

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35472
Docket No. CL-35883
01-3-99-3-862

The Third Division consisted of the regular members and in addition Referee Andr  e Y. McKissick when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12501) that:

I am filing claim on behalf of Ms. Cheri Thompson, Sparecrew Dispatcher, North Station, Boston, MA. Claim commences March 24, 1998 and is continuous at the rate of eight (8) hours at time and one-half for each and every day position CD-14A continuous to operate as a PAD position.

Carrier violated the Agreement when it left position CD-14 vacant for over ninety (90) days before awarding it to an employee off the street, thus this petition must be returned to the status of bump and bid. The position as past practice also should be bulletined under Scope Rule #1, as provided for under Rules 2-A-1.

Rules violated are Preamble, Rules 1, 2-A-1, 2-A-5 Agreement of September 2, 1994, Section 3, (Partially Excepted Positions), paragraphs (a) and (b) inclusive and all other rules of this Agreement.”

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.

The Organization alleges that the Carrier violated Article III, Section 3 of the September 2, 1994 Agreement, and in pertinent part, is as follows:

"Section 3 - Partially Excepted Positions

- (a) When a partially excepted position is vacant for more than 90 days, the partially excepted status will be automatically eliminated.
- (b) Preference will be given to individuals actively employed in the clerical craft in the seniority district when filling partially excepted and PAD positions. If an employee on a full time regular position becomes unable to hold a full time regular position and is senior to an employee holding a partially excepted of PAD position, the partially excepted of PAD position will be reported, it will be filled by an employee who would not otherwise be furloughed or the position may be abolished. The incumbent may be held on the position without penalty until the position is filled."

In addition, the Organization also contends the Carrier violated the Preamble, Scope-Rule 1, 2-A-1, and 2-A-5 of the Agreement, which reads, in material part, as follows:

"Positions or work coming under the scope of this agreement shall not be removed and transferred to employees coming under the scope of another agreement (except in the case of reduction of clerical forces to establish a one man agency) except by mutual agreement."

It is the Organization's contention that the CD-14A, a PAD position, was left vacant for more than 90 days before an "off the street" employee was hired for the vacancy, in violation of Section III of the Agreement.

Moreover, the Organization asserts that said positions are exempt from the application of the usual advertisement and displacement Rules. The Organization points out that 97 days had elapsed from January 13, 1998, the issue of notice, to April 1, 1998, the date of the new hire. The Organization contends that there is nothing in Article III, Section 3 of the September 2, 1994 Agreement, that suggest that a pending assignment extends the 90 day period. In sum, the Organization argues that this position should be "automatically eliminated" as per Agreement because the Carrier had ample time to fill the Lead Crew Dispatcher position.

The Carrier rebuts the contentions of the Organization by asserting that Bulletin No. 98-02, dated January 13, 1998, was posted and candidates were advised to submit their resumes. However, since there were no in-house candidates, the Carrier interviewed P. Smith, who accepted the said position on March 9, 1998. The Carrier notes that, this acceptance was less than 90 days and thus not violative of Article III, Section 3, of the Agreement. The Carrier adds that Smith did not "physically" arrive at the premises until April 1, 1998, but this does not change the fact that he was hired within the 90 days, as required.

Moreover, the Carrier points out that the Claimant did not apply for this position and thus was not harmed by the Carrier's decision to hire Smith. As such, the Carrier argues that the Claimant is not "aggrieved" as required. Besides, the Carrier notes that Article III, Section 3 of the Agreement utilizes the language "partially excepted position," not a "lead" position, as in the grievance. In addition, the Carrier notes that re-advertising is not required by Article III, Section 3 of the Agreement.

The Board finds that the posting of January 13, 1998 (Amtrak Exhibit 2) to the Seniority District (MBTA) constitutes notice to all employees of the vacancy, at issue. The record reflects that no one applied or bid for the position, in accordance with Rule 2-A-1 of the Agreement. Based on the evidence presented, the Carrier had the right to hire an "off the street" employee, Smith, on March 9, 1998, within the 90 days, as required by Article III, Section 3 of the Agreement. Consequently, the Board finds that the Carrier did not violate said provision of the Agreement, as the Organization contends. Thus, the date of hire is the date that Smith accepted between March 9 and March 16, 1998. Therefore, the operative date is not the date that Smith "physically" appeared for work on April 1, 1998. Based on the above, the Board finds that the Claimant was not harmed by this new hire and the Organization has not demonstrated that the Carrier breached said Rule.

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AWARD

Claim denied.

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 22nd day of May, 2001.