

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39557
Docket No. MW-37736
09-3-NRAB-00003-030087
(03-3-87)

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

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when, following P. D. Huck’s displacement from a grinder operator’s position on November 25, 1998, it failed and refused to allow Mr. Huck to report to his truck driver assignment, per Bulletin Y-15A of November 23, 1998, until December 1, 1998 (System File B-M-654-F/11-99-0217 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. D. Huck shall now be compensated for eight (8) hours’ pay for each of claimed dates for a total of twenty-four (24) hours at the truck driver’s rate of pay for November 26, 27, 30, 1998.”**

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.

On Monday, November 23, 1998, the Claimant was advised of his assignment to a bulletined Truck Driver position on which he had bid. On Wednesday, November 25, the Claimant was displaced from his regularly assigned position as a Grinder Operator, and he shortly thereafter advised the Carrier that he was available and willing to assume the Truck Driver position on Monday, November 30, the next regularly scheduled workday following the Thanksgiving holiday. The Claimant's Roadmaster waited until Monday, November 30, to notify the Carrier's Manpower Office that he approved the Claimant for reporting to his new position. The Claimant was allowed to assume his new position on Tuesday, December 1, 1998. The Organization thereafter filed a claim on the Claimant's behalf, alleging that the Carrier had violated the Agreement by failing to allow the Claimant to assume his new position on November 30, 1998, thereby causing the Claimant to lose three days' pay.

The Organization initially contends that the Carrier plainly and simply failed and refused to timely release the Claimant to his assigned Truck Driver position on Monday, November 30, 1998, when he was ready, willing, and able to assume this newly assigned position. The Organization asserts that under Rule 21E, an employee assigned by bulletin to a position must take the assigned position within 30 days unless held for special service or prevented from doing so due to illness or other authorized leave. The Organization argues that Rule 21E further stipulates that the employee should be released from his former assignment and report to his new assignment as soon as practicable after date of assignment.

The Organization emphasizes that under Rule 21E, the Carrier clearly does not have carte blanche authority to retain an employee in a position at its whim.

Instead, the Carrier is obligated to see that the affected employee is placed in his newly assigned position as soon as practicable. The Organization maintains that the Carrier's decision to wait until Monday, November 30, 1998, to initiate the Claimant's placement on his assigned Truck Driver position was inappropriate and a clear violation of the Claimant's seniority rights. The Organization points out that through no fault of his own, the Claimant was forced to suffer a loss of three days' pay because the Carrier was dilatory in placing him on his assigned Truck Driver position. The Organization argues that if the Carrier had acted promptly, the Claimant would have been placed on his assigned position on Monday, instead of on Tuesday.

Addressing the Carrier's assertion that no violation occurred, the Organization points out that early on Wednesday, November 25, 1998, two days after he was assigned to the Truck Driver position by bulletin, the Claimant made his request to take said position on Monday, November 30. The Organization contends that although the Claimant was advised that his request would be granted, the Roadmaster waited five days to contact the Manpower Officer to finalize the move. The Organization insists that the Carrier had every ability to allow the Claimant to assume his assignment on November 30, but it simply chose not to. The Organization maintains that the Carrier simply failed to carry its burden of demonstrating why it was not practicable to place the Claimant on his assigned Truck Driver position on Monday, November 30, 1998, after the Claimant went through all required channels to indicate his desire to be placed on the job that day.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization relied solely upon Rule 21E as the basis for its claim. The Carrier asserts that the "as soon as practicable" provision in this Rule concerns only releasing employees who are being held on other positions. The Carrier argues that there is no dispute that the Claimant owned no position at all on November 30, when he was demanding to report to the Truck Driver position.

The Carrier points out that Rule 21E came into being in response to the Organization's concern with long waiting periods, even after the report date, before releasing an employee from his current position in order to report to his new position. Rule 21E, however, does not cover the Claimant in this case because, as noted, he was out of service. The Carrier insists that by its own terms, Rule 21E applies only to employees then holding a position; it does not mention or apply to employees who, for whatever reason, own no position at the time that they would move to the new position. Although the Organization now may want to extend Rule 21E to employees who have no current position, the fact is that the Organization never bargained for or obtained such a right.

The Carrier then asserts that when the Claimant was bumped from his Grinder Operator position, he became subject to Rule 8. Under Rule 8F, the Claimant had only two specified options – either bump to another position or go into furlough. The Carrier emphasizes that there is no provision allowing for a bumped employee to immediately move to a position obtained by a bulleting award prior to the bulletined report date. The Carrier points out that by listing only two options in Rule 8, the parties implicitly excluded other options, a position relied upon by the Board in prior Awards. The Board also has resisted rule-making in the form of stretching an existing Rule to fit a different situation. Accordingly, the Carrier contends that the Organization cannot extend the coverage of Rule 21E to include employees not currently holding a position.

