

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33388
Docket No. MW-32256
99-3-94-3-628**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Chicago & North Western Transportation Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed to properly post the advertisement for the temporary position of track foreman, identified as Bulletin No. 2177 dated May 25, 1993, at the RC 592 Section Crew headquarters at Mason City, Iowa (System File 2PG-3575T/81-93-135).

(2) As a consequence of the violation in Part (1) above, Claimant J. B. Holding shall be compensated at the track foreman's rate of pay beginning June 11, 1993 and continuing and he shall also be given track foreman's seniority as of that date.”

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.

On May 25, 1993 Advertisement Notice 2177 advertising a track foreman's position at Blue Earth, Minnesota was telefaxed to the Carrier's facility at Mason City, Iowa to be posted pursuant to Rule 16. During the relevant period within which to place a bid on the position the Claimant did not place a bid. Claimant and the Organization contend that he did not do so because the advertisement was not posted as required by Rule 16 and provided written statements by the Claimant and his foreman that the advertisement was not posted. Carrier on the other hand contends that the advertisement was in fact posted and provided a written statement to that effect by the Roadmaster.

As is apparent from the foregoing, the matter turns on the competing evidence of the parties whether the advertisement in question was posted as required by Rule 16. Because both the Organization and the Carrier provide written statements in support of their conflicting views on this issue the statements must be examined for their competing credibility and, most importantly, in light of which party carries the burden of proof in this matter. The Organization attacks the credibility of the Roadmaster's assertion that he posted the advertisement because before he made that assertion he told the Claimant that he did not know why the advertisement was posted. The Carrier on the other hand attacks the assertions of the Claimant and his foreman that simply because they did not see the advertisement does not mean that it was never posted. It is the view of this Board that both arguments are equally compelling. Thus, we choose to look to the record as a whole to see if there is any other basis for concluding whether the Organization is correct for it, in a matter of contract interpretation, bears the burden of proof.

In doing so we find nothing more to bolster the credibility of the Organization's evidence over that of the Carrier. For example, and unlike the awards cited by the Organization, we find no other "preponderating evidence" (Special Board of Adjustment No. 1016, Award 51) nor previous instances of similar error or other evidence (Third Division Awards 27592 and 29826). Therefore, the Organization has failed to meet its burden of proof.

AWARD

Claim denied.

Form 1
Page 3

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of July 1999.