

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 27592
Docket No. MW-27020
88-3-86-3-59

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation

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

(1) The Carrier violated the Agreement when it failed to post Advertisement #92 dated August 20, 1984 and as a consequence thereof, assigned the position advertised thereby to an employee junior to Mr. N. Nonack (System Docket CR-1294).

(2) As a consequence of the aforesaid violation, Claimant N. Nonack shall be allowed the difference between what he should have been paid at the trackman-operator's rate (\$10.36 per hour) and what he was paid at the trackman's rate (\$10.26 per hour)."

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 employees 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.

The Claimant herein alleges that he was denied the opportunity to bid on and be accepted for the position of Trackman-Operator-Spike Puller because Advertisement No. 92, listing the position, was allegedly not posted at Mingo Junction, where the Claimant has his headquarters. Rule 3, Section 3 (b) specifically requires that advertisements be posted "at the headquarters of the gangs in the subdepartment of employees entitled to consideration."

The claim in its initial form stated that Advertisement No. 92 was not posted at Mingo Junction. The Carrier response was simply that the advertisement "was posted at 1:00 P.M., August 17, 1984." In its appeal, the Organization claimed that the date and time stated by the Carrier was that of receipt of the advertisement, not its posting. The Organization also cited previous instances of the alleged failure of the Supervisor at Mingo Junction to post advertisements; an inspection at Mingo Junction which disclosed that "advertisements were not being posted"; and the loss of keys to the locked glass-enclosed bulletin boards. Again, the Carrier response was simply to state that the advertisement was posted. In its further appeal, the Organization presented a statement from four Mingo Junction employees complaining of incorrect posting. Again, the Carrier replied that the advertisement was posted.

It is entirely correct, as the Carrier contends, that in instances such as this it is the Organization's responsibility to bear the burden of proof. Beyond what is recounted above, however, it is difficult to see what further the Organization could have provided in defense of its claim.

It then became the Carrier's responsibility to reply by more than a simple assertion. For example, a statement by the Supervisor or others at Mingo Junction would have been in order.

Beyond such assertion, the Carrier's only other response came in its submission to the Board. This, of course, is too late and may not be considered by the Board, since it was not raised on the property. The further evidence was a showing that certain Mingo Junction employees had bid on positions listed in Advertisement No. 92. This, however, does not conclusively prove that the advertisement was posted at Mingo Junction, since, as the Organization states, employees may have seen the advertisement elsewhere.

The claim as presented to the Board seeks for the Claimant the loss of pay he suffered by being denied the proper opportunity to bid on the position. This is not "penalty pay" levied on the Carrier; it is simply the appropriate remedy to make the Claimant whole based on violation by the Carrier of Rule 3, Section 3 (b).

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deva - Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1988.