Award No. 12824
Docket No. MW-12662

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

RAILROAD DIVISION, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY

STATEMENT OF CLAIM: A Track Foreman's job was advertised by the Company. Job was bid in by and awarded to Track Equipment Operator G. Barto. His job then was left vacant and not advertised as per contract.

Article 12, Sections (e) and (f) were violated.

Organization requests that M. D. DiGiovine and S. Palombo be compensated as asked for in original claims.

EMPLOYES' STATEMENT OF FACTS: These claims arose at Aliquippa, Pa., and are known as Claims TC–150, 151, 152, 153, 154.

Employes DiGiovine and S. Palombo were available and entitled to work performed by employe Curenton on the dates mentioned in the claims.

Article 12, Sections (e) and (f) were violated by the company when the company did not advertise G. Barto's job after he had been awarded the Track Foreman's job.

Track Foreman's job was advertised under advertisement No. 280 on February 18, 1959, to be closed at 4:00 P. M. on Tuesday, February 24, 1959. Employes' Exhibit No. 1.

Position was awarded to G. Barto on February 26, 1959. Employes' Exhibit No. 2.

G. Barto's position as Track Equipment Operator was not advertised until March 9, 1959. Employes' Exhibit No. 3.

Position was not awarded until March 13, 1959. Employes' Exhibit No. 4.

The Railroad Division, Transport Workers Union of America, AFL-CIO, formerly "The United Railroad Workers of America, CIO", does have a bargaining agreement effective December 31, 1946, with the Aliquippa and

ond Division and Award No. 5186 of the Third Division of the National Railroad Adjustment Board.

However, in the instant case, it must be noted that no work was actually lost in the instant case by any of the Carrier's employes represented by the Organization nor did the Carrier save anything as a result of the occurrence in question. The same people would have worked on the same assignments during the period in question and would have been paid the same amount of money regardless of what action was taken.

CONCLUSION

As a result of the position herein outlined, it is clear that Sections (e) and (f) of Article 12 were never intended to provide a penalty in this or any other case, but, on the contrary, were and are simply intended to provide a procedural guide for the parties to apply in good faith in the permanent filling of various departmental vacancies. It is also obvious that the instant claims are without foundation under any agreement, understanding or practice between the parties, and that the claimants are, therefore, in no way entitled to the penalty compensation claimed. It is also apparent that no damages or losses were in any way suffered by employes of the Carrier as the result of the occurrence in question.

In view of this, the Carrier respectfully submits that the instant claims are incapable of support on any basis and therefore requests that your Honorable Board uphold the Carrier's position by the issuance of a denial award.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts in this case are not in dispute. A Track Foreman's job was advertised by the Carrier, bid for and awarded to a Track Equipment Operator. This latter job then became vacant and was not advertised within the time stipulated by the Agreement. The Organization contends that by its failure to so advertise, the Carrier has violated Article 12, Section (e) and (f), in consequence of which it should be required to pay a penalty. Article 12, Section (e), provides that "permanent vacancies or new jobs will within five (5) days, be advertised for a three (3) day period and will be awarded to the senior bidder on the basis of seniority in that department, providing he possesses the necessary fitness and ability." The Carrier acknowledges the fact that it did not advertise the vacancy within the time limit, that this was nothing more than an oversight, that the job was filled the day it became vacant, that the individual who filled the vacancy was entitled to the job as the senior unassigned Track Equipment Operator, and that if it had advertised according to Article 12, this same individual would have filled the vacancy; further, that when the Carrier became aware of the vacancy and did advertise, this same individual was, in fact, awarded the position. The Claimants, on the other hand, during the questioned period of time, were assigned to their regular jobs as Track Equipment Operators, one with rest days of Thursday and Friday, and the other with rest days of Monday and Tuesday. The period of time involved in this dispute was February 26 to March 9, 1959. The vacancy in question should have been advertised prior to March 3 and awarded no later than March 5, but because of Carrier's oversight or non-compliance with Article 12, it was not advertised until March 9th. From February 26 to March 12th, during which the vacancy existed, it was filled by Curenton. The Carrier maintains that this action was consonant with the provisions of the third paragraph of Memorandum of Understanding, dated March 11, 1955, which is quoted below:

"All other temporary vacancies for Track Equipment Operators, if filled, shall be filled in order of seniority by the available unassigned Track Equipment Operators or MofW Helpers working on that day."

As a result of this vacancy being so filled, the Claimants submit that an extra employe was used on a permanent position, in violation of Section (e) and (f) of Article 12 of the Agreement. They further contend that instead of using Curenton on the dates in question, the Carrier should have used the Claimants on certain of their assigned rest days at the punitive rate of pay. Curenton, who filled the vacancy for the entire period, bid and was awarded the position once the Carrier advertised it. He did not lose any money, and both Claimants were assigned to their regular jobs as Track Equipment Operators, so that they did not incur any pecuniary loss.

In view of the foregoing recitation of the factual situation, it is evident that the principal issue is whether in the face of an acknowledged violation of Article 12, the Carrier is required to pay a penalty to the Claimants.

It is our judgment that the rule cited by the Organization does not provide for such a penalty in the event that a position is not advertised in accordance with the procedures as outlined. In the absence of express and explicit language, we are left with no alternative other than to assume that the intention of the contractual parties was that no penalty was to attach for a violation of this kind. It is a well established principle, as enunciated in previous awards of this Board, that a penalty cannot be assessed in the absence of specific language imposing such a penalty. (See Award 3651.) This Board does not possess the authority to alter in any way the specific language of the contract signed by both parties. We must, therefore, deny the claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the Agreement.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of August 1964.