

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36676
Docket No. MW-35096
03-3-98-3-842**

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen 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 award the position advertised in Advertisement No. 570, dated February 17, 1997, as required by Rule 3 and improperly canceled said bulletin (System Docket MW-4945).**
- (2) The Agreement was violated when the Carrier failed to award the positions advertised in Advertisement No. 572, dated February 24, 1997, as required by Rule 3 and improperly canceled said bulletin (System Docket MW-4946).**
- (3) The Agreement was violated when the Carrier failed to award the positions advertised in Advertisement No. 463, dated March 10, 1997, as required by Rule 3 and improperly canceled said bulletin (System Docket MW-4951).**
- (4) As a consequence of the violation referred to in Part (1) above, the senior qualified BMWWE employe who bid on the position advertised in said bulletin shall be allowed forty (40) hours' pay at his respective straight time rate.**
- (5) As a consequence of the violation referred to in Part (2) above, the senior qualified BMWWE employes who bid on the positions advertised in said bulletin shall each be allowed forty (40) hours, pay at their respective straight time rate.**

- (6) As a consequence of the violation referred to in Part (3) above, the senior qualified BMW employees who bid on the positions advertised in said bulletin shall each be allowed forty (40) hours' pay at their respective straight time 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.

This case involves three separate claims which were handled individually on the property, but consolidated for arbitration because of similarity of issues and contract language.

On February 17, 1997, the Carrier posted Bulletin No. 570 advertising two Class II Machine Operator positions on Indianapolis Production Zone Number 5: a Tie Handler position and a Jimbo Operator position. The closing date for said bulletin was February 24, 1997. On March 3, 1997, the Carrier posted Bulletin No. 573 awarding the Tie Handler position, but announcing that the Jimbo Operator advertisement was "canceled (bulletined in error)." Because the Carrier did not cancel the Jimbo Operator bulletin within seven calendar days from February 17, 1997, the Organization presented a claim that Rule 3, Section 3(e) had been violated and sought 40 hours' pay at his respective straight time rate "for the senior qualified BMW employee who bid on the position advertised in said bulletin." The Carrier denied the claim on grounds that the February 17, 1997 bulletin had been issued in error because there was an incumbent Jimbo Operator already filling that position as of the bulletin date of February 17, 1997.

On February 24, 1997, the Carrier posted Bulletin No. 572 advertising two Vehicle Operator positions, one Class II Machine Operator position, two Class I Machine Operator positions and two Trackmen - Casual Driver positions for the Indianapolis Production Zone Number 5. On March 3, 1997, the closing date of Bulletin No. 572, the Carrier "re-advertised" each of the referenced positions in Bulletin No. 573, closing at 5:00 P.M. on March 10, 1997, and subsequently awarded those positions to successful bidders by Bulletin No. 575 dated March 17, 1997. Because the Carrier did not cancel Bulletin No. 572 within seven calendar days from February 24, 1997, the Organization presented a claim that Rule 3, Section 3(e) had been violated and sought 40 hours' pay at his respective straight time rate "for the senior qualified BMW employee who bid on the position advertised in said bulletin." The Carrier denied the claim on grounds that the positions were re-advertised by Bulletin No. 573 because Bulletin No. 572 had contained factual errors i.e., wrong rates, change in qualifications, error in job titles, etc.

On March 10, 1997, the Carrier posted Bulletin No. 463 advertising numerous positions: one Vehicle Operator position, one Class III Machine Operator position, two Class II Machine Operator positions, two Track Foreman positions, one Trackman position and one Work Equipment Repairman position for the Indianapolis Production Zone Number 5. The closing date for said bulletin was March 17, 1997, which would have made March 17, 1997 the closing date and March 24, 1997 the award date. However, in Bulletin No. 467 on March 24, 1997 the Carrier did not award the positions, but rather announced that they were "cancelled (not needed)." Because the Carrier had not cancelled Bulletin No. 463 within seven calendar days from March 10, 1997, the Organization presented a claim that Rule 3, Section 3(e) had been violated and sought 40 hours' pay at his respective straight time rate "for the senior qualified BMW employee who bid on the position advertised in said bulletin."

In the first situation involved in these claim(s) it appears from the undisputed record that there was in fact no vacancy to bulletin or award. In the second situation, numerous typographical errors and inaccuracies in the original bulletin were simply corrected, following which the successful bidders were awarded the positions based on the accurate bulletin. In those circumstances, we are persuaded that Third Division Award 31255 and Public Law Board No. 3781 - Award 13, involving these same Parties, support a denial of the claims presented in Parts 1, 2, 4 and 5, supra. The third situation presented in Part 3, supra, differs factually, because in that case the record indicates only that Carrier management apparently

changed its mind after advertising the positions; but the Carrier never provided any explanation for doing so and then waited until the award date to cancel the allegedly superfluous bulletin. In those circumstances, we are persuaded that the Organization made out a prima facie showing that Carrier Rule 3, Section 3(e) violation which warrants sustaining Part 3 of the claim(s). However, in the absence of any showing by the Organization that there had in fact been "a senior qualified BMW employee who bid on the position advertised in said bulletin," we have no basis for awarding the monetary damages claimed in Part 6. See Third Division Awards 31763, 31757, 28922, 19960, and Second Division Award 11385.

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 18th day of August 2003.