

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36237
Docket No. MW-36337
02-3-00-3-563

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to properly and timely post the advertisement of an EWE ‘B’ Burro Crane Operator position on Gang Z-202 which was awarded to Mr. D. Johnson subsequent to the March 8, 1999 advertisement of said position (System File NEC-BWME-SD-3951 AMT).**
- (2) As a consequence of the aforesaid violation, Messrs. D. Rivera and D. Johnson shall each be compensated for an equal proportionate share of all overtime associated with said burro crane operator position for each workday in the period beginning December 15, 1998 through March 31, 1999 and each shall receive half of the per diem for each workday during the aforesaid period.”**

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 issue raised in this case is whether the Carrier violated Rules 3 and 55 by canceling the December 7, 1998 advertisement for an EWE 'B' Burro Crane Operator on Gang Z-202 on December 21, 1998 to the detriment of the Claimants, equipment operators in the Metropolitan Division. It is undisputed that such position was advertised in November and December, but repeatedly failed for bid. Gang Z-202 included two EWE 'A' positions and one EWE 'B' position designated as primary operator of a front-end loader, at the time this second 'B' position was advertised in December 1998 and designated as primary operator of a burro crane.

The record reflects that the Carrier had only three working burro cranes in the territory during this time period, and that each had bid assigned operators. It also had two other burro crane operator positions, night shift and relief, which were available and vacant for bid during the claim period; the Claimants did not bid on either. Due to the crane shortage, the Carrier chose to supplement the Gang by use of Division forces operating the burro crane when such was necessary on Gang Z-202. There is no dispute that during the claim period a Division maintenance force burro crane was used with Gang Z-202 as needed; no burro crane was actually assigned to that gang. The Organization presented petitions signed by numerous employees who attested to the fact that such burro crane was used "a lot," and it asserted the burro crane use may have been between 60-80 percent of the time, which the Carrier contested. There is no dispute that the burro crane was operated by a qualified employee. When an additional burro crane became available in March 1999, the Carrier designated it for Gang Z-202 and bulletined a EWE 'B' burro crane position for that gang, which was awarded to Claimant Johnson. This claim seeks lost overtime and pier diem for both Claimants during the period from the abolition of the initial advertisement, until the bid was awarded in March 1999.

The Organization argues that because the burro crane was used in Gang Z-202 continuously during the claim period, it represents a vacancy requiring posting under Rule 3, and the Carrier improperly canceled the advertisement and failed to assign a Machine Operator to the position thereby denying the Claimants the opportunity to work overtime on a gang which afforded per diem reimbursement in violation of Rule 55. In response to the Carrier's contention that the claim was procedurally defective, the Organization avers that it was told by Supervisor MW Assignments to contact the Division Engineer to resolve the claim, thereby justifying its initiation of the claim with

the Division Engineer, rather than the Supervisor designated to receive such claims. The Organization relies upon the following precedent in support of its claim: Third Division Awards 23494, 25601, 27339, 27707, 29616, 31265, 32371 and 32714.

The Carrier initially contends that the claim is procedurally defective under Rule 64 as it was not presented to the officer designated to receive such claims, the Supervisor MW Assignments, but rather, to the Division Engineer. It asserts that even if such supervisor advised the Vice Chairman to discuss such complaint with the Division Engineer, it did not alter the designation of officers to receive claims for compensation involving advertisement of positions. The Carrier argues that this procedural flaw requires dismissal of the claim, relying on Third Division Awards 9684 and 15631.

With respect to the merits, the Carrier argues that its decision to cancel the advertisement was a result of the shortage of equipment, the absence of any bids and the fact that a burro crane was not assigned to Gang Z-202 continually between December 1998 and March 1999. It asserts its right to effectively utilize its equipment by retaining its assignment to Division maintenance forces and using those forces to support the efforts of production gangs when necessary, as permitted by Rule 90-A, Article VI(b). The Carrier contends that the Organization failed to prove that the burro crane was used daily on Gang Z-202 during the claim period, or that other than assigned burro crane operators were used to run the equipment. The Carrier further posits that neither Claimant was aggrieved, as they did not bid on the originally posted Gang Z-202 burro crane position or the two vacancies, and were working in their assigned positions during the claim period. It notes that because per diem is a reimbursement for expenses incurred in connection with assignment to a gang, which neither Claimant is entitled to, and the claim requests payment at the overtime rate for time not worked, it is excessive.

Initially the Board notes that, under the un rebutted facts of this case, where the Supervisor MW Assignments was contacted by the Organization about the issues underlying the claim and told the Vice Chairman to deal directly with the Division Engineer, the fact that the claim was not technically filed with the designated officer does not render it procedurally defective. However, a careful review of the record convinces the Board that the Organization failed to establish a violation of either Rule 3 or 55 in this case. First, there is no evidence that the burro crane which was the subject of the canceled advertisement was, in fact, assigned to Gang Z-202 on a daily

basis, thereby created a vacancy requiring the filling of such position under Rule 3. Second, it is undisputed that the Carrier had only three burro cranes operating within the territory, one of which was used on Gang Z-202 on an as needed basis, and all were manned by assigned Division maintenance operators. Third, neither Claimant was aggrieved by the Carrier's cancellation of the advertisement, as neither bid on it or on the other two burro crane vacancies within the Division.

For all of these reasons, the claim must fail.

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 24th day of September 2002.