

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 77

Case No. 77

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 Carrier violated the Agreement when it assigned junior employe W. E. Buck instead of Claimant S. F. Miller to a B&B Mechanic position under Advertisement #4330-5.
2. The claim as presented by Vice Chairman Singer on July 25, 1989 to Division Engineer R. J. Rumsey shall be allowed because said claim was not disallowed by Division Engineer R. J. Rumsey in accordance with Rule 26 of the Agreement.
3. As a consequence of the violation referred to in Part 1 and/or Part 2 above, Claimant S. F. Miller shall be allowed to replace Mr. W. E. Buck on the advertised position and B&B mechanic's roster, and he shall be compensated for any differential in pay as between camp car cook and B&B mechanic.

FINDINGS:

Upon the whole record and all the evidence, and after hearing on July 31, 1991, 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.

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DECISION:

Claim for pay differential sustained on time limits under Rule 26 (a) of the parties' Agreement for period between July 10 and December 7, 1989. For the period after December 7, 1989, the claim is denied as untimely filed under Rule 3, Section 3, of the Agreement.

OPINION

The question raised by the herein claim and the record thereon is whether the Carrier violated the Agreement rights of the Claimant, Mr. S. F. Miller, when it did not award a Bridge and Building (B&B) Mechanic's position to the Claimant which the Claimant bid on in the exercise of his seniority under the Agreement. At the time of his bid on the B&B position, the Claimant was assigned as a Camp Car Cook.

I. FACTS

On July 25, 1989, the Claimant, Mr. S. F. Miller, filed a claim under Rule 26 (f) alleging that the Carrier had improperly awarded a B&B Mechanic position to a junior Employee, thereby violating Rule 3, Section 1, Rule 4, and Rule 39 of the Agreement. The remedy requested was that the Claimant be placed in the disputed position, given roster rights, effective July 10, 1989, and awarded the difference in pay between the rates for Cook and B&B Mechanic.

The claim was sent to the Carrier's Division Engineer, Harrisburg, Pennsylvania, by Certified Mail, return receipt requested. The green card signifying receipt of the claim was signed as received by the Office of the Division Engineer on July 27, 1989.

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Under date of October 17, 1989, the Organization wrote the Office of Division Engineer, alleging that he had not responded to the July 25, 1989 claim of Mr. Miller and demanding payment under Rule 26 (a) of the claim as presented.

By letter dated December 7, 1989, the Carrier's Manager of Labor Relations, Altoona, Pennsylvania, denied the claim and in addition, stated that the claim had been previously denied by Carrier letter dated August 4, 1989.

Following several denial letters subsequent to the Carrier's December 7, 1989 letter, the Carrier, by letter dated January 29, 1991, reiterated its denial of the claim and attached a copy of the Carrier's denial letter of August 4, 1989.

In its correspondence on the property, the Carrier asserted that the advertisement on the B&B Mechanic position closed on July 3, 1989, and that the Claimant's application for the position was received in the Division Engineer's Office by panafax on July 11, 1989. The Carrier submits that the Claimant's application for the disputed position was eight (8) days after the bulletin on the position closed and was therefore untimely under Rule 3, Section 3, of the Agreement.

II. FINDINGS AND DISCUSSION

After assessment and consideration of the foregoing and of the whole record, the Board finds that the proper disposition of this case is to sustain the requested pay differential for the period July 10, 1989 through December 7, 1989, and to deny the claim for the period subsequent to December 7, 1989.

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SBA No. 1016 / Award No. 77 - Case No. 77

There is no question that the claim of Mr. Miller was timely filed. The claim was sent to the Division Engineer on July 25, 1989 by Certified Mail; the return receipt card was signed as received by the Division Engineer's Office on July 27, 1989.

However, the record does not support the Carrier's contention that the Carrier made a timely denial of the claim by letter dated August 4, 1989. The Carrier's production, over a year later, of a copy of an August 4, 1989 attached to the Carrier's denial letter of January 29, 1991, does not constitute proof that the August 4, 1989 letter was forwarded by mail to the Organization in regular course. In the face of the Organization's denial of timely receipt of the August 4, 1989 denial letter, the Carrier had the burden to prove either the mailing of the August 4 letter or the receipt of the letter by the Organization. Such proof is not present in the confronting record,

In accordance with the principles set forth in National Disputes Committee Decision No. 16, the claim will be sustained from July 10, 1989, to December 7, 1989, the date of the Carrier's first denial that was received by the Organization.

In regard to the remaining facet of the case, concerning the Claimant's application for the B&B position, the Carrier's evidence establishes that the advertisement on the position closed on July 3, 1989, and that the Claimant's application for the position was not received until July 11, 1989, eight (8) days after the expiration of the advertisement. Since the date of receipt of the Claimant's application for the said position was subsequent to the July 3, 1989 close of the advertisement of the position, it is found that the Claimant failed to meet the Rule 3, Section 3, requirement that applications for

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Accordingly, for the period subsequent to December 7, 1989, the claim will be denied due to the Claimant's failure to make timely application for the B&B position, in accord with the provisions of Rule 3, Section 3, of the Agreement.

In view of the foregoing and on the basis of the record as a whole, the subject claim will be sustained in part on time limits under Rule 26 of the Agreement and denied in part on time limits under Rule 3, Section 3, of the Agreement.

AWARD:

It is found that the Carrier failed to make a timely denial of the claim under Rule 26 of the confronting Agreement; accordingly the claim is hereby sustained for the period July 10, 1989 through December 7, 1989.

It is found that the Claimant failed to make timely application for the disputed B&B Mechanic position under the provisions of Rule 3, Section 3, of the confronting Agreement; accordingly the claim is denied for the period subsequent to December 7, 1989.

The Carrier shall comply with this Award on or before December 10, 1992.

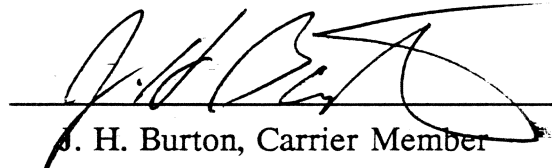
BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016



Fred Blackwell, Neutral Member



S. V. Powers, Labor Member



J. H. Burton, Carrier Member

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Executed on 6/2, 1992³

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