

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37943
Docket No. MW-36871
06-3-01-3-461

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(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 improperly advertised and assigned Track Inspector Position 37606 at St. Cloud, Minnesota (System File T-D-1947-B/11-00-0111 BNR).
- (2) The Agreement was violated when the Carrier improperly advertised and assigned Track Inspector Position 32002 and Track Maintainer Position 32752 at St. Cloud, Minnesota (System File T-D-1948-B/11-00-0115).
- (3) The Agreement was violated when the Carrier improperly advertised and assigned Track Inspector Position 32001 and Track Maintainer Position 32750 at Staples, Minnesota (System File T-D-1949-B/11-00-0116).
- (4) The Agreement was violated when the Carrier improperly advertised and assigned Track Maintainer Position 32751 at St. Cloud, Minnesota (System File T-D-1950-B/11-00-0117).
- (5) As a consequence of the violation referred to in Part (1) above, the Carrier shall now make the correction to Bulletin TC-12A in compliance with the Agreement and Track Inspector B. J.

Lesnar shall be compensated for eight (8) hours' straight time and all overtime worked by Mr. T. V. Sura and any subsequent employee assigned to Track Inspector Position 37606 beginning September 27, 1999 and continuing until this violation ceases.

- (6) As a consequence of the violation referred to in Part (2) above, the Carrier shall now make the correction to Bulletins F9911B-17, F9911B-17A, F9912A-18 and F9912A-18A in compliance with the Agreement and Track Inspector K. A. Aaberg and Track Maintainer D. M. Schell shall each be compensated for eight (8) hours' straight time and all overtime worked by Messrs. T. L. DeFoe and W. J. Janski and any subsequent employee assigned to Track Inspector Position 32002 and Track Maintainer Position 32752 beginning December 13, 1999 and continuing until this violation ceases.
- (7) As a consequence of the violation referred to in Part (3) above, the Carrier shall now make the correction to Bulletins F9911B-17, F9911B-17A, F9912A-18 and F9912A-18A in compliance with the Agreement and Track Inspector K. M. Koeniguer and Track Maintainer N. D. Maloney shall each be compensated for eight (8) hours' straight time and all overtime worked by Messrs. E. J. Brown and A. D. Ficek and any subsequent employee assigned to Track Inspector Position 33001 and Track Maintainer Position 32750 beginning December 13, 1999 and continuing until this violation ceases.
- (8) As a consequence of the violation referred to in Part (4) above, the Carrier shall now make the correction to Bulletins F9911B-17, F9911B-17A, F9912A-18 and F9912A-18A in compliance with the Agreement and Track Maintainer C. L. Rathbun shall be compensated for eight (8) hours' straight time and all overtime worked by Mr. D. G. Stavos and any subsequent employee assigned to Track Maintainer Position 32751 beginning December 27, 1999 and continuing until this 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.

The positions in dispute in the instant case were bulletined in pertinent part as follows:

<u>Job</u>	<u>Need</u>	<u>Description</u>	<u>Timeroll/Location</u>	<u>Rate of Pay</u>
37606 1		Track Inspector (Perm)	433-167 St. Cloud, MN Tk Insp Elk River Working RDM Radika's territory from Minneapolis to Staples	\$17.71/HR
32751 1		Track Maintainer (Perm)	433-167 St. Cloud, MN Tk Insp St. Cloud Working RDM Radika's territory from Minneapolis to Staples	\$17.22/HR
32001 1		Track Inspector (Perm)	433-168 Staples, MN Trk Insp Staples Working RDM Radika's territory from Minneapolis to Staples	\$17.71/HR

- 32750 1 Track Maintainer (Perm) 433-168 Staples, MN \$17.22/HR
Trk Insp Staples
Working RDM Radika's
territory from
Minneapolis to Staples
- 32002 1 Track Inspector (Perm) 433-171 St. Cloud MN \$17.71/HR
Working RDM Radika's
territory from
Minneapolis to Staples
- 32752 1 Track Maintainer (Perm) 433-171 St. Cloud MN \$17.22/HR
Working RDM Radika's
territory from
Minneapolis to Staples

By letter dated November 30, the Organization submitted a claim regarding the bulletining of Job No. 37606, and subsequently filed claims regarding the remaining positions on December 22, 1999. The claims were ultimately combined at the third level of on-property handling. The Carrier denied the claims, and having failed to reach a satisfactory resolution of the issues on the property, the parties submitted the dispute to the Board for final and binding resolution.

