

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 43

Carrier File No. 2MWB 89-10-24C

Organization File No. B-M-215-L

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier failed and refused to release D. S. Kingstad from a Group 3 Machine Operator position on Tie Gang MT-1 to assume a Group 2 Machine Operator position on Relay Gang No. 1 beginning on June 5, 1989.

2. As a consequence of the violation referred to above, Claimant D. S. Kingstad should receive for eighteen (18) workdays (from June 5, 1989 to June 28, 1989) the difference in rate of pay from Group 3 rate to Group 2 rate: \$30.24, and the difference in rate of daily expenses per Rule 37 from \$5.80 to \$13.80 per day: \$324.00. He should also receive travel time and mileage on the weekends of June 3, June 10, June 17, June 24, and the date of June 28, 1989, from Glendive, Montana to Trenton, North Dakota and to Saco, Montana (Gang MT-1 moved to Saco, MT. on June 19, 1989). Mileage on weekends of 933 miles at 24¢ per mile: \$223.92, and travel time of eighteen and one half (18.5): \$250.68. The total amount of this claim is for \$828.84.

FINDINGS

The Claimant was a Group 3 Machine Operator. He bid on a vacant position of Group 2 Machine Operator, a higher rated

position headquartered elsewhere. Notice of his selection for the position came on May 30, 1989. He was released to commence his new position on June 28, 1989.

The Organization contends that the Claimant was improperly delayed in being released to his new position and should be made whole in various respects for such delay. The Carrier states that the Claimant was held in his previous position only until a replacement employee was assigned thereto, and that no rule violation occurred. Rule 21, Bulletin Procedure, Section E is the sole applicable Agreement provision, and it reads as follows:

E. Employees assigned to positions on bulletin, unless being used for special service, must take position assigned to within thirty (30) calendar days, unless prevented from doing so by illness or other authorized leave.

Under this paragraph, an employee assigned to a position by bulletin assignment should be released from his former assignment and will report to his new assignment as soon as practicable after date of assignment unless being held for special service by the Carrier or prevented from doing so because of illness or other authorized leave. (If a move to another location is involved release should be at close of shift on last day of work week to enable reporting at short of shift on first day of work week following.)

It should be noted that the second paragraph was added some time following January 9, 1978, on which date the language was agreed to in a jointly signed Letter of Understanding.

The Board perceives no issue of "special service" here, so this exception is not in point. The Board also notes that the new position was scheduled to begin on June 12, 1989, so any claim for transferring the Claimant prior to this is without substance.

As the Carrier interprets the Rule, it had discretion to transfer the Claimant at any time up to 30 calendar days. The Carrier finds support in Public Law Board No. 2206, Award No. 26 (Eischen), concerning a 1977 incident involving a delay of 61 days in transferring an employee. In that dispute, the Organization sought remedy only from the thirtieth day, and the Award sustained that request, stating:

Such placement within thirty (30) days, with the limited exceptions mentioned in [Rule 21E], is clearly the manifest intent of the parties in Rule 21E, as supported by the Letter of Understanding dated January 9, 1978.

This Board finds the Carrier places undue reliance on this Award. Since this was a 1977 incident, there was no 1978 Letter of Understanding in effect when the Organization then initiated its claim. Thus, resolution of the issue was on the basis solely of the first paragraph of Rule 21E. Indeed, a close reading of the first paragraph would appear to be an obligation on the employee (who "must take" a position unless ill or on leave) rather than a restriction on the Carrier. This Board has no quarrel, however, with the concept that the Carrier perceives this as a 30-day limit in transferring employees, except for "special service" situations.

It is the second paragraph which is at issue here. Here, the Agreement states that the employee "should be released . . . as soon as practicable after date of assignment". This goes considerably further than the first paragraph, and the Carrier's argument that it continues to have a 30-day discretionary period is simply not

the case. Absent a "practicable" reason, delay in transfer is improper.


Having reached this conclusion, has it been demonstrated that it was "practicable" to move the Claimant at an earlier date? What has not been disputed here is that the move was made immediately upon a replacement employee becoming available to fill the position. This is hardly unusual. Further, there is no evidence that the Carrier failed to seek and obtain a replacement in an expeditious manner. While there might have been other means to fill the position temporarily, there is also no evidence, under the rule as revised in 1978, that the Carrier is required to take such steps.

As a result, the Board will deny the claim. However, this is not done on the basis of the Carrier's broad but erroneous interpretation that Rule 21E provides an unfettered 30-day period. Rather, the denial is based on the uncontradicted assertion that the transfer was made in the accepted manner upon the availability of a replacement employee (and, of course, within the overall 30-day limit).

A W A R D

Claim denied.


HERBERT L. MARX, Jr, Chairman and Neutral Member

 - Dissent - written dissent to follow
MARK J. SCHAPPAUGH, Employee Member


D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: 2/24/1994