

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31439
Docket No. MW-31659
96-3-93-3-684

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

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

STATEMENT OF CLAIM:

- "(1) The Carrier violated the Agreement when it failed to place the successful applicants onto the Production Gang positions, advertised within Bulletin No. 114 dated March 16, 1992, on March 30 and 31, 1992 in compliance with the provisions of Rule 3, Section 3 (System Docket MW-2661).
- (2) As a consequence of the violation referred to in Part (1) above, each successful applicant to the positions advertised within Bulletin No. 114 shall be allowed twenty (20) hours' pay at the applicable straight time rate of their awarded positions."

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.

The Carrier, on March 16, 1992, bulletined vacancies for a production gang. Pursuant to the Bulletin Rule, the bulletin called for bids to be received no later than March 23, 1992 and the assignments were to be made no later than March 30, 1992. Carrier, however, did not permit the successful applicants for the production gang vacancies to start until April 1, 1992.

The Organization argues that as of March 30, 1992, the successful applicants should have been on the job and earning pay therefor as of March 30, 1992, thus the claim for two days pay (at ten hours per day) for March 30 and 31, 1992.

Carrier's on-property defense is that it has not violated the Agreement, that Rule 3 (a) permitted it a period of 30 days in which the physical assignment must be made and that it complied with the 30 day provision.

The Organization responded that the Carrier is in violation of the Rule, that two prior Awards have so held, that the Agreement was revised between the dates Award 24 of Public Law Board No. 3781 and Third Division Award 29578 were adopted with Rule 3 (a) and (d) remaining unchanged. Thus, Carrier must accept the Rule as interpreted by a Board. Furthermore, the 30 day time frame as contained in 3 (a) is merely intended to permit the training of a successful applicant by the incumbent of the position advertised. Carrier did not respond to that assertion.

As of this writing there exists three decisions, each interpreting 3 (d) to mean that when assigned, the successful applicant either be physically working on the advertised position or at least be paid as though he was. (See Award 24 of Public Law Board No. 3781, Third Division Awards 29578, 31265).

It is noted that the second paragraph of Rule 3 (d) states:

"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 10 days."

In Award 24, of Public Law Board No. 3781, the Board held as follows:

"The claim is thus meritorious and will be sustained. However, the Employees who were in service and under pay are subject to the ten (10) day deferment of physical transfer provided by the second paragraph of Rule 3 (d). The award of compensation would be limited to the period beginning eleven (11) days after March 25, 1985 and would in all events provide only for the wage differential, if any, between their prior and award positions."

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The aforequoted portion of Award 24 is incorporated into this Award. The claim before the Board is sustained for all successful applicants who were not "***in service and under pay***" as of March 30, 1992.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of April 1996.