

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36831
Docket No. MW-35995
04-3-00-3-96**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad 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 Group 28, Class (e) Sectionman Truck Operator positions in connection with the operation of Truck MW 1915-68580 at Dietrich, Idaho and Truck MW 1915-68577 at Shoshone, Idaho (System File J-9820-71/1172154).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall bulletin Group 28, Class (e) Sectionman Truck Operator positions for the operation of Truck MW 1915-68580 at Dietrich, Idaho and Truck 1915-68577 at Shoshone, Idaho and Claimants L. L. Eborn and R. A. Skinner shall each be compensated at the applicable Group 28, Class (e) rate of pay beginning October 23, 1998 and continuing until said Sectionman Truck Operator positions are correctly assigned by bulletin.”**

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.

As a result of the parties' August 16, 1993 New Truck Driver Agreement and the requirements of Rule 20, the Carrier was obligated to bulletin two Sectionman Truck Operator positions for the vehicles described in the claim. However, the Carrier did not do so.

Claimants Eborn and Skinner have Sectionman Truck Operator seniority dates of March 13, 1997 and June 10, 1998 and were furloughed on October 23 and 19, 1998, respectively. The claim was filed after their furloughs seeking relief on their behalf.

In its letter of December 19, 1998, the Organization states:

* * *

"Sectionman Truck Operator positions, Group 28 Class (e) on the Shoshone and Dietrich Sections located on the Idaho Division have not been advertised by Bulletin pursuant to Rule 20 of the Collective Bargaining Agreement after the new Agreement was signed on August 12, 1993, to be effective August 16, 1993. Trucks MW 1916-68577 and MW-1915-68584 have been used forty (40) hours per week since the Agreement became effective and using the truck which was not properly assigned by bulletin is in violation of the provisions of the Agreement. And because the truck operators positions are not bulletined Claimants are denied compensation."

* * *

Thus, according to the Organization, the trucks in dispute were in use since August 1993. The claim was not filed protesting the failure to bulletin the positions until 1998 - five years later.

The Organization is correct that under the August 16, 1993 New Truck Driver Agreement and Rule 20, the positions should have been bulletined, but were not. We shall therefore require the Carrier to bulletin those positions if the trucks (or similar vehicles) are still in use.

The Organization is also correct that the violation is a continuing one. In this case, each day the Carrier failed to bulletin the positions as required by the August 16, 1993 New Truck Driver Agreement and Rule 20 constituted a new violation therefore making the violation continuing in nature. Compare Third Division Award 31043 which found as untimely a protest over the assignment of a position to an individual which was filed more than 60 days from the date of the assignment. That alleged violation was found to be a non-continuing one because the assignment in dispute was "... a separate and definitive action which occurred on a certain date but it was not an action repeated on more than one occasion" [relying upon Third Division Award 28826]. This case is different. The Carrier did not fail to bulletin the assignments in this case on one day, it failed to bulletin the assignments every day.

In continuing violation cases, although the initial violation may have occurred outside the time frame called for the filing of a claim, monetary relief can still be awarded. In those cases, monetary relief can be limited commencing with the number of days permitted for filing claims prior to date the claim was filed. In this case, in theory, that would be the 60-day period called for in Rule 49, thus making a potential monetary relief a sum commencing 60 days prior to the time the dispute was raised in 1998.

However, the Board has broad discretion with respect to the formulation of remedies. While the demonstrated violation has been found to be a continuing one, in the exercise of our discretion for formulating remedies, we are not required to impose monetary relief in all cases. While we have required the Carrier to bulletin the positions should the trucks (or similar vehicles) still be in use, with respect to monetary relief, we do not believe that any is required in this matter.

The Organization waited five years to bring this claim protesting the failure to bulletin the positions. As shown by the Organization's December 19, 1998 letter, the trucks were in use in 1993, yet no action was taken by the Organization until 1998. No sufficient explanation is given why such a long period of time was allowed to pass without action being taken by the Organization to protect rights under the Agreements. Clearly, in this case, the Organization slept on its rights to protest the Carrier's failure to bulletin the disputed positions. By waiting as long as it did, for all purposes, the Organization lulled the Carrier into a belief that it did not have to bulletin the positions. After having slept on its rights for so long, it would be manifestly unfair to now require the Carrier to compensate employees when it took the Organization so long to assert that the relevant Agreement provisions had not been followed.

The Carrier shall therefore bulletin the positions if the trucks (or similar vehicles) are still in use. No further relief shall be required.

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 28th day of January 2004.