NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 5
and	)
	) Award No. 16
UNION PACIFIC RAILROAD COMPANY	)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 12, 2000

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier failed and refused to bulletin two (2) Group 28 Class (a) Sectionman Truck Operator positions in connection with the operation of Truck MW 1916-66667 at Glenns Ferry,Idaho and Truck MW 1915-65505 at Orchard, Idaho and failed and refused to pay Sectionmen L. R. Keith and L. H. Andrews the Group 28 Class (a) Sectionman Truck Operator's rate of pay for operating the trucks involved here and for performing the duties and responsibilities of said position (System File N-152/950211).

2 As a consequence of the violation referred to in Part (1) above, Carrier shall bulletin a Group 28 Class (a) Sectionman Truck Operator position for the operation of Truck MW 1916-66667 at Glenns Ferry,Idaho and Truck MW 1915-65505 at Orchard, Idaho and Claimants L. R. Keith and L. H. Andrews shall be compensated for the difference in the Sectionman's rate of pay they received and that of the applicable Group 28 Class (a) Sectionman Truck Operator's rate retroactive sixty (60) days from the date the claim was filed (December 22, 1994) and continuing until the violation ceases.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties

to the dispute were given due notice of the hearing thereon and did participate therein.

An Agreement between Carrier and the Organization that took effect August 16, 1993, governed sectionman truck operator positions. On December 22, 1994, the Organization filed the instant claim. Carrier maintains that the claim should be dismissed because it was filed more than sixty days after the effective date of the Agreement. Carrier further contends that the claim should be denied because the Agreement was not intended to cover pickup trucks. The Organization contends that the claim was properly filed as a continuing claim and that the Agreement covers all trucks in excess of 10,000 pounds gross vehicle weight.

We consider the timeliness issue first. Rule 49(a) requires that claims be presented "within 60 days from the date of the occurrence on which the claim or grievance is based." Rule 49(b) provides:

> A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than sixty (60) days prior to the filing thereof. . . .

The parties disagree over whether the instant claim raises a continuing violation. As we observed in Case No. 7, Award No. 15,

> [T]he line between continuing and non-continuing violations can be a difficult one to draw at times. However, the key to drawing that line, in the first instance, is properly defining the alleged violation. If the alleged violation is a discrete act, the fact that the act continues to have consequences for a lengthy period of time does not make it a continuing violation. On the other hand, if the alleged violation is repeated multiple times over a lengthy period a continuing violation exists.

In the instant case, Carrier maintains that Third Division Awards Nos. 31403 and 28826 dictate a finding that the instant claim is not for a continuing violation. In Award No. 28826, on May 15, 1987, the Organization filed a claim alleging that, on February 23, 1987, Carrier violated the Agreement by appointing a welder helper who had less seniority than the claimant, to the position of Extra Gang Foreman. The Organization argued that the claim was a continuing one because every day that Carrier allowed the junior employee to remain in the position, it violated the Agreement. The Board rejected the Organization's argument, reasoning, "The alleged assignment of the Welder Helper to the Extra Gang Foreman's position on or about February 23, 1987, was a separate and definitive action which occurred on a date certain but it was not an action repeated on more than one occasion." In Award No. 31043, the Board applied Award No. 28826 to a claim arising out of Carrier's assignment of a Carpenter/Lead Workman to perform the responsibilities of a B & B Foreman and failure to advertise the B & B Foreman's position.

On the other hand, the Organization relies on Third Division Award No. 31223. In that case, the Board held that Carrier violated the Agreement when it assigned a Sectionman to perform the duties of a Track Foreman and failed to advertise the Track Foreman position. The Board rejected Carrier's argument that the claim was untimely, holding that the claim alleged a continuing violation.

Although decided only two months apart, Awards 31043 and 31223 appear to reach contrary results. We note that Award 31043 merely relied on Award No. 28826. The Board believed that Award No. 28823 controlled the case. However, Award No. 28826 only involved Carrier's alleged assignment, to a particular position, of an employee who was junior to the claimant. Such an assignment clearly is a discrete act and, although each day the junior employee works the position the effects of the alleged violation are felt, each day does not constitute a new violation. The claim in Award No. 31043, on the other hand, alleged that Carrier violated the agreement by having an employee who was not a Foreman perform Foreman's duties instead of advertising the Foreman's position. Although the differences between the two types of claims are subtle, they also are potentially significant. It is unfortunate that the Board in Award No. 31043 did not consider the potential differences between the case presented to it and the case presented in Award No. 28823. It is also unfortunate that the Board in Award No. 31223 did not consider prior Awards Nos. 31043 and 28826.

Fortunately, we need not choose between Award Nos. 31043 and 31223. The instant claim differs from the claims presented in those cases in subtle but significant ways. The instant claim does not allege that Carrier assigned Truck Operator duties to an inappropriate employee. Instead, it alleges that Carrier failed to pay the employee assigned to the position at the Truck Operator rate and failed to bulletin the position. Each part of the claim presents an alleged continuing violation.

