

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 36265  
Docket No. MW-35680  
02-3-99-3-617**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(Burlington Northern Santa Fe Railway  
( (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 bulletin a Group 2 Operator position on Front End Loader BNX24-0168 in accordance with Rule 20 of the Agreement (System File B-M-544-H/MWB 97-12-09AD BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, the senior applicant awarded the Group 2 Machine Operator position, operating Front End Loader BNX24-0168 by Bulletin RE4-13 dated September 15, 1997, shall ‘... be made whole for any and all losses incurred including pay for any pay differential he worked less than that of Group 2 machine operator from August 8, 1997, through the date the assigned employee is allowed to report to the position of Group 2 machine operator on BNX24-0168. We further request pay for all lost time, including pay equal to any and all overtime worked by T. A. Hanson during claimed period, beginning August 8, 1997 and continuing until the vacancy is assigned and filled by bulletin procedure.”**

**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.

A somewhat convoluted series of events led to the filing of the instant claim. On June 23, 1997, bulletin RE4-09 was published advertising a Group 2 Terex loader position at Minot, North Dakota. J. S. Bonebrake was assigned to the position on July 8, 1997. However, it was subsequently determined that Bonebrake's assignment to the position was improper because an employee with greater Group 2 Machine Operator seniority, L. Viall, had placed a bid for the position and should have been assigned in lieu of Bonebrake. The Carrier issued a correction bulletin assigning Viall to the position in question.

On July 9, 1997, Viall bid off the loader position at issue and onto a tractor mower position. The General Chairman contacted the Carrier's Manpower Office to point out the problem created by Viall's inability to assume the loader position and requested that the Carrier re-advertise the vacancy on the next scheduled bulletin cycle, on August 4, 1997.

On July 21, 1998, Viall reported to the tractor mower position, vacating the Group 2 Terex loader position at Minot, North Dakota. The Organization contends that T. A. Hanson was assigned to fill the vacancy on a regular daily basis on that date. The Carrier contends that the Group 2 Terex loader was operated intermittently, thereby relieving the Carrier from the obligation to bulletin the position. The Carrier further contends that Hanson did not fill the temporary vacancy until August 11, 1997.

Nevertheless, on August 25, 1997, the Carrier re-advertised the position on bulletin RE4-12. By award Bulletin No. RE4-12A dated September 9, 1997, the position was canceled and went unassigned because the Carrier failed to indicate the proper rate of pay for the position.

On September 15, 1997, Bulletin RE4-13 advertised the position in question again, this time with the correct rate of pay. On September 30, 1997, bulletin RE4-13A was published, assigning the Group 2 Terex loader position at Minot, North Dakota, to D. Zodrow.

The Organization filed the instant claim on October 3, 1997, alleging that the Carrier violated Rule 20 of the Agreement by failing to advertise a vacancy created on July 9, 1997. Rule 20 (A) requires that vacancies of more than 30 days be bulletined.

The Carrier denied the claim, asserting that the machine was not used regularly and therefore did not come under the requirement of Rule 20.

Before addressing those arguments, however, the Board must first consider the threshold timeliness argument raised by the Carrier. The Carrier asserts that the Organization did not file the claim until October 3, 1997, far beyond the contractual 60-day period from the date when T. Hanson was placed on the vacancy in question on July 21, 1997. In the Carrier's view, the claim is thus time barred under the provisions of Rule 42 (A), which state:

**"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 Organization maintains that this belated argument, raised for the first time at the final level of appeal, is without merit. The Organization argues that it presented the claim within the 60-day period from August 8, 1997, the outside date when the Carrier should have posted the corrected assignment. Moreover, the failure to properly advertise and assign a position is a violation of a continuing nature. To the Organization, any other interpretation would lead to nonsensical results in cases of this nature which have ongoing, recurring violations of the Agreement.

After thorough review of the matter, the Board rejects at the outset the Organization's assertion that the Carrier cannot raise a time limit issue for the first time during the Carrier's declination of the Organization's appeal. We believe the better reasoning on this point is set forth in Third Division Award 29260, in which the

Board held that procedural objections can be raised at any time during the on-property handling of claims. The Board explained:

“Board precedent teaches that the issue of non-compliance with procedural requirements can be raised at any time during the handling of the claim on the property. (Second Division Award 8399) Having raised the issue on the property, we concur with the Carrier that the claim is untimely and is therefore barred.”

