

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 29826  
Docket No. MW-29650  
93-3-90-3-645

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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 Agreement was violated when the Carrier failed to properly post Advertisement No. TCOM-89-6 dated July 31, 1989 on the Youngstown Seniority District.
- (2) The Agreement was further violated when the Carrier failed to properly post Advertisement No. TCOM-89-9 dated September 5, 1989 on the Youngstown Seniority District (System Docket MW-741).
- (3) As a consequence of the violation in Part (1) above, Messrs. R. D. Summers, P. C. Hake, D. Edmondson and J. E. Smith shall each be allowed:

'\*\*\* their applicable C1-1 rate, 10 hours for each date and any over-time, along with weekly expenses from the effective date of the award 8/14/89 through 9/25/89 and continuing as per Rule 26(f). Mr. J. Smith is claiming C1-1 rate from the effective date of Adv. TCOM-89-9 award account of this advertisement not being properly posted. Claim also includes any overtime and weekly expenses, also continuing as per rule 26(f) until all claimants are given the opportunity to work the positions. Since they were not given an opportunity for promotion, this is a violation of Rule 40.'

- (4) As a consequence of the violation in Part (2) above, Messrs. R. Koteles and M. Vodhanel shall each be allowed:

'... C1-1 rate, 10 hours for each date from September 18, 1989 through November 2, 1989 and continuing as per Rule 26(f) until both claimants are permitted to work the TCOM C1-1 positions. They are also claiming \$5.00 per work day for expenses for each date as outlined for the TCOM Gang. Mr. Koteles is claiming time made by D.K. Malloy ( C1-1 Sen. 9/27/82 ) and Mr. Vodhanel is claiming time made by L. Nemenz ( C1-1 Sen. 5/17/82 ).'"

**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 employes involved in this dispute are respectively carrier and employe 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 dispute involves a Claim by the Organization that Carrier failed properly to post openings for Class 1 Machine Operator positions on the Tie Change Out Machine (P-811) on Carrier's Youngstown Division. The Organization alleges that as a result of Carrier's violation of Rule 3, the Claimants were not afforded an opportunity to place bids for positions. Rule 3 reads in pertinent part as follows:

"Section 3. Advertisement and award.

- (a) All positions and vacancies will be advertised within thirty (30) days previous to or within twenty (20) days following the dates they occur. The advertisement shall show position title, rate of pay, headquarters, tour of duty, rest days and designated meal period.
- (b) Advertisements will be posted on Monday or Tuesday and shall close at 5:00 P.M.

on the following Monday. Advertisement will be posted 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."

On July 31, 1989, the Chief Engineer bulletined 11 Class 1 Machine Operator positions and one Foreman position on the Plasser-Theurer Tie Change Out Machine (TCOM), at that time located in Kalamazoo, Michigan. The awards to that bulletin were posted August 14, 1989. On September 5, 1989, the Chief Engineer's Office bulletined seven Class 1 Machine Operators for the TCOM at Dunkirk, New York. The awards for that bulletin were made on September 25, 1989. All of those positions were abolished on November 15, 1989 when the TCOM ceased operation at the end of the production season.

By letter of September 25, 1989, and by letter of November 2, 1989, the Organization filed two separate claims on behalf of Claimants alleging violations of Rules 3, 4 and 40 of the Agreement. Attached to those claims were statements from several Youngstown Seniority District employees asserting that the TCOM advertisement had not been properly posted. The claims were properly processed up to and including the Carrier's highest appellate officer.

The facts and positions of the Parties in this case are nearly identical to those in Third Division Award 27592, involving the same Parties as in the present case. In that Award, the Board held as follows:

"...[T]he Carrier's response [to the Organization's claim] 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)."

For the reasons set forth in Award 27592, the instant claim is sustained with respect to wages lost by Claimants as a result of Carrier's violation of the Agreement. There is no evidence on this record, however, to support awarding Claimants "weekly expenses" as claimed in the latter section of Parts (3) and (4) of the claim. Accordingly, Claimants shall be made whole for only the difference between their wages during the period at issue and what they would have earned but for Carrier's violation.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

Catherine Loughrin  
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 29th day of September 1993.