Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30401
Docket No. MW-30156
94-3-91-3-593

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

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

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

(1) The Carrier violated the Agreement when, within Advertisement No. 1, dated March 22, 1990, it advertised a stabilizer position, headquartered at camp cars SC-420 and failed to close said advertisement or award the position in compliance with the provisions of Rule 3, Section 3 (System Docket MW-1420).

(2) As a consequence of the aforesaid violation, Mr. R. Kadri shall be assigned the stabilizer Cl-1 position on SC-420 and allowed ten (10) hours' pay at the applicable straight time rate of said position beginning April 5, 1990 and continuing and in addition, any overtime and expenses to which he would have been entitled had he been assigned to said position."

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.

This is a time claim in which the Organization contends that a Stabilizer Operator position advertised on March 22, 1990, headquartered at camp cars SC-420, should have been awarded to the furloughed Claimant.

The record shows that the Carrier advertised for a Machine Operator Class 1 (Stabilizer Operator) position in Advertisement Number 1 on March 22, 1990, with a closing date of April 5, 1990. By notice dated April 9, 1990, Advertisement Number 1 was canceled. On April 12, 1990, in Advertisement Number 2, the Carrier advertised for a temporary Machine Operator Class 1 (Stabilizer Operator) and awarded the position to Machine Operator S. E. Hazel on April 27, 1990. On June 4, 1990, the Carrier readvertised the permanent position of Machine Operator Class 1 (Stabilizer Operator) and awarded the permanent position to S. E. Hazel on June 21, 1990.

The position at issue in this dispute had been awarded to M. A. Fife during the 1989 production season, and he elected to remain on the position for the 1990 production season. The Carrier states that it advertised the position on March 22, 1990, when it was advised that Mr. Fife was medically unable to return to the position for the 1990 season. The Carrier was subsequently advised that he would be qualified to return to duty within the 30-day period specified in Rule 3, Section 3, and then canceled Advertisement 1 as being erroneous. The position was then readvertised as specified above.

Rule 3, Section 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.

.....

(d) Awards will be made and bulletin announcing the name of the successful applicant will be posted within seven (7) days after the close of the advertisement.

This Rule shall not be construed so as to require the placing of employees on their awarded positions when properly qualified employees are not available at the time to fill their places, but physical transfers must be made within ten (10) days.

(e) An advertisement may be canceled within seven (7) days from the date advertisement is posted."

As noted in Award 13 of Public Law Board No. 3781, between the parties, the Carrier could have dealt with this situation in alternative ways:

> "After deciding that the Backhoe position had been advertised in error, the Carrier could have dealt with the problem by cancelling the advertisement or, alternatively, by abolishing the Backhoe position advertised. The Carrier chose the abolishment alternative and thus Rule 3, Section 3 (b), (d), and (e) did not come into play. Further, since the job abolishment was effected before the position had been awarded to any Employee, the requirement of notice of a job abolishment was not applicable."

The Organization contends in the instant case that the Carrier failed to cancel the advertisement pursuant to the requirements of Rule 3, Section 3(e). It is clear from the record, however, that the Carrier canceled Advertisement Number 1 on April 9, 1990, thus complying with the requirements of Rule 3, Section 3(e). Accordingly, we conclude that the Organization's claim must fail.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 8th day of August 1994.

LABOR MEMBER'S DISSENT
TO
AWARD 30401, DOCKET MW-30156
(Referee Duffy)

In this dispute, the Carrier failed to make an award of a position and place the successful applicant onto the position within seven (7) days of the close of the advertisement of a job, as required within Rule 3, Section 3(d). The Carrier's responsibility to do so and its liability for failure to do so are well established (see Award 24 of Public Law Board No. 3781 and Third Division Award 29578). In this case, the Carrier simply refused to comply with Rule 3, Section 3(d) and offered no real defense of its violation during the handling on the property.

In deciding this dispute, the Majority erred in at least two important respects. As a result, this award is palpably erroneous and of no precedential value. First, in its submission to the Board, for the first time in the history of this dispute, the Carrier raised the affirmative defense that the advertisement involved here was canceled and, in an effort to meet its burden of proof of such affirmative defense, it offered a purported cancellation notice, de novo, attached to its submission. The Organization properly entered a timely objection to the new argument and evidence. However, the Majority made its decision in this case based on the Carrier's de novo argument and purported evidence submitted for the first time before this Board. It is well established that a party may not introduce arguments or

evidence for the first time before this Board. Such tactics circumvent the Railway Labor Act's emphasis on resolving issues on the property and are flatly barred by Board Circular No. 1. The Majority's reliance on such de novo material, in and of itself, renders this award erroneous.

Secondly, even if the Carrier's argument concerning cancellation of the subject advertisement had not been de novo and barred from consideration by the Board, the Majority erred when it accepted this argument and found that Rule 3, Section 3(e) allowed the Carrier to cancel said bulletin in the circumstances involved here. Rule 3, Section 3(e) reads:

> "(e) An advertisement may be canceled within seven (7) days from the date advertisement is posted."

When the parties negotiated Rule 3, Section 3(e) to allow the Carrier to cancel an advertisement, they also negotiated the clear and unambiguous limitation to the Carrier's right to do so which is contained in the self-same section: the Carrier may cancel an advertisement only if it does so within seven (7) days from the date the advertisement is posted. It was undisputed throughout the handling of this dispute that the advertisement involved was posted

on March 22. Examination of the purported cancellation notice (improperly offered de novo, as noted above) reveals that it was dated April 9, eighteen (18) days later. In determining that the Carrier could cancel the advertisement on April 9, 1990 pursuant to Rule 3, Section 3(e), the Majority has either defied universally accepted arithmetic and has erroneously found eighteen to be less than or equal to seven or, more probably, it has taken upon itself to modify the specific language of Rule 3 to which the parties agreed when they adopted the Agreement. Such a modification has no essence in the Agreement and, in fact, is clearly contrary to the specific language of the rule. Inasmuch as it is a fundamental axiom that the Board is without authority to amend or modify the Agreement, it is crystal clear that the Majority exceeded its jurisdiction by modifying the time limit negotiated into the Agreement by the parties in this instance and rendering Rule 3, Section 3(e) ineffectual.

For these reasons, the award is palpably erroneous and of no value.

Respectfully submitted,

G. L. Hart
Labor Member