

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26494

Docket Number MW-26270

Herbert L. Marx, Jr., Referee

(Brotherhood of Maintenance of Way **Employees**)

PARTIES TO DISPUTE: (

(Burlington Northern Railroad Company
(former **St.** Louis-San Francisco Railway Company)

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

1. The Carrier violated the Agreement when it assigned junior employe E. **Taber** instead of D. P. Cagle to the second-class **B&B** mechanic's position advertised by Bulletin No. 72 dated November 23, 1983 (System File **B-2210/MWC 84-2-3B**).

2. The Carrier also violated the Agreement when it assigned junior **employe** G. T. Hill instead of E. R. Bedford to the B&B foreman's position advertised by Bulletin No. 68 dated November 23, 1983 (System File **(B-1627/MWC 84-2-3A)**).

3. Mr. D. F. Cagle shall be assigned to the second-class **B&B** mechanic's position advertised by Bulletin No. 72 and he shall be afforded seniority as a second-class **B&B** mechanic dating from December 28, 1983. Mr. E. R. Bedford shall be assigned to the **B&B** foreman's position advertised by Bulletin No. 68 and he shall be afforded seniority as a **B&B** foreman dating from December 28, 1983. Messrs. D. P. Cagle and E. R. Bedford shall each be compensated for all wage loss suffered as a consequence of the violations referred to in Parts (1) and (2) hereof, respectively."

OPINION OF BOARD: These two virtually identical Claims concern the application of Rules 36 and 37, which read as follows:

"Rule 36. Bulletining Positions and Vacancies

(a) New positions or vacancies to be bulletined will be advertised in accordance with the following:

(1) **All** bulletins will be dated and mailed on the third working day prior to the **15th** or last day of each month. Such bulletins will be mailed to the foremen of all gangs in which **employees** hold seniority applicable for assignment to the bulletined position. Copy of bulletins will also be sent to the General Chairman, and to the Division Chairman **on** the applicable Seniority District.

Rule 37. Bidding on Bulletins

Applications for bulletined positions or vacancies will be **accepted** by the officer issuing the bulletin until 12:00 noon on the fifteenth calendar day from the date bulletined, except that if the fifteenth day falls on a rest **day or** holiday covered by agreement between the parties, applications will be accepted until 12:00 Noon on the first work day following such fifteenth day."

Claimants are employed on Bridge and Building Gang No. 71. They each bid on separate bulletins advertising new positions. The bulletins were dated November 23, 1983. The Carrier does not dispute the Claimants' assertion that these bulletins were received by Bridge and Building Gang No. 71 on December 8, 1983. There is also no dispute **raised** concerning assertions that the Claimants mailed bids for the positions to the proper Carrier office on December 12, 1983, and that these were received by the Carrier on December 19, 1983.

The Carrier determined that the two bids were "untimely" under Rule 37. The positions were then awarded to employees junior to the Claimants.

The Organization points out that the Claimants submitted bids four days after receiving notice of them. Even accepting the Carrier's assertion of receipt thereof on December 19, this would be only 11 days - - within the required 15 days - - from the date of the Claimants' first knowledge of the bulletins. The Organization argues that a notice can only be considered "bulletined" when it is first made available to employees.

The Organization further argues that the date of a bulletin is obviously insufficient **to** determine that it is "bulletined." Through inadvertence or otherwise, a bulletin might well be dated 15 or more days prior to its coming to any employee's notice and thus defeat the entire procedure.

The Carrier's position is somewhat unclear to the Board. In its Submission, the Carrier states as follows:

"Here, the vacancies in question were bulletined on November 23, 1983. Under the provisions of Rule 37, bids for the vacancies were accepted until 12:00 noon on December 16, 1983."

Rule 36(a) states "All bulletins will be dated and mailed on the third working-day prior to the 15th or **last** day of each month . . ." The Board does not **fathom** how a bulletin "**dated** and [presumably] mailed" on **November 23** meets this requirement. Nor does the Carrier offer any explanation as to setting December 16 as the closing date under Rule 37.

If the Carrier's contention that the notice was "bulletined" on November 23 is accepted, then the fifteenth day would be December 8 - - the same day it is asserted without dispute that Bridge and Building Gang No. 71 received the bulletin. If such interpretation is followed, the Claimants would have been effectively barred from the opportunity of bidding. Such could not be the purpose of Rule 37.

On the other hand, the Carrier points out that employees at various points may first see the notice on various dates, and it would be impractical to set differing expiration dates for the same bulletin.

Obviously, some further clarification of the intent of Rules 36 and 37 is required, but this is not the Board's function. Given no guidance as to previous mutually accepted practice, the Board may only concern itself with the Rules as written.

The Carrier did not adhere to the requirement in Rule 36(a)(1) to date and mail the bulletin on the "third working day prior to the . . . last day of each month." The Claimants waited four days to submit bids on a bulletin which they must have observed had been dated some time earlier. There is no proof that the bids were mailed on December 1.2 or explanation as to why they were not received by the Carrier until December 19.

The Board is without adequate support either to sustain or to deny the Claims. In this state of the matter, a dismissal Award is appropriate, thus leaving similar instances for resolution based on clearer factual circumstances.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That no Finding is made as to violation of the Agreement.

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Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:

A handwritten signature in cursive script, appearing to read "Nancy J. Dever", written over a horizontal line.

Nancy J. Dever ~ Executive Secretary

Dated at Chicago, Illinois, this 9th day of September 1987.