

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39293
Docket No. MW-37900
08-3-NRAB-00003-030294
(03-3-294)

The Third Division consisted of the regular members and in addition Referee Susan R. Brown when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(BNSF Railway Company (former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier unjustly refused to allow Mr. M. W. Dale to exercise his truck driver seniority to displace junior employees on the truck driver's position at Hysham, Montana beginning on February 7, 2000 and continuing and when it refused to allow him to bid on any position requiring a DOT Qualification (System File B-M-803-F/11-00-0562 BNR).
- (2) The Agreement was further violated when the Carrier failed to render a decision from the June 8, 2000 unjust treatment hearing pursuant to the provisions of Rule 40(D) and when it failed to provide a full and complete transcript of said hearing as required by Rule 40(E).
- (3) As a consequence of the violations referred to in Parts (1) and (2) above, Claimant M. W. Dale shall now ‘. . . be allowed to immediately exercise seniority to a position of his choice in accordance with his seniority, and that Claimant be made whole for any and all losses, including straight time and overtime lost work opportunities, beginning upon the date of Carrier's refusal

to assign him, continuing until such time that the unjust treatment ceases. The Organization also seeks that Claimant be made whole for any losses incurred in regard to Railroad Retirement and vacation accreditation along with any and all other fringe benefits.”

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.

The dispute that is now before the Board is, for all practical purposes, the same dispute that was decided by the Board in Third Division Award 38952, which was adopted on February 29, 2008. The existence of Award 38952 is the clearest possible example of res judicata that one could find, i.e., the identical case - facts, issues, participants, and the parties - has been decided in the Carrier's favor by the prior Award.

The Organization's assertion in this case that it has better evidence than in Award 38952, as well as a time limit argument, cannot change the result. For us to use the Organization's alleged better evidence and/or its time limit argument in this case would amount to an indirect way of reviewing this dispute de novo. Stated differently, were the parties free to obtain a subsequent award contrary to the prior decision in Award 38952 by submitting new evidence, argument and supporting Awards, then the very process of dispute resolution in this industry would be undermined, because Awards would lose their acceptability as final and binding on

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the parties. It is up to the parties to put on their cases fully and completely when presenting them to the Board.

The bottom line in Award 38952 is that under the same basic facts, the Carrier did not violate the Agreement. For purposes of stability, our decision must be the same in this matter.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 29th day of September 2008.