The more difficult question lies in determining the date of the “occurrence” upon which this claim is based for purposes of calculating the 60-day time limit period. The Carrier contends that the date of the “occurrence” for purposes of calculating timeliness is July 21, 1997, the date when Viall actually vacated the position in question and the date when, according to the Organization, T. Hanson was placed on the position. Thus, in the Carrier’s view, it is a relatively simple matter to count forward 60 days from that date to determine that the instant claim is untimely. The Organization’s opposing position is that Viall bid off the position on July 9, 1997, and the Carrier was contractually obligated to rebulletin and assign the position within 30 calendar days, or by August 8, 1997. The October 3, 1997 claim was filed within 60 days of that date, the Organization argues.

In examining these contrasting viewpoints, it is clear that there is disagreement as to when a position becomes “vacant” under Rule 20 (A) of the Agreement. That provision states: “All vacancies and new positions of more than thirty (30) calendar days’ duration shall be bulletined in the seniority district for the sub-departments involved.” It is not necessary for the Board to reach a determination as to whether a vacancy is created when an employee bids off the position or actually vacates it. The Carrier has 30 days before it is required to bulletin the position. Under either the Carrier or the Organization scenario, the matter did not ripen into a grievable occurrence until sometime in August, when the position had not been bulletined for 30 days. The fact that Hanson occupied the position on a temporary vacancy did not obviate the Carrier’s obligation to comply with Rule 20. Under these circumstances, we find that the Organization’s October 3 claim was filed within the 60-day time limit of the Agreement, and the Carrier’s argument must be rejected.

Turning to the merits, the Carrier maintains that the Organization failed to sustain its burden of proving that there was a full-time vacancy for over a 30-day

period that required posting of the disputed position. The Carrier asserted that the Group 2 Terex loader position did not have to be bulletined because it was worked intermittently. However, as we have noted, filling the position under the temporary vacancy provisions of Rule 19 does not relieve the Carrier of its obligation to fill vacancies under Rule 20 (A). The position at issue existed on a regular basis both before and after the period which gave rise to this claim. The Carrier was contractually required to rebulletin and assign the position in a timely manner; it did not do so. The claim is sustained. D. Zodrow, the employee ultimately awarded the position, is to be made whole for monetary losses incurred as a result of the contractual violation.

**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 October 2002.**

**Carrier Members' Dissent  
To Award 36265 (Docket MW-35680)  
(Referee Kenis)**

Organization's claim was that operator Hanson operated front end loader BNX24-0168 for more than 30 days on a temporary basis and that Rul 20(a) requires vacancies of more than 30 days be bulletined and awarded.

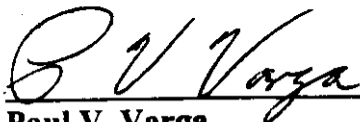
While we agree that the events involved in this record were somewhat convoluted, the evidence of record did not support the claim that was made. As is noted at page 2 of Award 36265, the Organization contended that Hanson "was assigned to fill the vacancy on a regular daily basis" on July 21, 1997. However, the record substantiates that Hanson was first used, per a Rule 19(a) request, on August 11, 1997. There is no evidence of the use of Hanson or anyone else on this equipment on any date prior to August 11, 1997. Obviously, Organization's initial claim that Hanson was used beginning on July 9 or July 21 was bogus. Carrier had also noted that the use of either of these dates made the Organization's October 3, 1997 claim untimely under the Rules.

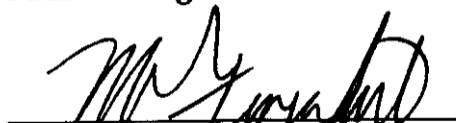
It was also substantiated in this record that this position was bulletined on August 25 and September 15, 1997 and was subsequently awarded to employee Zodrow on September 30, 1997. Such was in compliance with Rule 20.

Organization's burden was to substantiate that Hanson was used to operate BNX24-0168 for more than 30 days on a temporary basis to substantiate a violation of Rule 20(a). This chronology substantiates that the position was timely bulletined.

The Majority's conclusion that the Carrier failed, "... to rebulletin and assign the position in a timely manner..." is unsupported in this record.

**We Dissent**

  
Paul V. Varga

  
Martin W. Fingerhut

  
Michael C. Lesnik