

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32218
Docket No. MW-31285
97-3-93-3-296**

The Third Division consisted of the regular members and in addition Referee W. Gary Vause when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (AMTRAK)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to properly and timely post the advertisement and award the position of an EWE 'A' which was awarded effective October 27, 1991 to junior employe J. Keenan (System File NEC-BMWE-SD-3054 AMT).**
- (2) As a consequence of the aforesaid violation, Mr. J. W. Wilkins shall be compensated the rate differential of pay between his position and the position awarded to Mr. Keenan, all overtime earned by Mr. Keenan and the Claimant's name shall be placed ahead of Mr. Keenan on the roster."**

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.

A package of 31 Track Laying System (TLS) job advertisements was sent from the Labor Assignment Office in Philadelphia to the Track Laying Systems (Headquarters). This is a system traveling unit whose headquarters are in its Camp Cars. The package was posted on the regular bulletin board which is in the TLS Camp Car Dining Room. There is a dispute over the date the jobs were posted and open for bid. The Carrier contends that the posting was accomplished on Monday, October 7, and continued to Monday, October 14, 1991. The Organization argues that the jobs were not posted and open for bid until a date later than October 7.

Among the 31 job advertisements was the advertisement in question (No. 186-TLS-1091) which advertised for two Engineer Work Equipment (EWE) Class "A" Operators for Track Laying Machine (TLM) Gang Y-142.

J. Keenan, who had established seniority as an EWE "A" Operator within the Track Laying Machine and Track Laying System Support Unit of the Maintenance of Way Track Department, bid for and was awarded one of the EWE "A" Operator positions effective October 28, 1991. The other EWE "A" Operator position went "no qualified bidders." The Carrier asserts that the awards for these positions were sent from the Labor Assignment Office in Philadelphia to the TLS Headquarters on October 24 and were received and properly posted at the TLS Headquarters on October 30, 1991. The Organization contends that the awards were not timely posted.

At the time of the events in question, Claimant J. W. Wilkins had established and held seniority as an EWE "A" Operator within the Track Laying Machine and Track Laying System Support Unit of the Maintenance of Way Track Department. The Claimant had greater seniority than J. Keenan.

The EWE "A" Operator position that went "no qualified bidders" subsequently was readvertised on Bulletin No. 216-TLS-1191. The Claimant bid on and was awarded the job effective November 28, 1991.

The Organization filed a claim asserting that the Carrier had failed to properly post Advertisement No. 186-TLS-1091 and its applicable award. The Carrier disagreed. The claim was appealed and denied by the Carrier and is properly before the Board.

The question in this case is whether the Carrier properly posted Job Bulletin No. 186-TLS-1091 and the award applicable to the advertisement at the Claimant's headquarters, and if not, what is the appropriate remedy?

The Organization argues on the following grounds that the Carrier violated the Agreement when it failed to post the subject bulletins in a timely manner. Rule 3(b) specifically requires that advertisements will be posted for a period of seven days at the headquarters of the gangs in the subdepartment of employees entitled to consideration in filling the positions. Rule 3(b) further requires that such advertisements will be posted on Monday and shall close at 5:00 P.M. on the following Monday. Any variance from that posting day or period must be construed as a violation of 3(b). There is no dispute that the position in question was awarded to a junior employee. The Organization presented a prima facie claim to the Carrier, which the Carrier failed to refute. Moreover, the Carrier failed to present evidence to support its position that the factual circumstances were other than as set forth in the claim. The Carrier should not be allowed to remedy these deficiencies by presenting evidence de novo before this Board.

The Carrier asserts that it properly posted Job Bulletin No. 186-TLS-1091 and the award applicable to the advertisement at the Claimant's headquarters. The Carrier concedes that had the Claimant submitted a bid, he would have been awarded the position that was awarded to "no qualified bidders." However, the Claimant simply failed to timely submit a bid on the position. The Carrier urges the Board to deny the claim, but in the event the claim is allowed, the Organization's request for payment at the punitive rate should be denied as excessive. The proper rate of pay for proven lost work opportunities on this Carrier's property is the pro rata (straight time) rate.

"RULE 3

ADVERTISEMENT AND ASSIGNMENT TO POSITION

(a) All positions and vacancies will be advertised within thirty days previous to or within five days following the dates they occur, except that temporary vacancies need not be advertised until the expiration of thirty days from the dates they occur.

