Moose Lake, Federal Dam. *See* Org. Exh. 20. Indeed, in its initial denial of the claim, the Carrier made note of the

fact that "You may also note that your protection has expired effective 04-19-91." Therefore, the Carrier was well aware of the fact that Claimant had been receiving protective benefits and must be charged with knowledge of its own records. Further, there is nothing to show that after the claim was filed that the claim was not otherwise processed in a timely fashion.

With respect to the merits, the question for resolution is whether Claimant was unavailable for work during March and April 1991 so as to preclude his receipt of protective benefits. The record shows that he was not available.

By letter dated March 14, 1991 Director-Personnel Norals informed furloughed Maintenance of Way employees that physical exams would be necessary for those employees like Claimant who were out of work for over 90 days and that the employees were obligated to contact the Carrier "ONLY during the week of March 18" to schedule the exams. There is nothing presented in this record that calls into question the Carrier's assertion that the letter was mailed to Claimant's last address on file and in the ordinary course. The assertion by the Organization that "Claimant is not certain when, or if, he received this notice" does not factually defeat the assertion made by the Carrier that the letter was mailed to Claimant in

the ordinary course.

The Carrier asserts that Claimant did not call in to schedule his physical exam during the week of March 18 as instructed in the letter. The Organization's response that Claimant "*believes* he placed a phone call inquiring about available work to Mr. Hugo from Plummer Section House during the week of March 18, 1991" [emphasis added] does not sufficiently demonstrate on a factual basis that the call was, in fact, made by Claimant as required.

Thus, Claimant did not call in to schedule his physical during the week of March 18 as instructed. He did not call in until March 28, 1991 for that purpose. Coupled with the fact that work was available for employees junior to Claimant and that the record shows that other work was available for Claimant for which he did not bid and that other employees junior to Claimant were able to perform that work, we are sufficiently satisfied that the record demonstrates Claimant was not available for work during March and April 1991. Because he was not available, Claimant cannot receive protective benefits.

The Organization's position that Claimant was not required to work in certain zones is not persuasive. Again, the record does not factually support the Organization's position that work which junior employees performed could not,

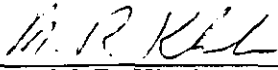
by rule or practice, have been performed by Claimant had he accepted such assignments. Nor is there support for the Organization's argument that the Carrier unduly delayed Claimant's physical examination.

In conclusion, what this case boils down to is that the Carrier instructed Claimant to schedule his return to duty physical exam in a specific fashion. He was instructed to call in during the week of March 18, 1991 to make arrangements for his exam. The record fails to support a conclusion that Claimant followed those instructions. As a result, Claimant's physical exam was delayed and Claimant lost opportunities to work. Given that failure, and further given that the record demonstrates other assignments during the period covered by this claim for which Claimant did not utilize his seniority, we must conclude that Claimant was therefore unavailable for work and he cannot claim protective benefits for that period of unavailability.³

AWARD

Claim denied.


Edwin H. Benn
Neutral Member


M. R. Kluska
Carrier Member


E. L. Torske
Organization Member

Dated: 11-9-93

³ Our decision is limited to the period at issue in this case (March and April 1991). We express no opinion on Claimant's eligibility for periods outside of the period before us.