The Carrier emphasizes that the reporting provisions in Rule 21E primarily are directed to the employee. The only requirements directed at the Carrier are that the Carrier must release the employee from a current assignment, if the employee has one, and that the Carrier is to give the employee a weekend to make the move if travel is required. The Carrier insists that nothing in Rule 21 requires it to accept an employee into a new position at a time of the employee's choosing.

The Carrier further contends that because Rule 21 does not apply to employees who currently own no current assignment, there can be no doubt that the Carrier retains the managerial discretion to set the time for those employees to report to the job. The Carrier insists that it simply adhered to the longstanding

bulletin procedure regarding report dates. The Carrier asserts that the Organization is not justified in challenging this decades-old procedure.

The Carrier further argues that the parties historically have regarded the bulletined report date as the appropriate reporting date for purposes of Rule 21E. Accordingly, the bulletined report date is the earliest “practicable” date that an employee may hope to enforce. The record shows that the Carrier has been specifying report dates on its advertised positions for at least two decades. This is a necessary administrative tool for the Carrier’s orderly management of its workforce, as well as a benchmark for employees in reporting to newly acquired positions. The Carrier points out that the usual ten-day report date interfaces with several provisions of the parties’ Agreement. The Carrier asserts that the report date represents the date that the Carrier realistically figures will ensure that the receiving crew will be ready to take the employee, and the date by which vacancies caused by the moving employee’s change of positions can be filled, so that work will not be delayed or crew schedules disrupted.

The Carrier insists that an advertised position is not considered as available for occupancy by the successful bidder until the bulletined report date. The Carrier emphasizes that it is management’s prerogative to determine staffing levels and when it needs to have vacancies filled. The Carrier asserts that the Organization’s belated challenge to this decades-old procedure is further undermined by the fact that the Carrier’s records show that from 1990 until about mid-2002, there were more than 5,700 instances of employees in the same situation as the Claimant – occupying no position and not permitted to report to their new position until the bulletined report date. For years, the Organization did not file any claims over these situations, and the Carrier maintains that it is puzzling why the Organization lately has decided to challenge this longstanding practice.

The Carrier contends that settled arbitral precedent on the property already expressly recognizes that the Carrier-designated report date controls, and that an employee has no right to force a transfer to the new position before that report date. The Carrier asserts that if an employee is allowed to report early, as occurred in this case, it is only when the Carrier determines, at its discretion, that it will accommodate the employee’s early move. The Carrier argues that the magnitude of

the scheduling process, with more than 10,000 assignments per year, precludes allowing individual employees to unilaterally choose their reporting day. There must be central control and coordination, and only the Carrier can serve that function.

The Carrier contends that the Organization's position is so unrealistic that it can be viewed only as an attempt to obtain leverage over the Carrier for other Organization agendas. The Carrier points out that the Organization might file a claim on every one of the 10,000-plus positions bulletined each year, demanding that the Carrier justify its report date for each assignment, with the ulterior motive of forcing the Carrier to capitulate on other, unrelated issues to avoid the scheduling disaster that would result from application of an instant-reporting requirement. The Carrier asserts that to find in favor of the Organization on the instant claim would only spawn a legion of new disputes.

The Carrier then argues that there is no dispute that the Claimant was offered a Grinder Operator position pending his bulletined report date for the Truck Driver position at issue. The Claimant elected to reject this alternate work opportunity, thereby failing to mitigate the damages he now claims. The Carrier asserts that the Board long ago adopted a rule against unjust enrichment of claimants who fail to mitigate their damages. At most, the Claimant ordinarily might claim the difference in wages between the two positions, but the Carrier points out that because the Truck Driver position was a lower-rated position than the Grinder position that the Claimant refused to accept, the Claimant is not entitled to any money damages at all.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it failed to allow the Claimant to report for his Truck Driver assignment earlier than December 1, 1998.

It is fundamental that the Carrier has the managerial right to determine the start date of new positions, and the position in question was originally set with a report date of December 7, 1998. The Carrier accommodated the Claimant and allowed him to start on December 1, 1998. However, there is nothing in the Agreement or in any other Rule that required the Carrier to start the Claimant in his new position on November 23 or any other date prior to the date that he was eventually started.

It is fundamental that the Organization bears the burden of proof in claims of this kind. In this case, the Organization failed to offer sufficient evidence to support the claim that the Claimant's Agreement rights were violated. Therefore, the claim must be denied.

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 27th day of February 2009.