

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41745
Docket No. MW-41845
13-3-NRAB-00003-120139**

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: (
(National Railroad Passenger Corporation (Amtrak)
(- Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to post the advertisement of the foreman - electric traction (ET) position headquartered in Lancaster, Pennsylvania as required by Rule 3 and thereby deprived Mr. R. Ligatti the opportunity to bid and be awarded that assignment (System File NEC-BMWE-SD-4947 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Ligatti shall now ‘. . . be afforded an ET Foreman roster date effective on 11/29/2010 and ranked one (1) number above the incumbent, Robert Miller, Jr. For your ready reference, Mr. Ligatti’s ET Gang Foreman Roster date is 4/17/2000 as opposed to Mr. Miller’s 9/17/2007. Clearly, Mr. Ligatti stood as the next senior employee in line for the ET Foreman’s position when reviewing the ET Lineman’s roster. . . .’”**

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 dispute raises the issue of whether the Carrier properly advertised the Electric Traction (ET) Foreman position on Gang J-044 contained in Job Bulletin No. 111-ETPM-1110 under the relevant provisions of Rule 3 of the Agreement, Advertisement and Assignment to Position, set forth below:

“(b) Advertisements will show whether the positions or vacancies are of a permanent or temporary nature, and will be posted for a period of seven days at the headquarters of the gangs in the sub-department of employees entitled to consideration in filling the positions, during which time an employee may file his application. Advertisements shall be posted on Monday and shall close at 5:00 P.M. on the following Monday. Bids which are postmarked or received anytime during the application period will be considered.”

The Claimant was assigned as a Gang Foreman on Gang J-122, headquartered at Lamokin, when he was displaced from his position on November 2, 2010. Pursuant to the Agreement, he had ten days to exercise his seniority. The Foreman advertisement in question was emailed for distribution to field headquarter locations including Lamokin on November 4, 2010; the email indicates that it was sent to Supervisor Reilly, as well as Foreman Cross. In a written statement, Foreman Cross denies ever seeing the advertisement either electronically or on paper. Reilly's statement indicates that he printed it out and set it on the lunch table in the locker room, as was his practice, and that it has always been the responsibility of the Foreman at this location to post the paper copy received in his mailbox at headquarters. The Claimant asserts that he never saw the advertisement or learned about it until after the close of the posting period (November 8-15, 2010). Two of the Claimant's co-workers submitted written statements indicating that they heard that a junior co-worker removed and destroyed the advertisement so as to prevent senior employees from seeing it. There was no evidence that the Carrier

was aware of such fact until the claim was filed, at which time it challenged the Organization to identify the person so that an appropriate investigation could be done. Four employees bid on the advertisement, and it was awarded to the senior qualified bidder (Robert Miller, Jr.) effective November 29, 2010. There is no dispute that the Claimant was qualified for the ET Foreman position and was senior to Miller.

The Claimant stated that he had a conversation with Supervisor Reilly after the bid closed about not seeing any advertisement or knowing about the position, and contended that Reilly indicated that he knew the Claimant would have bid on the job because he had done so on other ET Foremen advertisements during the prior year. Reilly's written statement indicates that his conversation with the Claimant occurred on November 8 or 9 (during the posting period) when he chose to exercise his seniority to displace a Lineman, and that he told him about the ET Foreman advertisement and asked him if he was going to bid. It is undisputed that Reilly could not find a copy of the advertisement when he looked after the Claimant said that he knew nothing about the posting. All employees are aware that information about advertisements and vacancies is available on the Carrier's Toll Free Engineering Voice Mail System and at the Organization's Bulletin and Assignment Office.

The Organization argues that the Carrier failed to properly post the ET Foreman advertisement for the entire seven-day posting period as required by Rule 3, and that it had the obligation to post it in a safe and secure cabinet so as to ensure that it was not misplaced or lost, citing Third Division Award 32218. It notes that the Carrier's own evidence establishes that (1) it failed to meet such obligation, (2) the advertisement was not posted and maintained throughout the required period, and (3) the Claimant was unaware of the bulletin until after the posting period had expired.

The Carrier contends that the advertisement in question was properly posted in accordance with Rule 3, noting that it presented unrefuted proof that it was electronically sent on November 4, 2010 to both Supervisor Reilly and Foreman Cross, and that Reilly printed it out and placed it on the lunch table in the locker room of the Lamokin headquarters. The Carrier asserts that Cross' statement that he did not see or post the advertisement, at best, creates an irreconcilable dispute of fact supporting dismissal of the claim, citing Third Division Awards 26428, 33388 and 33416. Additionally, it asserts that the Organization's statements agree that

Reilly made the advertisement available for all employees to review and consider, which is the extent of the Carrier's responsibility under the Agreement. Because there is no evidence establishing that the Carrier was made aware that an employee had removed and destroyed the advertisement during its posting period, the Carrier contends that it cannot be held responsible for this act of misconduct. Finally, the Carrier asserts that its employees have access to all advertisements and job opportunities 24/7 on either its toll free system or at the MOW Bulletin and Assignment Office, which the Claimant would have contacted during the posting period to determine which position to displace, and the Claimant was specifically informed of this ET Foreman posting when he called to speak with Reilly to exercise his seniority on a Lineman position on either November 8 or 9, 2010. It requests that the claim be either dismissed or denied on its merits.

A careful review of the on-property record evidence convinces the Board that the Organization met its burden of proving that the ET Foreman advertisement in question was not posted at the Lamokin headquarters for the entire seven-day posting period (November 8-15, 2010) and that such fact violated the requirement set forth in Rule 3(b). See, Third Division Award 32218. There is no dispute of fact that, while Reilly may have placed a paper copy of the advertisement on the table in the lunch room, it did not remain there throughout the posting period and could not be located by Reilly when he investigated the Claimant's assertion that he had not seen the advertisement and had no knowledge of this job opportunity.

The Carrier was unable to rebut the Organization's evidence that it was removed and destroyed by a co-worker early on. The Organization's unwillingness to identify the employee involved does not change this fact. Neither does the Carrier's assertion that it was the responsibility of Foreman Cross to accomplish the postings, because Cross admitted being unaware of this advertisement and not posting it. While Rule 3(b) does not require the posting to be in a locked cabinet or secure bulletin board, it does require that the advertisement be posted for a period of seven days at the headquarters, and it is the Carrier's responsibility to assure compliance with such requirement by establishing the necessary procedures.

With respect to the appropriate remedy, the evidence is disputed as to exactly when the Claimant was informed by Reilly about the ET Foreman posting. However, it is clear that the Claimant had to call either his Supervisor or the MOW Bulletin and Assignment Office within the November 2-12 period to ascertain where he could exercise his seniority and make a displacement, which he did to a Lineman

position on the same gang on November 9, 2010. Thus, he would have had access to the information concerning all assignments/postings during the open period for bids. However, because the Claimant seeks only a revision of his ET Foreman Seniority Roster date to November 29, 2010 immediately above Miller, who was junior to the Claimant and awarded the position in question, the Board concludes that such remedy (without compensation or the award of a position) is appropriate for the proven violation of Rule 3.

AWARD

Claim sustained.

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 30th day of September 2013.