

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 35967  
Docket No. MW-34934  
02-3-98-3-671

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes  
(Burlington Northern Santa Fe (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 assigned Assistant Foremen M. E. Scott, J. M. Bainter and R. R. McCabe to perform the duties of a foreman, failed and refused to bulletin their positions as foreman positions and failed to properly compensate them for said service (System File C-96-B050-9/MWA 96-04-02AA BNR).
- (2) As a consequence of the violations referred to in Part (1) above, Messrs. M. E. Scott, J. M. Bainter and R. R. McCabe shall each be compensated the difference in pay between that of a foreman and the assistant foreman straight time and overtime rates and all other benefits to which they were entitled beginning November 21, 1995 and continuing until the violation ceases.”

**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.**

**We are met at the threshold of this case by arbitrability objections from the Carrier, stating that the claim submitted to the Board is materially different from that presented in handling on the property. In that connection, as originally filed on January 13, 1996 by the Vice General Chairman, the claim read in pertinent part as follows:**

**“Please be advised, that I am submitting a claim in behalf of Mr. M. E. Scott-employee # 424150-1, Mr. J. M. Bainter employee # 733482-4 and Mr. R. R. McCabe employee # 7Y32.73-.5, due to a violation of the agreement between the Burlington Northern Santa Fe Railroad and the Brotherhood of Maintenance of Way Employees.**

**This claim will be retroactive sixty (60) days from the date the carrier acknowledges receipt and will also be a continuing claim for as long as the violation continues. The carrier is violating the agreement by not bulleting the positions of Mr. G. D. Adwell employee # 704176-7 Asst. Foreman M. Miller employee # 737147-9 Asst. Foreman and Mr. R. Showalter employee # 739635-1 as Foremans. (sic)**

**The carrier is depriving the claimants of a higher rated position by utilizing the Asst. Foremans to perform Foreman duties. The Assistant Foremans are reporting directly to the Roadmaster for their assigned duties each day and are obtaining line ups, Track Warrants, and other duties as given them by the Roadmaster. . . . The time I am claiming for the claimants, Respective, are differences in the rates of pay, difference in overtime, and all other benefits they were deprived because of the violation.”**

**In his letter of April 2, 1996 appealing the Carrier’s initial denial, the General Chairman described the claim as follows:**

**“The facts surrounding this case are that the Carrier has bulletined three (3) positions as Assistant Foremen in the Galesburg, Illinois area. . . .**

These Positions are being occupied by G. D. Adwell, M. Miller and R. Showalter. These Assistant Foremen are working independent of any assigned Foreman and receiving instructions directly from the Roadmaster.”

It cannot be gainsaid that the claim submitted to the Board appears to be materially different from the foregoing, in that it alleges on its face that the Claimants themselves were improperly being utilized as ersatz Foremen while occupying positions classified as Assistant Foremen. The Board routinely dismisses claims framed for arbitration materially differently than the dispute that was handled between the parties on the property. See Third Division Awards 16607, 19031, 20518 and 28627.

Even if, arguendo, those difference could be reconciled, the Carrier asserted and perfected throughout handling a viable objection that the claim presented on January 13, 1996 was time-barred under the 60-day filing requirement of Rule 42.A, reading as follows:

**“RULE 42. TIME LIMIT ON CLAIMS**

**A. All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. . . .”**

The Carrier points out that the bulletining of Assistant Foreman positions challenged in the original claim occurred many years ago and that even the statement submitted by Foreman L. Pendergrass ostensibly in support of the claim states that the gravamen of the alleged contract violation began no less than two years before the claim was filed. Finally, the Organization has not persuasively established the affirmative defense that the prima facie untimely claim filed on January 13, 1996 is of the “continuing violation” variety, in which the 60-day time limit is relaxed by operation of Rule 42.D.

Based on all of the above, this claim is dismissed without any comment on its underlying merits or lack thereof.

**Form 1  
Page 4**

**Award No. 35967  
Docket No. MW-34934  
02-3-98-3-671**

**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 8th day of March, 2002.**