(b) Advertisements will show whether the positions or vacancies are of a permanent or temporary nature, and will be posted for a period of seven days 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. Advertisements shall be posted on Monday and shall close at 5:00 PM on the following Monday. Bids which are postmarked or received anytime during the application period will be considered.

(c) Application for new position or vacancy advertised under this Rule 3 must be prepared on Bid Form with receipt attached thereto, properly filled out, and filed with the official whose name appears on the advertisement, who will detach receipt, sign, and return same to the applicant.

(d) Awards will be made and bulletin announcing the name of the successful applicant will be posted within ten (10) days after the close of the advertisement. The ten (10) days may be extended by an equal number of work days when any of the nationally observed holidays enumerated in Rule 48 fall within the normal work week of the involved assignment office." [Emphasis added.]

* * * *

Rule 3(b) clearly states that the advertisement will be posted on Monday. A posting on any other day does not comply with Rule 3(b). Similarly, Rule 3(d) states that awards will be made and the bulletin announcing the name of the successful applicant will be posted within ten days after the close of the advertisement. Awards not made in conformity with Rule 3(d) violate the Rule.

The Organization stated a prima facie claim, and the Carrier is in a position to provide evidence to refute that claim if it is unsupportable. In a letter sent on or about December 26, 1991, J. S. Collins, Supervisor, Maintenance of Way Labor Relations, advised the Organization representative, Joel Myron, of the Carrier's position. That letter contained the following statements:

"The Carrier's investigation has revealed that on October 3, 1991 a package of T.L.S. advertisements including a T.L.S. abolishment was sent from the Labor Assignment Office in Philadelphia for distribution. This package contained 31 separate advertisements which opened on October 7, 1991 and closed at 5:00 p.m. on October 14, 1991.

One of these advertisements, No. 186-TLS-1091 was for two (2) EWE 'A' TLM operators in gang Y-142. Mr. J. Keenan was awarded one position and the second position went 'No Qualified Bidders'.

The Carrier received over thirty (30) bids on this package from T.L.S., two (2) of which were for Advertisement No. 186-TLS-1091. The Carrier also has in its possession a receipt showing this package was received and posted at the T.L. S. Camp Facilities on October 8, 1991.

Since thirty (30) people on the T.L.S. Camp saw this package and placed bids on one (1) or more of the positions advertised the Carrier does not agree that Rule 3 was violated and the package was not timely posted. Mr. Wilkins simply did not bid on this package.

The award for the positions in question was sent from the Labor Assignment Office in Philadelphia on October 24, 1991, effective October 28, 1991, not October 27, 1991 as your claim states. The Carrier is in possession of a receipt showing this award package was received and posted at the T.L.S. Camp on October 30, 1991."

With respect to the posting of the advertisement, the above statement asserts that the advertisement "was received and posted ... on October 8, 1991." If this were the case, then the posting occurred on Tuesday, rather than on Monday, as required by Rule 3(b). During the handling of this matter on the property, the Carrier failed to respond to the Organization's request for production of the receipts which allegedly indicated the respective dates of posting the advertisement and awarding the bid.

In argument before the Board, the Organization objected to the Carrier's attempt to introduce documents, including documents purporting to be receipts, because they were not presented to the General Chairman during the handling of this dispute on the property. Because such documents are new and had not been properly presented during

the handling of the dispute on the property, it is inappropriate for the Board to consider them.

The Carrier asserts that as many as 30 employees at the TLS Camp placed bids on one or more of the advertised positions. However, the Carrier adduced no evidence to establish that any bids were placed by employees on the required date of posting, Monday, October 7, 1991.

Because the Carrier failed to refute the Organization's prima facie claim with admissible evidence, the claim must be sustained in part.

The remaining question is determination of the appropriate remedy. The Organization requests that the Claimant be compensated the rate differential of pay between his position and the position awarded to Keenan, all overtime earned by Keenan, and that the Claimant's name be placed ahead of Keenan on the seniority roster.

A number of Awards support the Carrier's argument that the request for payment at the punitive rate is excessive. See, e.g., Third Division Awards 27146, 27147, 27148, 27149, 27150, 27701, 28180, 28181, 28349, 28796 and 28990, as well as Public Law Board No. 4549, Award 1. All of these Awards held that the proper rate of pay for proven lost work opportunities on this Carrier's property is the pro rata (straight time) rate.

The claim, therefore, will be sustained, but only for compensation at the pro rata rate.

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 17th day of September 1997.