

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5244

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	)	
and	)	Case No. 24
	)	
NORTHEAST ILLINOIS REGIONAL COMMUTER	)	Award No. 19
RAILROAD CORPORATION (A PUBLIC CORPORATION)	)	
	)	

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Martin H. Malin, Chairman & Neutral Member  
R.C. Robinson, Organization Member  
J.S. Morse, Carrier Member

Hearing Date: August 30, 1994

**STATEMENT OF CLAIM:**

1. The Agreement was violated when the Carrier failed and refused to properly notify Mr. W. Kaminski that he was disqualified from the position of assistant foreman of B & B Catenary Gang No. 1 within the time limit set forth in the Agreement (Carrier's File 08-39-161).
2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be allowed an assistant B & B foreman's date of March 8, 1993, and he shall be compensated in the amount he would have earned had he continued in that position.

**FINDINGS:**

Public Law Board No. 5244, upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Claimant bid on and was awarded a position as assistant foreman on B & B Catenary Gang No. 1 on March 1, 1993.

Claimant assumed the duties of that position on March 8, 1993. On April 8, 1993, Claimant received a medical leave of absence. Claimant returned to service on June 14, 1993. Upon his return to service, Claimant was advised that he had been disqualified from the assistant foreman's position.

An unjust treatment hearing was held on July 13, 1993. Carrier's Director of Engineering testified that he had his secretary type a letter of disqualification to Claimant on April 15, 1993, and that she took the letter to the Post Office and mailed it. Carrier introduced a copy of the letter, which advises Claimant that, "[I]t has been determined that you be disqualified from your position as Assistant B&B Foreman - Catenary Gang 1, effective at the end of your tour of duty on April 16, 1993, . . . "

Claimant testified that he never received the letter in the mail. Claimant further testified that he saw a copy of the letter for the first time upon his return to service on June 14, 1993.

Claimant contends that Carrier violated Rule 8(D). Claimant argues that Rule 8(D)'s requirement of timely notification of disqualification requires that the disqualification be received by the employee in a timely fashion. Claimant cites numerous awards which he claims supports his position.

Carrier contends that it complied with Rule 8(D) by depositing the disqualification notice in the mail. Carrier relies on PLB No. 4958, Award No. 11, for the proposition that Carrier fulfills its duty of notification by placing the notice in the mail. Carrier further argues that it would be very expensive for it to send all letters of disqualification by certified mail to ensure their delivery.

Rule 7(B) provides:

When making assignments, the senior applicant of the rank bulletined will be awarded the position subject to the demonstration of his ability to meet the requirements of the position within thirty (30) calendar days after the date reporting to the position. If the employee fails to qualify within this period, the position will be declared vacant and rebulletined, and the disqualified employee, having been notified in writing the reasons therefor, will return to his former position if it still exists or has not been claimed by a senior employee exercising displacement rights, in which event such employee shall exercise general displacement rights.

Rule 8(D) provides:

Employees accepting promotion will be given a fair chance to demonstrate their ability to meet the requirements of the position. If the employee fails to so qualify within thirty (30) calendar days after the date reporting to the position, the position will be declared vacant, and the employee, having been notified in writing the reasons therefor, will return to his former position if it still exists or has not been claimed by a senior employee exercising displacement rights, in which event such employee shall exercise general displacement rights.

A side letter extended the thirty day qualification period to forty-five days for Catenary Gang positions.

This claim turns entirely on whether Carrier met its obligation to notify Claimant of his disqualification when it mailed the letter on April 15, 1993, even though Claimant denies ever receiving it through the mail. There is no dispute that if Carrier failed to meet its obligations, the claim should be sustained.

A long line of authority consistently holds that notification is not accomplished by placing a notice in the mail if the party to whom it is directed does not receive it. See, e.g., *Third Division Award No. 17227*; *Third Division Award No. 11505*; *Third Division Award No. 16000*; *Third Division Award No. 17291*; *Third Division Award No. 25309*.

*PLB No. 4958, Award No. 11* does not support a different result. In that case, notice of an investigation was sent certified mail to the claimant who failed to pick it up from the post office. The Board held that the claimant was in constructive receipt of the notice. To hold otherwise, would have enabled an employee who receives notice of an attempt to deliver a notice to defeat a carrier's compliance with its obligations by refusing to pick the notice up at the Post Office.

The agreement does not specify how notification is to be accomplished. Multiple methods are available to Carrier, such as hand delivery and certified mail.

In the instant case, however, Claimant denied receiving any notice in the mail from Carrier. Carrier offered no evidence to the contrary. As the Third Division has stated on several occasions:

Notification connotes communication of knowledge to another of some action or event. The method of

communication in the instant case was left to the discretion of the party bearing the responsibility of notification and the Carrier elected to use the regular first class Mail service rendered by the Post Office Department. Had the Carrier elected to use certified or registered mail service offered by the Post Office Department, probative evidence of delivery would be available to support Carrier's assertion.

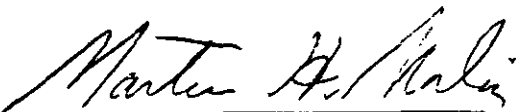
Third Division Award No. 17227, quoting Third Division Awards Nos. 14354 & 10173. Under these circumstances, in accordance with numerous prior awards, we must sustain the claim.

#### AWARD

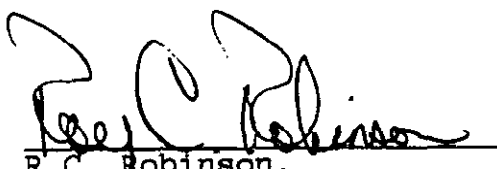
Claim sustained.

#### ORDER

Carrier is ordered to comply with this Award within thirty (30) calendar days of the date two or more members of this Board affix their signatures hereto.

  
Martin H. Malin, Chairman

  
J.S. Morse  
Carrier Member

  
R.C. Robinson,  
Organization Member

Dated at Chicago, Illinois, November 18, 1994.