

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37340
Docket No. SG-37406
05-3-02-3-452

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(CSX Transportation, Inc. (former Louisville and
(Nashville Railroad)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation, Inc. (CSXT):

Claim on behalf of W. E. Gunter, Jr., for the differential in pay between the amount that the Claimant was paid for the month of June, 2001, and the position of Signal Inspector at Montgomery, Alabama, and continuing until this dispute is resolved, account Carrier violated the current Signalmen's Agreement, particularly Rules 6, 7, 16, 17, and 46 through 50 and CSXT Labor Agreement 15-122-93, when it failed to advertise and properly award the positions on Seniority District No. 6, the Claimant should also be placed on the System Seniority Roster and the Mobile District Roster with a Class 2 and a Class 1 date of May 31, 2001. Carrier's File No. 15(01-0134). General Chairman's File No. 01-137-8. BRS File Case No. 12029-L&N.”

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 filed the instant claim on behalf of Signal Maintainer W. E. Gunter, Jr. seeking the difference in pay between the Signal Maintainer and Signal Inspector rates. It asserts that the Carrier violated the Agreement when it failed to properly advertise or abolish Position No. 7M24-360. The Organization contends that the Carrier failed to properly advertise or abolish vacant positions on Seniority District No. 6, thereby denying the Claimant the opportunity to gain seniority in the higher classification.

The Organization maintains that the Carrier had five days to advertise the Lead Signal Maintainer position vacated by B. R. Rogers, but failed to do so. The Organization emphasizes that although the Carrier indicated that it is aware that this is a violation of the Agreement, its policy is that no position can be advertised or abolished until that request is made by the local supervisor. In addition, this Lead Signal Maintainer position, which was to work on a "special assignment," was to direct the work of another employee, M. O. Stanfill, who was also assigned to this "special assignment." The Organization argues that the Carrier violated Rules 6 and 7 in that it did not advertise the Lead Signal Maintainer position, while Stanfill continues to perform his duties without the direction of a Lead Signal Maintainer and is allowed overtime to the exclusion of another employee, J. L. Blackwood, who is senior to Stanfill.

The Organization argues that had the Carrier properly advertised and awarded the position to J. L. Blackwood, the Claimant would have been the senior bidder to gain seniority in Class Nos. 3 and 4. The Carrier's failure to properly advertise the Lead Signal Maintainer position vacated by Rogers denied Blackwood the opportunity to gain overtime by bidding to the same and the Claimant the

opportunity to gain seniority in the higher classification. The Organization maintains that this represents a continuing violation.

The Organization emphasizes that during handling on the property, the Carrier did not deny that it violated the Agreement Rules that deal with the advertisement and awarding of positions. The Organization disputes the Carrier's contention that it advertised the Lead Signal Maintainer position six times during 2001 by asserting that the Carrier advertised this particular position, relating to the special project, only once during 2001.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially points out that the claim presented to the Board is not the same as the one originally filed on the property. The Organization amended its Statement of Claim. The Carrier asserts that the Board long has held that it is a fatal defect to amend a claim during its progression, and the Board has dismissed claims upon that determination alone. Moreover, the original version of the instant claim is important because the Organization recognized the Carrier's option to discontinue that assignment.

Turning to the merits, the Carrier emphasizes that there is no dispute that J. L. Blackwood did not bid on a 7M24-360 Lead Signal Maintainer position that was advertised for assignment on numerous occasions during 2001, nor did he bid on any other position in 2001. The Carrier argues that Blackwood's failure to act renders moot the entire matter of compensation for him and the Claimant. The Carrier maintains that it cannot be held responsible for Blackwood's failure to act. As for the Organization's assertion that the Carrier advertised only one of two vacant Lead Signal Maintainer positions, the Carrier points out that there is much uncertainty about the existence of two positions running in tandem from February to April 2001, and the Carrier had the managerial right not to fill the second position if it became vacant or to discontinue the position if it was not needed. The Carrier contends that it has the unfettered right to stop work on any assignment and abolish it, so the blanking of a vacant assignment does not provide Blackwood and the Claimant with an opportunity to make a claim for a windfall payment. The Carrier asserts that it had the choice of either advertising or abolishing the job

referenced in the original claim, and this choice must still exist for the alleged second position.

The Carrier goes on to argue that there is no support for the Organization's argument that Rules 6 and 7 require Signal Maintainers, like M. O. Stanfill, to have a Lead Signal Maintainer supervising them. Similarly, there is no merit to the Organization's assertion that the Lead Signal Maintainer position was required to work in lock step with a Signal Maintainer with regard to straight time and overtime service. The Carrier points out that Signal Maintainers can and do work independently of Lead Signal Maintainers, and there is no contractual requirement that a Signal Maintainer must have a lead position working alongside.

The Carrier then asserts that the instant claim essentially is a request for injunctive relief. The Organization wrongfully requests the Board to grant injunctive relief by insisting that the Carrier issue an advertisement bulletin for a second Lead Signal Maintainer position and assume that J. L. Blackwood would be the successful applicant. The Organization also requests that the Carrier issue an advertisement bulletin for the Signal Inspector position once occupied by Blackwood and assume that the Claimant would be the successful applicant awarded that job. The Carrier maintains that such requests are beyond the scope of the Board's authority, and similar requests previously have been denied. The Carrier contends that it advertised sufficient Lead Signal Maintainer positions to accomplish the needed services, and every employee, including J. L. Blackwood, was given an opportunity to bid on the advertised positions. The Carrier argues that it complied with the Agreement and retained its managerial right to determine the size of its workforce.

The Carrier emphasizes that there is no contractual support to uphold the Organization's assertions in this matter. The Organization failed to support its request for compensation with evidence and contractual support, and the Board should not attempt to speculate on the facts. The Carrier asserts that in view of the Organization's failure of proof, the Board should dismiss the instant claim as based on speculation and conjecture. The Carrier points out that there is no evidence that the Claimant suffered any compensation loss and is entitled to additional compensation. The Claimant is fully employed at another location, and he is seeking a windfall payment through arbitral fiat.

The Board reviewed the procedural arguments raised by the Carrier and concludes that given the following determination, we need not rule on those issues.

With respect to the substantive case, the Board finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement by not properly awarding positions as set forth in the claim. The Board agrees with the Carrier's position that the claims are based upon speculation that a variety of events would have occurred. There is simply insufficient evidence in this record to support the fact that the Claimant would have been entitled to the position or the difference in pay as demanded in the claim. There is no contractual support to uphold the Organization's contention. There is no question that the Organization bears the burden of proof in claims of this kind. In this case, the Organization failed to meet that burden. See First Division Awards 12661 and 16076. The Board cannot make an Award based upon speculation. For all of the above reasons, this claim must be denied.

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 19th day of January 2005.