

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 27970
Docket No. MW-27352
89-3-86-3-573

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation - Amtrak
(Northeast Corridor)

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

(1) The Carrier violated the Agreement when it failed to properly post vacancies (Wilmington Shops) including the position of Assistant B&B Foreman, at Bear, Delaware (System File NEC-BMWE-SD-1289).

(2) As a consequence of the aforesaid violation, Mr. M. Goodyear shall be assigned to the position of Assistant B&B Foreman and he shall be allowed the difference between what he should have been paid at the assistant foreman's rate and what he was paid at the B&B carpenter's rate beginning April 4, 1985."

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 waived right of appearance at hearing thereon.

All of the assignments in Carrier's Wilmington, Delaware Carpenter Shop, including the position of Assistant Carpenter Foreman in Gang C-092, were abolished and rebulletined on March 27, 1985. The closing date for this advertisement was April 4, 1985. Under Rule 3 all advertisements are to be posted for seven days in the headquarters of gangs entitled to consideration in filling the vacancy. For some unexplained reason the bulletins covering these advertisements were never posted at Claimant's headquarters location.

On April 2, 1985, Claimant, upon learning of the advertisements from his Foreman, phoned a Supervisor in Baltimore complaining that there were no bulletins posted on the Wilmington changes at his headquarters location. Claimant was advised that the bulletins had been sent out through normal procedures and it was also explained to him which jobs were available. The next morning copies of the bulletins were dispatched to Claimant's headquarters but there is no evidence that they were ever posted.

Shortly thereafter Claimant sent an undated "To whom it may concern" letter to his Organization detailing the failure to post the bulletins in his headquarters. He asked that he be awarded the Assistant Foreman's job in Gang C-092 because he was not given the opportunity to "examine and bid this position."

On April 17, 1985, a claim was filed on behalf of Claimant asking that he now be awarded the job and that he be compensated the difference between the rate he was receiving and the rate of the Assistant Foreman's assignment, continuing until he is placed in the position. This claim was denied. The matter was handled on appeal, as provided in the Agreement, without settlement.

Before this Board the Organization argues that Carrier failed to comply with the explicit provisions of the Agreement and that the Claim must be sustained as presented. The Organization contends that Carrier was made aware of the failure to post the advertisement in Claimant's headquarters before the bulletins closed and elected not to correct the defect through any of several alternatives available.

Carrier argues that at best all that occurred was a technical violation of the Rule. Claimant had an opportunity to make a telephone bid for the vacancy but did not do so. He chose instead to wait and file a claim thus allowing potential liability to accumulate. Claimant, it is argued has no contractual right to the position or the compensation sought because by his own volition he did not bid on the position in question. The Board should not award a penalty because of the oversight which occurred.

Rule 3, the Rule under review here is drafted in simple, uncomplicated language. It provides:

"ADVERTISEMENT AND ASSIGNMENT TO POSITION

(a) All positions and vacancies will be advertised within thirty days previous to or within five days following the dates they occur, except that temporary vacancies need not be advertised until the expiration of thirty days from the dates they occur.

(b) Advertisement will show whether the positions or vacancies are of a permanent or temporary nature, and will be posted for a period of seven days at the headquarters of the gangs in the sub-department of employees entitled to consideration in filling the positions, during which time an employee may file his application.

(c) Application for new position or vacancy advertised under this Rule 3 must be prepared on Bid Form with receipt attached thereto, properly filled out, and filed with the official whose name appears on the advertisement, who will detach receipt, sign, and return same to the applicant."

One clear purpose of the Rule is posting of bulletins for seven days in the headquarters of employees entitled to consideration. Additionally, the Rule does not provide for telephone bids. Instead it requires that bids be on a specific form.

Based on the evidence in the record it is obvious that the Assistant Carpenter Foreman's advertisement was not posted for a period of seven days at Claimant's headquarters. As was the situation in Third Division Award 23436, wherein we considered a claim directly on point with the matter under review here, we are convinced that the failure to post was not purposeful. But, like the situation in Award 23436, the Agreement was, nevertheless, violated. Accordingly, Claimant should now be awarded the position.

On the monetary remedy it is noted that in Award 23436 we provided:

"...we will pay Claimant the difference in earnings between what she would have earned had she bid and been awarded Position GT-Vac. #12 and what she actually earned while occupying Position GT-357."

We will do the same here. The Claimant shall be allowed the difference between what he earned as a carpenter and what he would have earned as an Assistant Carpenter Foreman.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1989.