

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 58

Case No. 58

Referee Fred Blackwell

Carrier Member: J. H. Burton

Labor Member: S. V. Powers

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the regularly assigned employees on Ballast Gang No. 1, Sw. Timber Gang No. 1, Sw. Timber Gang No. 2, Extra Crossing Gang No. 1, Extra Crossing Gang No. 2, SC-810 and Tie Unloading Gang No. 1 were held off their regularly assigned positions on March 23, 24, 25, 26, 30 and 31, 1987 (System Docket CR-4033).
- (2) The Agreement was also violated when the regularly assigned employees on Boutet Welding Gang Nos. 1, 2, 3, 4, 5 and 6 were held off their regularly assigned positions on March 30, 31, April 1 and 2, 1987.
- (3) The Agreement was also violated when the regularly assigned employees on TO-817 were held off their regularly assigned positions on March 23, 24, 25, 26, 30, 31, April 1, 2, 6, 7, 8 and 9, 1987.
- (4) The Agreement was also violated when the regularly assigned employees on SE-811 were held off their regularly assigned positions on March 23, 24, 25, 26, 30 and 31, 1987.
- (5) As a consequence of the aforesaid violations:
 - (a) The employees assigned to the gangs referred to in Part (1) above, shall each be allowed sixty (60) hours of pay at their respective straight time rates.
 - (b) The employees assigned to the gangs referred to in Part (2) above, shall each be allowed forty (40) hours of pay at their respective straight time rates.

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- (c) The employees assigned to the gangs referred to in Part (3) above, shall each be allowed one hundred twenty (120) hours of pay at their respective straight time rates.
- (d) The employees assigned to the gangs referred to in Part (4) above, shall each be allowed sixty (60) hours of pay at their respective straight time rates.

FINDINGS:

Upon the whole record and all the evidence, and after hearing on September 6, 1990, in the Carrier's Office, Philadelphia, Pennsylvania, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

DECISION:

Claim Sustained.

OPINION

I. NATURE OF CASE

This case arises from four (4) claims that were filed in behalf of various Gangs on May 6, 1987, on the basis of allegations that in the administration of the advertisement and award of Trackmen positions for the 1987 production season, the Carrier violated the Agreement Rule 3 requirement that awards of advertised vacancies will be made within seven (7) days after the close of the advertisement of the vacancy.

The requested remedy is that the Carrier pay compensation to the Claimants for the days that the Claimants are alleged to have been improperly held off their awarded positions in violation of Rule 3 of the Agreement.

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The Gangs covered by the four (4) claims, filed on May 6, 1987, together with the date of the advertisement of positions, the effective date of the positions, and the closing date on the bulletin, are as follows:

Ballast Unloading Gang 1, SW. Timber Gang 1, 2, Xtra Xing Gang 1, 2, SC 810, and Tie Unloading Gang 1. Advertisement dated March 9, 1987, effective April 1, 1987, with bids being in and accepted until March 23, 1987 (Employees' Exhibit A-1).

Boutet Welding Gangs 1, 2, 3, 4, 5, 6. Advertisement dated March 19, 1987, effective April 6, 1987, with bids being in and accepted until March 23, 1987 (Employees' Exhibit B-1).

Gang TO 817. Advertisement dated March 9, 1987, effective April 13, 1987, with bids being in and accepted until March 23, 1987 (Employees' Exhibit C-1).

Gang SE 811. Advertisement dated March 9, 1987, effective April 1, 1987, with bids being in and accepted until March 16, 1987 (Employees' Exhibit D-1).

II. PERTINENT AGREEMENT PROVISIONS

Rule 3, in pertinent part, reads as follows:

"RULE 3 - SELECTION OF POSITIONS

* * *

Section 3. Advertisement and award.

(a) All positions and vacancies will be advertised within thirty (30) days previous to or within twenty (20) days following the dates they occur. The advertisement shall show position title, rate of pay, headquarters, tour of duty, rest days and designated meal period.

(b) Advertisements will be posted on Monday or Tuesday and shall close at

5:00 P.M. on the following Monday. Advertisement will be posted 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.

* * *

(d) Awards will be made and bulletin announcing the name of the successful applicant will be posted within seven (7) days after the close of the advertisement.

This Rule shall not be construed so as to require the placing of employees on their awarded positions when properly qualified employees are not available at the time to fill their places, but physical transfers must be made within ten (10) days."

