

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39912
Docket No. MW-38127
09-3-NRAB-00003-040011
(04-3-11)**

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

**(Brotherhood of Maintenance of Way Employees
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 properly post the April 1, 2001 bulletin for a Group 2 Operator (Undercutter Position No. 19877) at Spokane, Washington as required by Rule 20 and thereby denied Mr. L. D. Ostereich the opportunity to bid and be assigned to said position per his seniority. (System File S-P-847-O/11-01-0272 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. D. Ostereich shall be assigned the aforesaid Group 2 Machine Operator position and he shall ‘. . . receive the difference in pay between his GP-3 pay he did receive and the GP-2 pay he should have received. We also ask for any overtime a junior Employee got while working the GP-2 positions and any future loss of earnings occurred until the violation has stopped.’”**

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 Organization maintains that the Carrier violated the Agreement when it failed to properly make bulletins available as required by Rule 21A. The Carrier counters that the Bulletins were posted on the crew bus and available to the Claimant and his crew.

On May 5, 2001, five members of the SC-04 Mobile District crew, including the Claimant, signed a letter to Manpower Planners that states, in pertinent part:

“Bulletins:

We the undersigned members of SC-04 Mobile District crew, protest not receiving the last two sets of bulletins.

During the periods between April 1st and April 13th we worked 10 or 12 hours a day including bus time. The thought of jumping into a traffic jam after work to find the nearest depot or tool house which we would not have a key access to is one valid reason for not seeing bulletins.

April 12 we worked late on a Friday and then moved over a weekend to Ritzeill Wa. Again working unusual hours 10 am until 6:30 pm plus another hour bus ride. Still no bulletins or time to drive to Spokane 60 miles away to find locked bulletins.

On May 5th we finally seen bulletin which close shortly. Also on May 5th a call was placed to [M]anpower [P]lanners asking for help or a better plan for receiving bulletins. After a 20 minute long distance cell phone charge we were denied our right to have bulletins sent to a responsible member of our gang.

Enclosed is a bid form from just one of the six employees on SC-04. Many other complaints from TP-04 about the lack of bulletins have been noted.

Perhaps Manpower reverted back to no bid no bump. If so, please notify us.

It could be possible that these missing bulletins are purposely misplaced and it is not fault of Manpower Planning. If so, we apologize."

Assistant Roadmaster T. Smith was assigned to TP-04 and SC-04. He authored a memo dated October 10, 2001, which stated:

"This letter states that all job bulletins have been posted on the gang bus, for the workseason 2001 for both TP04 and SC04 crew members. Both TP04 and SC04 crew members have been informed of this at several morning job briefings throughout the work season. One problem we have had is that after bulletins have been posted on the bus, they are taken and not returned even though we ask that they remain on the bus. Again all crew members from TP04 and SC04 have been made aware of this on several occasions."

The issue before the Board is whether the postings were properly bulletined. Rule 21 Bulletin Procedure provides:

"Except as otherwise provided in this Agreement, new positions or vacancies subject to bulletin, as provided in Rule 20, will be bulletined for a period of fifteen (15) calendar days at the headquarters or outfits of gangs in the sub-department of employees entitled to consideration in filling of the position. Such bulletining will be numbered consecutively by the issuing officer commencing on January 1st of each year."

The Rule 21 Bulletin Procedure was modified by the Consolidated Seniority District Letter of Agreement, in pertinent part:

- “A. New positions or vacancies subject to bulletin under the Agreements referenced above will be bulletined for ten (10) calendar days instead of the times specified in the relevant rule in those Agreements.”**

The Claimant was assigned to Gang SC-04. During the handling of the claim, the Carrier stated that the Bulletins were sent to the Foreman working in conjunction with SC-04 and mailed to the gang’s corporate lodging. The Carrier continues that the gang outfits are now hotels and motels and that the bulletins are therefore posted on the crew bus. Further, Gang SC-04 worked with Gang TP-04 and the crews shared the bus. The crews reported to the same Assistant Foreman, and his statement that the bulletins were posted on the crew bus should be dispositive. Further, the Claimant could have requested that a bulletin be faxed to him at the hotel using the Carrier’s fax system for Bulletins.

According to the Organization, the statement of the Assistant Roadmaster is anything but dispositive and does not serve to refute the claim. The Assistant Roadmaster plainly admits that the bulletins were removed from the bus. The missing bulletins were not replaced and the statement of the members of Gang SC-04, that they never received the notices, stands unrefuted. The fax system is voluntary, not pursuant to a Rule, and faxes to hotels are expensive – a cost the Carrier does not reimburse. Further, mailing the Bulletins to the hotel is not the same as posting them.

The Board carefully reviewed the evidence and agrees with the Organization. The Carrier states that it posts the Bulletins on the crew bus. Gang SC-04 alerted the Carrier that they had not been receiving recent bulletins and the Assistant Foreman acknowledged that the Bulletins, although originally posted on the bus, were being taken from the bus. The statement of Gang SC-04 members shows that those bulletins were not replaced and were not seen. The claim that the bulletins at issue were not properly posted is uncontradicted.

On the issue of damages, the Carrier argues that the claim is excessive and unproven, that the Claimant was fully employed and the claim that he would have bid to a higher rated machine is speculation. The Organization maintains that the measure of damages is the difference between the Group 3 and Group 2 Machine Operators. The Board concurs with the Organization that the measure of damages

is the difference in pay between a Group 3 Machine Operator and a Group 2 Machine Operator. See Third Division Award 27970. Therefore, the claim will be sustained for compensation at the pro rata rate.

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 31st day of August 2009.