Rule 21 (Bulletin Procedure) of the parties' Agreement provides in pertinent part:

- "B. Each bulletin will show its consecutive number, date of posting and date of expiration; and for each position thereon will specify whether temporary or permanent, location and rate of pay, assigned hours, work days ... and nature of work.
- K. All bulletins shall be made in the following form:

The following position is advertised for bids in accordance with Rule 21 of the Maintenance of Way Agreement.

PLACE _____
DATE _____
BULLETIN NO. _____

ALL CONCERNED:

**APPLICATIONS WILL BE RECEIVED UNTIL (time) (date) FOR
THE FOLLOWING POSITION:**

TITLE OF POSITION _____
PERMANENT OR TEMPORARY: _____
IF TEMPORARY, POSSIBLE DURATION AND REASON: _____
HEADQUARTERS: _____
RATE OF PAY: _____
HOURS OF SERVICE: _____
ASSIGNED WORK DAYS: _____”

The Organization contends that the Carrier failed to meet the requirements of Rules 21B and 21K of the parties' Agreement when advertising and assigning the positions in question. According to the Organization, the parties have a long-established systemwide practice of bulletining the territory to be covered and the nature of the inspection routine involved, assigning trackage by station, milepost or subdivision limits. The Organization contends that this practice is demonstrated by hundreds of bulletins from 1971 to 2000, and establishes the “nature of work” required by Rule 21B. The Carrier, the Organization maintains, is attempting to unilaterally change the established method for bulletining and assigning Track Inspector and Track Maintainer positions.

It is the Organization's additional position that its claim with regard to Job No. 37606 was timely filed as a continuing claim, contrary to the Carrier's contention that the claim was untimely under Rule 42 of the parties' Agreement. Moreover, the Organization argues, the Claimants are entitled to the remedy requested because under Board precedent monetary reparations may be appropriate to enforce the integrity of the parties' Agreement.

By plain language, neither Rule 21B nor Rule 21K mandates any specific wording or level of detail in designating a bulletined position's "location" or "nature of work." Nothing in the language of these provisions requires the location to be provided with more specificity than identifying the position's headquarters, nor that the "nature of work" be detailed by more than the position's classification as Track Inspector or Track Maintainer. In fact, in establishing the form to be used in bulletining positions, Rule 21K lists in pertinent part only "title of position," "headquarters," "hours of service," and "assigned work days." The Board finds, therefore, that there is no explicit contractual requirement to include in bulletining a Track Inspector or Track Maintainer position the precise territory for which the assigned employee will be responsible, or where the employee will be at the start and end of each workday, as the Organization submits.

The Organization contends that the Board's reading of Rule 21B and 21K must be informed by the parties' past practice. The Carrier counters that past practice is relevant only where the parties' Agreement is ambiguous, a situation not present here. Even assuming arguendo, however, that the terms "location" and "nature of work" could be considered ambiguous and, therefore, to be defined through examination of the parties' past practice as the Organization asserts, the Board finds that the Organization failed to show any consistent practice with regard to the information included in bulletining Track Inspector and Track Maintainer positions.

A review of the sample bulletins submitted by both parties and spanning virtually three decades reveals a variety of descriptions that defy the Organization's position that historically and customarily territorial limits have been designated by track limits between stations, mileposts, or subdivision limits. While many bulletins have designated mile post or other trackage limits, and even provided location by workday, many have not. Indeed, many, as in the case of the bulletins challenged herein, have provided only the headquarters and a general city-to-city description of the area of work. Many even use language quite similar to that used in the bulletins in dispute herein. See, e.g., Bulletin TC-14 (June 1, 1994), Job No. 16020, Track Inspector (Temp), Aberdeen, South Dakota, "Inspecting track between Mobridge and Appleton on RDM Ostberg's Territory" Bulletin TC-28 (October 18, 1995), Job No. 16055, Track Inspector (Temp), Aberdeen, South Dakota, "Inspecting track between Mobridge and Appleton and other duties as instructed by Roadmaster"