III. POSITIONS OF THE PARTIES

The Organization submits that the Carrier violated Agreement Rule 3 by the manner in which it administered the advertisement and award of positions for Gangs that were being activated for the 1987 production season on the Columbus Division. The Organization further submits that the record does not support the Carrier's procedural objections that certain claims were not properly handled under Rule 26, and that the claims are defective because the Claimants are not designated by name.

The Carrier submits that Agreement Rule 3 was not violated by the Carrier's administration of the program for advertising and awarding Gang positions for the 1987 production season, because all successful bidders were placed on the jobs they were awarded on the designated date the position came into existence. The Carrier further submits that Carrier Officials conferred with two (2) Assistant General Chairman who understood the problem associated with the manning of Gangs for the 1987 production

season, and who voiced no objection to the advertisement and award procedure used by the Carrier to man the Gangs.

The Carrier also advances a procedural objection to some of the claims¹ which were submitted to the Division Engineer and denied by him on May 19, 1987, and which were not included in the Organization's June 3, 1987 appeal letter to the Manager-Labor Relations within the sixty (60) day time limit period provided by Rule 26 (b). The Carrier also asserts that the claims are fatally flawed, because the Claimants are not identified by name.

* * * * *

After due study of the foregoing, and the entire record including the submissions presented by the parties in support of their positions in the case, it is concluded and found that the claims are supported by the record and that a sustaining award is in order.

More specifically, the record establishes that the Carrier's procedure for advertising and awarding Gang positions for the 1987 production season violated the provisions of Rule 3 of the Agreement between Conrail and the BMWWE effective February 1, 1982.

Procedural Issues

As regards the Carrier's procedural objection to some of the claims under Rule

¹ The claims that are subject to this objection are the claims for Gangs in Ballast Unloading Gang 1; SW. Timber Gang 1, 2; Xtra Xing Gang 1, 2, SC 810; and Tie Unloading Gang 1.

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26, the pertinent facts are that the objected to claims were submitted to the Division Engineer and denied by him on May 19, 1987; the Organization made timely filing of its June 3, 1987 appeal letter to the Manager-Labor Relations within the sixty (60) day time limit period provided by Rule 26 (b), but the claims in question were not listed in that letter. The claims are not referred to in the Carrier's letter of July 24, 1987, which reviews the parties' discussion of similar claims on June 26, 1987. The claims were listed for discussion in the monthly grievance meeting in the Organization's letter to the Carrier's Senior Director-Labor Relations dated September 17, 1987 (Carrier Exhibit 5-A). In a November 9, 1987 letter, the Carrier denied the claims for various Gangs that had been listed in the Organization's September 17, 1987 letter; the Carrier's November 9, 1987 letter made no mention of a Rule 26 objection to any of the listed claims.

On the basis of these facts and the record as a whole the Board finds that the Carrier did not raise this objection on the property and that in consequence, the objection is found to have been waived. Third Division Award No. 12516 (05 2164), Third Division Award No. 11731 (09-20-68), and Third Division Award No. 15907 (10-31-67).

Similarly on the Carrier's second procedural objection, the Board has considered and finds unpersuasive the Carrier's objection that the claims are fatally flawed, because the Claimants are not identified by name. The Claimants were identified as those Employees awarded positions in the various Gangs named in the claims. The Gang name has been specified in the claim; the date of the job advertisement and job award are also specified in the advertisements and in the claim. This is sufficient identification of the

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Claimants to render the claims valid.

Merit Issues

Rule 3 regulates the administration of the advertisement and award of job vacancies by means of several specific time requirements. The advertisements of job vacancies must be posted on Monday or Tuesday and shall close at 5 P.M. the following Monday. (Paragraph (b) of Rule 3). Awards will be made to the successful applicant within seven (7) days after the close of the advertisement. (Paragraph (d) of Rule 3).

The meaning of the first paragraph in Rule 3 (d) was construed in a previous dispute between these same parties in Award 24, Public Law Board No. 3781 (03-20-89).

The construction of that paragraph is reflected in the following excerpt from page 3 of Award 24:

"The Board finds that the first paragraph in Rule 3 (d) means that the job assignments resulting from awards will start not later than 'seven (7) days after the close of the advertisement.'"

Consistent with this ruling, the Board finds that Rule 3 (b) requires that the advertisements of job vacancies must be posted on Monday or Tuesday, and that the advertisement shall close at 5 P.M. the following Monday.

