

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40431
Docket No. MW-40096
08-3-NRAB-00003-070273
(07-3-273)**

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon 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 Agreement was violated when the Carrier failed to promptly bulletin the SC-06 Foreman position vacated by Foreman E. Ferguson on May 2, 2005 [System File C-05-B050-6/10-05-0231(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. Klundt shall now ‘. . . be paid for eighty (80) hours of straight time at the appropriate Foreman rate of pay and paid for all overtime performed by SC-06 during the claim period at the appropriate Foreman rate of pay as settlement of this claim.’”**

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.

From January 10 to May 2, 2005, E. M. Ferguson was the Foreman (Position 07580) on Surface Gang TSCX006 ("SC-06") a mobile gang of less than 25 employees regularly working eight hours per day, Monday through Friday. At all relevant times R. Baker was Assistant Foreman.

On March 16, a bulletin indicated that Ferguson was the successful applicant for a Foreman job on the MDZ High Speed Tamper Crew ("MDZ Crew") with a May 2 reporting date. Because special factors are involved, appointments to the MDZ Crew are done manually instead of being automatically generated by computer, as typically is done for seniority based assignments. As a result, no automatic posting contemporaneously occurred for the SC-06 Foreman vacancy created as a result of Ferguson's new appointment.

On May 2, Ferguson vacated the SC-06 Foreman's job. Assistant Foreman Baker (who is junior to the Claimant) was assigned temporarily to fill, and did fill, the vacancy. A May 16 job posting did not list the SC-06 Foreman vacancy. The job was posted on June 1, and, subsequently, given a June 20 reporting date. The Claimant bid for and was awarded the position.

Citing Rules 20, 21 and 22, the Organization submitted a claim on August 1, which was received by the Carrier on August 2, 2005. It substantively argues that (1) the Carrier waited until June 1 to post a bulletin for the SC-06 vacancy after it was vacated on May 2 and (2) the vacancy should have been bulletined on May 16 with a May 31 award date, which resulted in enriching a junior employee at the expense of the senior Claimant. Regarding the issue of timeliness, the Organization

asserts that the first claim date was June 6 for a claim beginning on June 6 and ending on June 19. Any earlier date would have been hypothetical.

The Carrier asserts that the claim is untimely and, therefore, not properly before the Board. It reasons that under the Organization's theory the bulletin should have been posted on May 16. If this is true, because under Rule 42A claims must be filed within 60 days, the instant claim could have been asserted no later than July 14, 2005. The Organization's General Chairman receives all bulletins and awards pursuant to Rule 21D, so its knowledge of the May 15 and June 1 bulletins forecloses any assertion that it was unaware of material facts.

But, the Carrier continues, under Rule 20, it has 30 days to bulletin a vacancy. Therefore, no claim would ripen to begin the 60-day window until June 1 and a claim would have to be received by July 31. Because the claim was not received until August 2, it exceeded the allowed 60 days.

The Carrier also asserts various substantive defenses. However, they need not be discussed because its procedural threshold timeliness defense is meritorious.

Both parties rely on Third Division on-property Award 36265. Under its facts, the Organization defeated the Carrier's assertion of untimeliness based on the finding that "the Carrier has 30 days before it is required to bulletin the position" and, therefore, "the matter did not ripen into a grievable occurrence until . . . the position had not been bulletined for thirty days." The rationale applies here, but results in a favorable outcome for the Carrier.

It is unnecessary to decide if the Carrier's posting obligation began on March 16 (when the Carrier first knew about an upcoming vacancy) or May 2 (when the vacancy actually occurred) or June 1 (the date of posting). The claim is untimely under each date because it was not received until August 2, beyond any possible 60-day grievance period. The effort to shoehorn timeliness with a claim requesting a remedy beginning June 6, without any allegations and convincing proof of a valid, continuing violation, is without merit. Indeed, May 2 is the only date stated in the claim. The June 6 - 19 period has no relevance except to avoid the consequences of a

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time limit by seeking a constricted remedy for an alleged violation accomplished more than 60 days previously.

Accordingly, the claim is dismissed as untimely.

AWARD

Claim dismissed.

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 14th day of May 2010.