

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29450
Docket No. MS-29696
92-3-91-3-39

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(Theodore F. Cicerchi

PARTIES TO DISPUTE: (

(The Pittsburgh and Lake Erie Railroad Company

STATEMENT OF CLAIM:

"Am I entitled to my seniority? The contract very cleary (sic) states that the advertisements are to be numbered for the information of employees covered by this agreement- Article 3 Paragraph (d).

Article 5, subtitled advertisements and vacancies, Paragraph (a) states in part: '...The senior employee will be notified and placed on the position within ten (10) days from expiration date of advertisement. ...'"

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.

This Claim is made by an individual employee covered by the Agreement pertaining to the Order of Railroad Telegraphers (TCU). Claimant alleges the Carrier violated the Telegrapher's Agreement when a junior telegrapher was awarded a dispatcher position. There is no dispute that dispatcher positions are covered by the Agreement between Carrier and the American Train Dispatchers Association. Claimant does not hold any seniority under the Dispatcher Agreement.

The Claim consists of two letters dated August 24, 1988, and August 26, 1988. The Claim alleges a violation of Article 3(d) of the 1951 Telegraphers Agreement. A review of subsequent material exchanged during the development of the on-property record does not reveal any alleged violations of any other specific provisions of the Agreement. Article 3(d) provides as follows:

"ARTICLE 3

Promotion To Supervisory, Official Positions, etc.

(d) When additional Train Dispatchers are needed, an informative notice stating the number of men needed will be shown on advertisement notices for the information of employees covered by this Agreement. Employees who desire to qualify shall advise the Superintendent, with copy to Superintendent of Communications and General Chairman, in writing, within ten (10) days after date of notice."

The record shows that dispatcher positions were advertised on March 2, 1988, and on August 12, 1988. Both positions were awarded to telegraphers junior to Claimant. The first award was dated March 14, 1988. The second award was dated August 23, 1988.

Claimant's Submission bases the Claim on the March 2, 1988 advertisement and the March 14, 1988 award. The Submission says that the August 12, 1988 advertisement and the August 23, 1988 award no longer apply. The Submission also alleges, for the first time, that Article 5(a) was violated. Article 5(a) reads as follows:

"ARTICLE 5

Advertisements and Vacancies

(a) New positions and permanent vacancies will be promptly advertised to all employees affected for a period of seven (7) days; advertisement to show location, rate of pay, assigned hours and rest days. Employees desiring such positions will, within the time limit shown on advertisement, file applications, in duplicate (over personal signature), with the proper officer. The senior employee will be notified and placed on the position within ten (10) days from the expiration date of the advertisement. A copy of all applications, advertisements and assignment notices will be sent to the General Chairman by the proper officer."

Distilled to its essence, Claimant's position is that Carrier was required to advertise the dispatcher position under Article 3(d) and award it in seniority order per Article 5(a).

Carrier raises several defenses. First, it says that time limits bar consideration of any claim based on the March 14, 1988 award. Since the Claim was not made in writing until August 24, 1988, more than five months after the award, the Claim is untimely. Second, Carrier argues that the alleged violation of Article 5(a) cannot be considered by the Board since it was not part of the record developed by the parties on the property. Finally, Carrier contends that Article 3(d) only requires it to make the informational advertisement. Nothing in Article 3(d) restricts Carrier's right to select employees to fill the dispatcher positions which are outside of the Telegraphers Agreement.

The scope of this Board's review of a dispute is confined to those matters raised by the parties on the property. Our examination of the record confirms that no claim of violation of Article 5(a) was made on the property. Accordingly, any such allegations cannot now be considered by the Board for the first time.

Carrier says it has fully complied with any requirements of Article 3(d). It says this provision only mandates that it advertise dispatcher positions for the information of telegraphers. We agree. Based on the record before us, it is clear from the context of Article 3 that it pertains to positions outside of the scope of the Telegraphers Agreement. It is equally clear that Article 3(d) contains no language to impose any seniority order restriction on Carrier's right of selection. Claimant has made only mere assertions, unsupported by evidence, to establish a contrary application of Article 3(d).

Finally, the record contains no rebuttal to Carrier's assertion that the Claim is untimely. By long established precedent, the un rebutted assertion of a material fact becomes an established fact for purposes of our deliberations.

In Claims of this nature, the Claimant has the burden of proving, by sufficient probative evidence, the merits of his Claim. For the reasoning set forth previously, we find that Claimant has not satisfied his burden of proof.

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 21st day of October 1992.