

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30794  
Docket No. CL-31044  
95-3-93-3-6

The Third Division consisted of the regular members and in addition Robert W. McAllister when award was rendered.

(Transportation Communications  
( International Union  
PARTIES TO DISPUTE: ( .  
(Delaware and Hudson Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of  
the TCU (GL-10913) that:

The following claim is hereby presented to the Company in  
behalf of David F. Gilchrist. (861-92 DHO13)

Claim earnings of B. Crowley, position #63 CATS Clerk on  
following days under Rule 12(g) and (h) of TCU Agreement.  
Position vacated by R. Muskopf:

November 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28,  
29, 30, 1991. December 1, 2, 5, 6, 7, 8, 9, 12, 13, 14,  
15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 1991."

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.

Third Division of the Adjustment Board has jurisdiction over  
the dispute involved herein.

Parties to said dispute waived right of appearance at hearing  
thereon.

In mid-November 1991, W. Minkler, a Carrier Supervisor, was  
assigned to assist in the implementation of new waybilling and EDI  
on the Delaware & Hudson. To fulfill this responsibility, Minkler  
was unable to perform his regular supervisory duties at Clifton  
Park. As a result, the Carrier promoted R. Muskopf from his  
position as Customer Service Clerk #63 to fill Minkler's position  
on a temporary basis. The Carrier then assigned B. Crowley, who  
was then the senior furloughed clerical employee, to fill position  
#63.

On January 10, 1992, the Carrier posted a bulletin advertising a vacancy on Position #63, advising the duration of the vacancy was temporary. Being the senior qualified applicant for the position, Crowley was awarded the position on January 17, 1992.

The Organization asserts the Carrier had an obligation to advertise the vacancy in November 1991 because it was evident the duration of the vacancy would exceed two weeks. The Organization cites the following portions of Agreement Rule 12 - Bulletining New Positions and Vacancies:

"(g) Vacancies of a known duration of two weeks or more, other than annual vacations will be bulletined.

(h) A temporary position which becomes permanent through any cause shall be bulletined."

The Carrier denies it had knowledge of the fact that the vacancy would last more than two weeks. It avers it promptly bulletined the position when it became apparent temporary reassignment would take longer.

Cases of this nature are difficult because it is impossible for this Board to know when the Carrier had actual knowledge that the job would continue to be vacant for another two weeks. The Board also recognizes the difficulty faced by the Carrier in trying to decide if the vacancy must be bulletined. Nevertheless, the Carrier cannot simply fill a job on a day-to-day basis for several months without bulletining it pursuant to Rule 12. At some point, a presumption arises that the Carrier knew this would be a continuing vacancy. Certainly, if the Carrier had issued its bulletin during the second or third week, that presumption might be a weak one. When, however, the Carrier does not issue a bulletin for almost two months after the job has worked, the presumption becomes quite strong against the Carrier. In this case, the Carrier has given us no reason to believe it did not know the vacancy would continue for more than two weeks. We conclude the Carrier violated the Agreement by not bulletining the position earlier than it did. The Board, however, will sustain the claim only for the period commencing November 25, 1991, giving the Carrier some benefit of the doubt.

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 6th day of April 1995.