In Case. No. 7, Award No. 15, we held, in accordance with prior authorities, that an alleged failure to pay an employee at the proper rate presents a continuing violation. Each day that carrier fails to pay the employee at the appropriate rate constitutes a new violation of the Agreement. Thus, the claim that Carrier failed to pay Claimant at the Truck Operator rate is a continuing one and is timely.

The claim that Carrier violated the Agreement by its failure to bulletin the Sectionman Truck Operator position does not pose a claim of an improper action by Carrier. Rather, it poses a claim of Carrier's failure to act. If, as the Organization contends, Carrier was obligated to bulletin a Sectionman Truck Operator position, then the violation resulting from its failure to bulletin the position continued each day the position went unadvertised. Therefore, we conclude that the claim presents an alleged continuing violation and is timely. As in Case No. 7, Award No. 5, we note that the issue of laches was not raised on the property and we do not consider it in this case. Accordingly, we proceed to the merits of the dispute.

The merits of the dispute turn on whether the Agreement covers operators of pickup

trucks. Section 2 of the Agreement provides:

> Rule 4 of the Collective Bargaining Agreement is revised to include new Group 28 in the Track Subdepartment as follows:
>
> (a) Sectionman Truck Operator (employe assigned to a section gang to drive any non-semi truck with a gross vehicle weight of 10,000 pounds or more).

The express language of the Agreement strongly supports the Organization's position that the dividing line between Sectionman Truck Operator positions and Sectionman positions is the vehicle's gross vehicle weight and not whether the vehicle is a pickup truck. The language speaks of "*any* non-semi truck with a gross vehicle weight of 10,000 pounds or more." Carrier, however, points to Section 12, which provides, "This Agreement does not modify any existing practices or understandings regarding the utilization of Sectionman Truck Operators." Carrier maintains that prior to the Agreement, operation of a one-ton pickup truck did not require a truck operator and Section 12 preserved this practice.

Section 12 is ambiguous. Carrier is seeking to read Section 12 as creating an exception to the clear, express language of Section 2. As such, Carrier bears the burden of proof as to the mutual understanding of the parties as to the meaning of Section 12.

Carrier relies on a letter written during handling on the proorperty by its Assistant Director of Labor Relations, one of two individuals who signed the Agreement on Carrier's behalf. The letter relates, in relevant part:

> [C]ommencing with the initial meeting in Kansas city to negotiate the Truck Driver Agreement, I advised you that the Agreement was only for two-ton vehicles and did not include pickup trucks. I have continually advised you that it was not my intent to add a host of new trucks which were never included. Throughout the course of my negotiations with you, I continuously emphasized this with you and I advised you that the only reason the terminology was changing from two-ton to GVW 10,000 pounds or more was as a result of the position taken by another BMWE General Chairman in a Third Division Case where the assertion was made that a two-ton truck would only weight four thousand (4,000) pounds. At no time during the course of the negotiations did you ever take exception and the Agreement was therefore signed in <u>good faith</u> by the Carrier on this premise. (Underlining in the original.)

The Organization responded with a letter from the General Chairman who was one of two individuals who signed the Agreement on behalf of the Organization. It related, "In connection with our discussions surrounding pickup trucks, I specifically indicated that pickup trucks with a GVWR of less than 10,000 pounds would not come under the scope of the agreement eventually signed into effect 8-16-93 because '*the requirements of service relative to the operation*' of such vehicles did not change." (Italics in original.) He further related that the parties had provided for

new truck operator positions for vehicles over 10,000 pounds because new DOT regulations imposed new licensing requirements for all commercial vehicles with a GVWR in excess of 10,000 pounds.

A subsequent letter from Carrier's Director Labor Relations, who was not one of the individuals who signed the August 16, 1993, Agreement, reasserted that the Agreement was not intended to cover pickup trucks. The letter maintained that the Agreement was negotiated because Carrier was adding two ton vehicles with cranes to Section forces and was adding dual tandem trucks and larger fuel trucks to Extra Gangs and was having trouble attracting employees to those positions.

Carrier is maintaining that the ambiguous language of Section 12 carved out an exception to the otherwise clear language of Section 2. Under these circumstances, Carrier has the burden to prove that the parties intended Section 12 to maintain an existing practice with respect to pickup trucks.

The record suggests that discussions concerning pickup trucks either reflected an understanding to exclude all pickup trucks or to only to exclude pickup trucks with GVWR under 10,000 pounds. The record suggests that the reference to 10,000 pounds was intended either to clarify that a two-ton truck was not a truck with GVWR of 4,000 pounds or to react to new DOT licensing requirements for commercial vehicles with GVWR above 10,000 pounds. As an appellate body, we are unable to assess credibility and choose between conflicting accounts concerning the representations that were made during negotiation of the Agreement. Therefore, we are forced to conclude that Carrier has failed to establish that Section 12 preserved a practice concerning pickup trucks as an exception to Section 2. Accordingly, the claim must be sustained.

AWARD

Claim sustained.

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ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member
dissent

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, January 29, 2001.