

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25687

Docket Number MW-25748

Hyman Cohen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(Kansas City Terminal Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to properly post Bulletin Nos. 837 and 838 for ten (10) days and as a consequence thereof, assigned the position advertised by Bulletin No. 837 to an employe junior to applicant A. R. Katamura (Carrier's File MW-2-83-2).

(2) As a consequence of the aforesaid violation, the two positions advertised by Bulletins 837 and 838 shall be readvertised by bulletin, Mr. A. R. Katamura shall be assigned to the position of Special Trackman-Truck Driver, Gang 2 in the absence of application by a senior employe, Mr. A. R. Katamura shall be allowed the difference between what he should have been paid at the Special Trackman-Truck Driver's rate and what he was paid in a lower rated position for nine (9) days and he shall be accorded a seniority date as Special Trackman-Driver as of the date a junior employe was assigned to that position.

OPINION OF BOARD: The instant claim alleges that the Carrier violated the Agreement when it failed to properly post Bulletin Nos. 837 and 838 for ten (10) days; as a consequence the Carrier assigned the Special Trackman-Truck Driver Gang No. 2 position advertised by Bulletin No. 837 to an employe junior to the Claimant, who was an applicant for the position.

Expecting the Carrier to bulletin the position in question prior to August 9, 1982, the Claimant closely watched the Bulletin Board in the Tower No. 3 building where bulletins were customarily posted. He first noticed the Special Trackman-Truck Driver position advertised by Bulletin No. 837 on the Bulletin Board when he reported for duty on the morning of August 9, 1982. He proceeded immediately to submit an application for the position. The Carrier refused to recognize the bid submitted by the Claimant because the time limit for the submission of bids had expired. It should be noted that Bulletin No. 837 was dated July 29, 1982 and also stated that "[A]ll bids must be submitted \* \* \* no later than 12:01 p.m. August 8, 1982."

On August 11, 1982, J. E. Ludgate sent a letter to Engineer Dryer in which he stated that while "cleaning out the Tower #3 Building", he "found two Bulletins under the desk" which he placed "on the Bulletin Board". This caused the Claimant to request recognition of his bid on Bulletin No. 837 which was again denied by the Carrier because the time limit expired.

Rule 5, Section 1 of the Agreement provides as follows:

"All new positions and vacancies of more than thirty (30) days duration will be promptly bulletined for a period of ten (10) days. Bulletin will show location, descriptive title and rate of pay."

After carefully examining the evidence, the Board concludes that the Carrier violated Rule 5, Section 1 by failing to post Bulletin No. 837 at the Tower No. 3 building for the period of ten (10) days as provided in Rule 5, Section 1 of the Agreement. Although Ludgate does not indicate the numbers of the Bulletins that he found under the telephone on the desk in Tower No. 3 building, the Board has inferred that he found Bulletin Nos. 837 and 838. Reinforcing this conclusion are the written statements of Truck Operator Cumbie and his helper D. K. Rich that were submitted by the Carrier which indicate that they placed Bulletins on desks at "various gang headquarters", during the week of July 28, 1982. In his statement, Truck Operator Cumbie indicates that he gave his helper, D. K. Rich, Bulletins which he then "placed \* \* \* on all desks the same as I have been doing since I became a supply man." The Carrier refers to this statement in support of its position that Bulletins were delivered to all Maintenance of Way gang headquarters on July 28, 1982 in the same manner they have been handled for at least the past 35 years. It is significant to point out that both Truck Operator Cumbie and his helper, D. K. Rich, did not post the Bulletins on the Bulletin Board as contemplated by Rule 5, Section 1. To merely place Bulletins on unidentified desks at various gang headquarters does not meet the requirements in Rule 5 that all new positions of more than 30 days will be promptly bulletined so as to be observed by the workforce. Furthermore, while past practice is used frequently to establish the intent of contract provisions which are so ambiguous or so general as to be capable of different interpretations, ordinarily it will not be used to give meaning to a provision which is clear and unambiguous. Clearly, a past practice consisting of placing Bulletins on desks at various headquarters points is unavailing to modify the clear language of Rule 5, Section 1.

The assertion by the Carrier that "numerous personnel" observed the Bulletin in question properly posted is a mere assertion and does not constitute probative evidence. It is also claimed that the Bulletin was posted properly, at one (1) location, at least, as evidenced by the successful submission of the bid by Trackman Dryer, the only bidder within the time period set forth in Bulletin 837. However, the bid sheet executed by Trackman Dryer does not indicate that Bulletin 837 was posted as required within the intent and meaning of Rule 5, Section 1 of the Agreement. Thus, there is nothing in the record to indicate that Bulletin 837 was posted in compliance with Rule 5, Section 1 of the Agreement.

That the Bulletins were not posted within the requirements contained in Rule 5, Section 1 is supported by the written statement of C. L. Howerton who indicated that he did not see Bulletins 837 and 838 until Friday, August 6, 1982 which is the date when Ludgate found the Bulletins and placed them on the Bulletin Board. Moreover, besides the Claimant, K. L. Clark, C. K. Fultz and J. A. Ortiz did not see Bulletins 837 and 838 until Monday morning, August 9, 1982, although they closely watched the Bulletin Board expecting to bid on the positions advertised in the Bulletins. They, as well as Howerton, submitted a bid for the position set forth in Bulletin No. 837.

Viewing the record in its entirety, the Organization carried the burden of proving that the Carrier violated Rule 5, Section 1 by failing to promptly post new vacancies of more than 30 days duration for a period of 10

days. As a result of the violation, the remedy is as follows: a) The two positions advertised by Bulletins 837 and 838 shall be advertised again by bulletin; b) The Claimant shall be assigned to the position of Special Trackman-Truck Driver, Gang 2 in the absence of application by a more senior employee; c) Absent an application by a more senior employee, the Claimant shall receive the difference between what he would have been paid at the Special Trackman-Truck Driver's rate and the rate he was paid in the lower rated position for nine (9) days; and d) He shall be accorded a seniority date as Special Trackman-Truck Driver as of the date the junior employee was assigned to that position.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of November 1985.