

****CORRECTED****

**Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40341
Docket No. MW-40675
09-3-NRAB-00003-080522**

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 Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CP Rail System (former Delaware and Hudson
(Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to bulletin a trackman position on the section gang at Necospeck, Pennsylvania in connection with incumbent Trackman E. Hermanofski vacating said position beginning September 15 and continuing through November 4, 2006 (Carrier's File 8-00513 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Vanderpool shall now be compensated at the respective and applicable rate of pay for all straight time and overtime hours worked by the Necrospeck Section Gang beginning September 15 and continuing through November 4, 2006.”**

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.

This claim arises from the Carrier's admitted failure to advertise the Trackman position on the Necospeck section gang vacated by Hermanofski between September 15 and November 4, 2006 while he was assigned to cover various other positions. The Organization filed this claim on behalf of the Claimant, a Trackman who was working on the road at the time, asserting that the Carrier's failure to bulletin this position in compliance with Rule 3.6 denied the Claimant the opportunity to cover the vacancy and work at home during this period, and seeks all time and compensation lost by the Claimant. The relevant portion of Rule 3, Vacancies and New Positions, provides:

"ADVERTISEMENT AND AWARD

3.6 All positions and vacancies will be advertised within thirty (30) days previous to or within twenty (20) days following the dates they occur. . . ."

The Organization argues that the Carrier basically admitted its violation of Rule 3.6, and the fact that it was not intentional is insufficient to negate the violation or the Claimant's entitlement to a monetary remedy, citing Third Division Awards 23436, 25687, 27592, 27970, 29826, and 32218; Public Law Board No. 2142, Award 11; Special Board of Adjustment No. 1016, Award 51. It asserts that the Claimant was unaware of the vacancy because he was working away from home, and could not be expected to make a request, and that he suffered by not being able to work at home for this seven week period of time. The Organization contends that it is irrelevant whether this is considered a temporary vacancy because there is no exception to the advertising requirement contained in Rule 3.6 for temporary vacancies.

The Carrier asserted that it was unaware of the duration of this vacancy, that it did not intend to circumvent the Rules, that there has been no showing of any loss suffered by the Claimant, who was working and fully employed during this period, and that there is no evidence that the Claimant made a written request to cover the position or that the Organization requested that the vacancy be filled. It contends that this was a temporary vacancy covered by Rules 3.13 and 3.14, and that the Organization failed to meet its burden of proving a violation of the Agreement or that the Claimant was harmed by the absence of a bulletin.

A careful review of the record convinces the Board that the Carrier violated Rule 3.6 by failing to advertise the vacancy in issue in accord with the clear provision of Rule 3.6. Even if the Carrier was unaware of the expected duration of the vacancy, when it extended past 20 days following Hermanofski's assignment to a different position, the Carrier was in technical violation of the Rule by not advertising the vacancy. The Carrier failed to show how the temporary vacancy provisions cited apply to this factual situation.

The real question raised by this claim is the nature of the appropriate remedy. Precedent makes clear that the Claimant is entitled to be compensated for the difference between what he would have earned had he bid and been awarded the position and what he actually earned, even if the violation was unintentional. See, e.g. Third Division Awards 23436 and 27970. There is no evidence in the record to show either what the Claimant actually earned during this period or what he would have earned as part of the Necospeck section gang. It is clear that the Claimant held the position of Trackman, so the vacancy did not represent a promotion. The Organization has not demonstrated a monetary loss associated with the Claimant's ability to work at home, because there is no contention that he did not receive his contractual entitlements associated with working away from home. What is left to determine is the exact time period during which the Claimant would have worked this vacancy if the Carrier had complied with Rule 3.6 in order to establish the extent of his monetary entitlement, if any. The Carrier's violation occurred when it failed to advertise the vacancy on the 21st day after it occurred. Had it done so, the posting would have closed 10 calendar days later under Rule 3.7, and the award would have been made within seven days after the close of the advertisement, under Rule 3.9. Thus, the 37 days permitted for the completion of the process establishes that the appropriate claim period commences on the 37th day after September 15 and continues until November 4, 2006. The parties shall jointly check the pertinent

records to establish what, if any, losses were suffered by the Claimant during that period, and he shall be compensated accordingly.

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 1st day of March 2010.