The application of these findings to the job advertisements of permanent Gang positions demonstrates the particulars of the Carrier's violation of Rule 3. The advertisement for Ballast Unloading Gang No. 1 (Carrier Exhibit 6), for example, was posted on March 9, 1987. In view of this posting date, March 9, the advertisement should

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have closed at 5 P.M. on Monday, March 16, 1987, and the job should have been awarded on Monday, March 23, 1987. However, under the language of the advertisement, the advertisement closed on March 23, 1987, not on the correct date of March 16, and the position was awarded on April 1, 1987, not on the correct date of March 23, 1987. This same kind of non-compliance with Rule 3, with varying numbers of days of lateness in the closing of the advertisement and the awarding of the positions to the Claimants, is a pattern that is present in the other advertisements for Gang positions in the 1987 production season (Carrier Exhibits 7 - 21).

Thus, the successful applicants for positions on Ballast Unloading Gang No. 1 (Carrier Exhibit 6) assumed their awarded positions seven (7) days later than required by Rule 3. The successful applicants for the advertised positions on the other Gangs that are covered by the claims, as noted, assumed their positions later than required by Rule 3.

In sum, Rule 3 clearly and unambiguously provided a specific schedule/time table for the closing of the advertisements and the awarding of the Gang positions in question in this dispute. The time frames used by the Carrier in the advertisements of the Gang positions for the 1987 production season were contra to the time frames provided in Rule 3, and the Carrier thereby violated the Rule. Further, the subject finding of the Carrier's violation of Rule 3 is not negated by the Carrier's conference with two (2) Assistant General Chairmen, inasmuch as the record supports the Organization's assertion that under the Agreement, Rule 39, only the General Chairman is authorized to

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permit such an exception.

In view of the foregoing, and based on the record as a whole, the Board finds that the claims are valid and accordingly, the claims will be sustained.

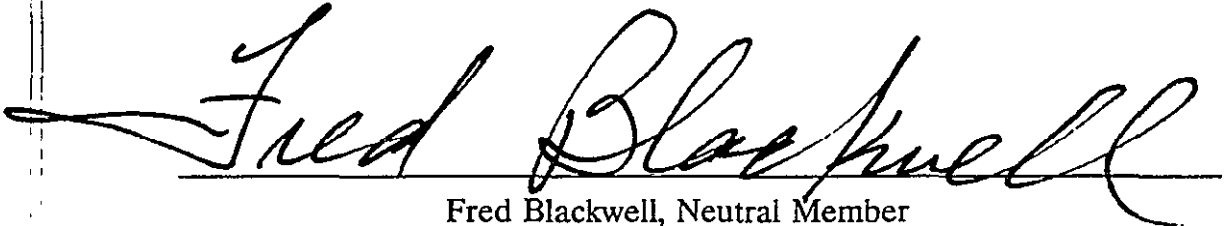
AWARD:

The claims are supported by the record as a whole and accordingly, the claims are hereby sustained in accordance with the Opinion.

The Claimants who were actually at work and under pay on any of the claim dates, shall not be entitled to receive compensation under this Award.

The Board retains jurisdiction until April 5, 1993 to hear and determine such questions that the parties submit in writing on or before February 18, 1993.

BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016


Fred Blackwell, Neutral Member



S. V. Powers, Labor Member

J. H. Burton, Carrier Member

Executed on _____, 1993

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PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

ADDENDUM TO AWARD NO. 58

Case No. 58

Referee Fred Blackwell

Labor Member: S. V. Powers

Carrier Member: J. H. Burton

Parties To Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

CONSOLIDATED RAIL CORPORATION

Statement Of Claim:

[As stated in the submission and not repeated herein.]

ADDENDUM OPINION

BACKGROUND

This Addendum addresses the matters discussed and considered in the Executive Session on this Board's proposed Award No. 58 which was held at the offices of the National Railway Labor Conference, 1901 L Street, N.W., Washington, DC, on June 22, 1993.

In proposed Award No. 58, this Board sustained claims filed by members of various Gangs on the basis of allegations that the manner in which the Carrier administered the advertisement and award of Trackmen positions for the 1987 production season violated the Agreement Rule 3 requirement that awards of advertised vacancies

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will be made within seven (7) days after the close of the advertisement of the vacancy. The proposed Award requires the Carrier to pay the Claimants the compensation requested in part (5) (a) (b) (c) and (d) of the claim.

