

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(The Lake Terminal Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10445) that:

1. Carrier violated the effective Agreement when it failed to assign Mr. James A. Pavlich to the position of Chief Crew Caller effective February 6, 1989, and then failed to timely respond to his claim concerning this failure.

2. Carrier shall now compensate Mr. Pavlich eight (8) hours' pay at the rate of Chief Crew Caller for February 6, 1989, and for each and every day thereafter that a like violation occurs."

FINDINGS:

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

The carrier or carriers and the employe 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.

On January 24, 1989, the Carrier advertised a Chief Crew Caller position, with a daily pay rate of \$122.28. The deadline for tendering applications for the position was 10:00 A.M. on January 27, 1989. At the time, Claimant held a Maintenance of Way Clerk position paying \$114.91 per day.

Sometime during the advertisement period, the Carrier informed clerical employees that it would soon be restructuring clerical duties which would necessitate changes in the contents of various clerical jobs.

One hour before the advertisement period on the Chief Crew Caller position expired, Claimant asked the Accounting Manager whether the duties of his position were slated for changes and he more specifically inquired whether or not his position would maintain the \$114.91 daily rate. The Manager replied that Claimant's position would remain unchanged. Relying on this information, Claimant decided not to submit a bid on the Chief Crew Caller

vacancy. At 10:00 A.M. on January 27, 1989, the Carrier awarded the Chief Crew Caller position to an employee with less seniority than Claimant.

Less than one-half hour after the bidding on the Crew Caller position was closed, the Carrier issued bulletins abolishing Claimant's job and re-establishing a similar job, but at a rate of \$112.40 per day. The pay rate on the bulletin re-establishing the position was a mistake and so, later in the day, the Carrier revised the bulletin to reflect the corrected rate of \$114.91, exactly the same rate as Claimant's present position. However, on January 30, 1989, the Carrier again revised the bulletin re-establishing Claimant's position and adjusted the pay rate to \$111.41 per day, which was \$3.50 a day less than the present rate. The Carrier decreased the rate as a result of discovering that AAR reporting responsibilities were no longer encompassed within the duties of Claimant's position.

When he was notified that his position was going to be abolished, Claimant attempted to exercise his seniority to displace the junior employee who had been awarded, but had not yet assumed the Chief Crew Caller position. His displacement was properly barred because the Crew Caller position, while subject to the promotion and bidding rules, was exempt from the displacement rule.

Asserting that the Carrier misrepresented material facts which induced Claimant to forego bidding on the Chief Crew Caller position, Claimant personally filed a Claim on March 23, 1989.

At the onset, the Organization argues that this Board should sustain this Claim as presented per Rule 49(a) because the Carrier did not decline the Claim within the sixty day limitation period. Rule 49(a) requires the Carrier to notify, whoever filed the Claim, the reasons for disallowing the Claim within sixty days of the date the Claim is filed. Many decisions of this Board have determined that the Carrier bears the burden of proving that the declination was deposited into a recognized mode of communication within the sixty day time limit. Third Division Awards 22600 and 25100. The record reflects that Claimant did not receive a declination letter and so, on May 31, 1989, he wrote the Carrier stating that the Carrier had breached the time limits. The Carrier responded on June 2, 1989, by forwarding a copy of a denial letter dated May 9, 1989, which was addressed to Claimant. The May 9, 1989 letter indicates that the District Chairman received a copy of the declination. The District Chairman never refuted that he timely received the correspondence. Since the District Chairman received the declination within the sixty day time limit, the Carrier dispatched the declination, via U.S. Mail, in a timely fashion. The Carrier is not responsible for letters lost in the mail. The Carrier need only prove, as it has here, that it properly deposited the correspondence in the mail. The fact that the District Chairman received his copy raises the reasonable presumption that the same letter, which was addressed to Claimant, was dispatched in the mail at the same time. Therefore, the Carrier did not breach Rule 49(a).

Turning to the merits, the first revision of the bulletin re-establishing Claimant's position (maintaining the present pay rate) shows that the Carrier lacked any intent to change the rate of his position at the time that

it answered his inquiries on January 27, 1989. Indeed, the Organization never provided any persuasive argument why the Carrier would hide the fact that it contemplated changing the rate of Claimant's position. Absent some motive for concealment, the Carrier acted in good faith. At first, it did not intend to change Claimant's pay rate and only upon closer scrutiny did it ascertain that the position no longer handled a critical duty.

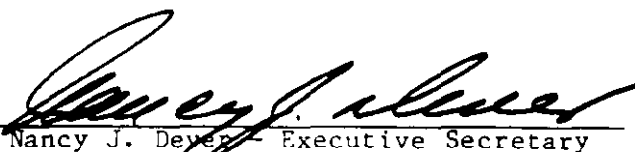
Moreover, there is some doubt that Claimant relied exclusively on the information provided him before the bidding period expired on the Crew Caller position. Claimant had been forewarned that clerical duties were to undergo a substantial reorganization. He should have taken the safe alternative, that is, filed an application for the Chief Crew Caller position.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 3rd day of April 1992.