

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31975
Docket No. CL-32292
97-3-95-3-120**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(CSX Transportation, Inc. (former Seaboard
(Coast Line Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11129) that:

- 1. Carrier violated the Agreement on October 24, 1993, when it failed to fill Position No. 173 while it was under advertisement.**
- 2. As a result of the above violation, Carrier shall compensate Claimant W. D. McDaniel eight (8) hours at the applicable overtime rate."**

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 were given due notice of hearing thereon.

On October 24, 1993, while Position 4EWB-173 at the Centralized Waybilling Center was vacant and under advertisement, Claimant was called to fill the vacancy at the overtime rate. However, prior to his leaving home, the Carrier contacted Claimant and told him not to report. This claim followed seeking payment to Claimant at the overtime rate.

The Carrier states that the decision not to fill the position in this fashion was based upon the fact that work volumes or loads did not warrant the filling of the position at the overtime rate. The Carrier further relies upon Rule 15:

"Rule 15 - Temporarily filling Bulletined Positions

Bulletined positions may be filled temporarily pending an assignment; and, in the event no bids are received from employees covered by this agreement, assignment may be made by appointment, with bulletin to be issued accordingly."

As the Organization recognizes, a plain reading of Rule 15 shows that the Rule is permissive with respect to the Carrier's temporarily filling a position that has been bulletined ("Bulletined positions may be filled temporarily pending an assignment" [emphasis added]). As such, and because no Rule mandates the Carrier to fill the position, whether the Carrier chooses to exercise its managerial prerogatives to fill the position is subject to review by this Board for arbitrary conduct. Third Division Award 31708.

The Carrier demonstrated a non-arbitrary reason for its decision to ultimately not assign the work to Claimant. According to the Carrier, work volumes or loads did not warrant the filling of the position at the overtime rate. Further, according to the Carrier as stated on the property "... on the date of this claim work volumes were not such that the Carrier felt they needed this position to work." There is no evidence in this record that those assertions were inaccurate or that the "work unnecessarily piled up or was inordinately assigned to other employees" on this date. Award 31708, supra.

The Organization's argument that the employees doing the work function in a pool arrangement and that because the position was not filled on the claim date someone had to do the work, is not persuasive. That argument is speculative. There is no evidence in the record to support that contention.

Public Law Board No. 2470, Award 47 does not change the result. In that case, the record disclosed that work was distributed to another employee (“... the Carrier diverted the third shift Clerk-Operator to work the Assistant Agent’s position.”). Similarly, Third Division Award 19047 is not persuasive. In that case, the Board found that the upgrading of a Laborer to fill a vacancy left Laborer’s work to be performed. Here, there is no evidence that the work of the vacant position was improperly distributed to others.

Other Rule provisions argued will not be considered as they were not raised on the property.

AWARD

Claim denied.

ORDER

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 6th day of May 1997.