Bulletin No. TC-30 (November 10, 1997), Job No/ 13057, Track Insp (Relief)(Perm), St. Cloud, Minnesota, "Sat/Inspect trk Staples to Minn; Sun/Inspect trk Minn to Staples; Mon-Tues-Wed/Inspect trk on RDM Radika's territory as assigned" Bulletin F9912A-18A (December 10, 1999), Job No. 39465, Track Inspector (Perm), Dilworth, "Inspecting track on Roadmaster Weatherly's territory" Bulletin 118 (October 21, 1971), Track Supervisor (Temp), Staples, Minnesota, "Staples to Frazee, 1st Sub....Track Supervisor to work fifth day of the week as Roadmaster directs" Bulletin 97 (December 19, 1979), Track Inspector, Bellingham, Washington, "Mon, Tues, Thur & Friday Insp track So. Bellingham to Blain...Wednesday as assigned by Roadmaster" Bulletin M-15 (September 28, 1987), Job No. 41481, Track Maintainer (Perm), Glasgow, Montana, "Working all of G. A. Nyberg's District" Bulletin M-30, Track Maintainer (Perm), Glasgow, Montana, no territory description Bulletin M-05 (April 5, 1999), Track Inspector (Perm), Plentywood, Montana, "Inspects track on B.M. Klein's territory".

The Board thus concludes that the Organization cannot prevail on the merits. Therefore, the Board need not address the parties' arguments regarding timeliness or remedy.

Having found that the Organization failed to prove any violation of the Agreement, the Board must deny the claim.

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 19th day of September 2006.

LABOR MEMBER'S DISSENT
TO
AWARD 37943, DOCKET MW-36871
(Referee Parker)

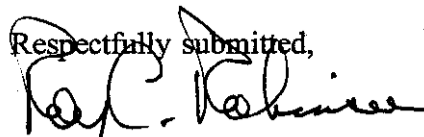
The Majority clearly erred when it rendered its decision in this case and a dissent is therefore required.

This case was a combination of similar disputes involving the Carrier's decision to advertise Track Inspector and Track Maintainer positions headquartered at one (1) location, i.e. St. Cloud, Minnesota without defined areas of responsibilities. A dispute arose when the Carrier failed and refused to list the respective territory limits on the bulletin.

The Organization took the position that the advertisement of track inspector and track maintainer positions have historically contained information, in accordance with Rule 21, relative to the specific nature of the positions, including territory limits the positions are responsible for covering, where the positions will start and end each day and whether the positions will be required to be away from headquarters on any given night. It was the Organization's position that the Carrier is obligated to set territorial limits for each track inspector position. Those territorial limits can be established by mile post designation and by the track limits established between two (2) Carrier stations. The Organization clearly proved a decades long practice of assigning territories to track inspectors, even to the point of providing documentation that the Carrier abolishes and reassigns track inspector positions when those territories are changed. The important fact that remains, is that the Carrier offered no credible evidence to contradict those bulletins and the mutual interpretation of an Agreement that has stood for decades. Instead, it offered as purported evidence a handful of instances where specific mile post locations were omitted from a few bulletins. The reason mile post designations were not necessary is self evident. Those bulletins list the working territory where there was only one (1) track inspector or track maintainer on the entire territory. The balance of the bulletins offered as evidence by the Carrier were for relief positions. That was not the case here, where there were three (3) track inspectors and three (3) track maintainers bulletined with identical territories. It is simply inconceivable of the mischief that will abound due to the Majority's error. Clearly, the spirit and intent of Rule 21 was unhinged by this decision. The parties had historically maintained that the designation of territorial limits in job bulletins, establishes the "... nature of work.", as intended in Rule 21B and as maintained between the parties from prior to the 1970 BNRR merger through the date of the violations covered by these claims.

This award is palpably erroneous and I, therefore, dissent.

Respectfully submitted,



Roy C. Robinson
Labor Member