Following the issuance of proposed Award No. 58, the Board met in Executive Session, pursuant to the Carrier's request, at the offices of the National Railway Labor Conference, 1901 L Street, N.W., Washington, DC, on June 22, 1993.

Prior to the Executive Session, the Carrier outlined the issues it intended to raise in the Executive Session in a letter dated March 25, 1993, which is reproduced in full in Appendix pages 1 and 2 annexed hereto. In the Executive Session discussion on June 22, the Board had before it the Carrier's Executive Session Brief and the Organization's responses to the Carrier's letter of March 25, 1993.

The Carrier's recommended disposition of the remedy in proposed Award No. 58, as stated in the conclusion of the Carrier's Executive Session Brief at pages 19 and 20, now follows.

"The Carrier has demonstrated that the Claimants in Proposed Award 58 could not have begun work before being medically qualified for service, and thus could not have been aggrieved prior to such medical qualification.

Additionally, it has been shown that the issue of remedy is properly before the Board, and that such remedy should not exceed actual monetary loss, absent a penalty provision in the controlling rule, which is not present in the applicable Agreement.

The Carrier urges the Board to restrict remedy in this case to

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monetary loss, and to deny monetary compensation for any time prior to the Claimants' medical qualification for service."

The recommended disposition of the remedy in proposed Award No. 58, as stated in the conclusion in the Organization's response to the Carrier's March 25, 1993 letter, now follows.

"The proposed award in Case No. 58 of Special Board of Adjustment No. 1016 fully considered the facts in the record, applied the Agreement in a well-reasoned manner and is fully consistent with award precedent on this property. In order to even consider the points raised in the Carrier's March 25, 1993 letter and in our meeting, it would require consideration of significant new arguments that were never raised on the property and evidence that was never placed in the record and, in fact, probably does not exist. Consequently, we respectfully request that the Board reject the Carrier's position and require payment of these claims similar to those required in Award 24 of Public Law Board No. 3781."

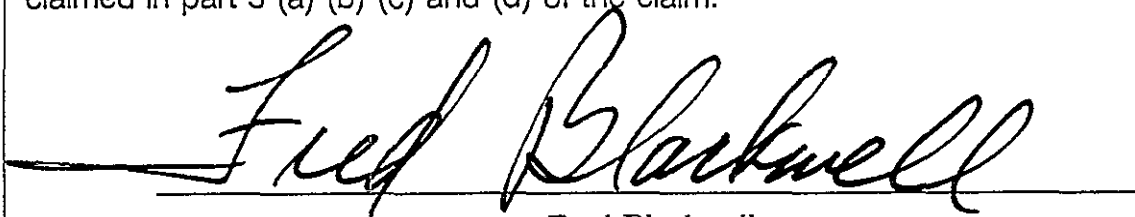
The partisan Board Members argued the pro and con of these positions extensively during the Executive Session on said proposed Award No. 58.

FINDINGS AND DISCUSSION

The Carrier's contended remedy in this matter would add to the express time frame in Rule 3 (d) a period of time for the Carrier's Medical Examination Program to be completed as a condition precedent to the award provisions of Rule 3 (d) becoming operative. Adopting this interpretation of Rule 3 would constitute an amendment to the rule that is not within this Board's power to make. The time frames in Rule 3 are laid out

in specific and sufficient detail to allow the Carrier to coordinate its Medical Examination Program with the rule's time tables and the consequence of the Carrier's failure to do so cannot be alleviated by the action of this Board. Rule 3, as stated at page 8 of proposed Award No. 58, *"clearly and unambiguously provided a specific schedule/time table for the closing of the advertisements and the awarding of the Gang positions in question in this dispute."* Different time frames, if needed, must be addressed by the parties at the bargaining table, for, as noted, this Board cannot prescribe time frames different from those set out in the rule.

After due study of the foregoing, and of the whole record, including the extensive Executive Session record and discussion concerning proposed Award No. 58, the Carrier's position concerning the appropriate remedy in this matter is found not persuasive and it is therefore rejected. Accordingly, the Carrier shall immediately compensate the Claimants in accord with the dates and for the hours described and claimed in part 5 (a) (b) (c) and (d) of the claim.

A handwritten signature in cursive script, reading "Fred Blackwell", is written over a horizontal line.

Fred Blackwell
Chairman / Neutral Member
Special Board of Adjustment No. 1016

April 30, 1996

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