

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19672
Docket Number MW-19606

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: { (Brotherhood of Maintenance of Way **Employees**
(Southern Pacific Transportation Company
((Texas and Louisiana Lines)

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood that:

(1) The Carrier violated the Agreement when it used Apprentice Foreman A. **Huerta** instead of Laborer-Driver A. Maldonado to perform overtime service as a truck driver on **September** 26 and 27, 1970 (System File Case MW-71-6).

(2) Laborer-Driver A. **Maldonado** be allowed one and one-half (**1-1/2**) hours of pay at the Laborer-Driver's time and one-half rate and eight (8) hours of pay at the Laborer-Driver's double time rate because of the violation referred to in Part (1) hereof.

OPINION OF BOARD: Claimant is the assigned laborer-driver on Extra Gang No. 370 working a Monday through Friday work week with Saturday and Sunday designated as rest days. On Saturday, September 26, 1970 at 7 A.M., Claimant and the other members of Extra Gang No. 370 were called to work in the area because of heavy rains. When they were no longer needed, at **9:30** P.M., they returned to their headquarters point. The Apprentice Foreman of the Gang drove Claimant home in the truck, and after leaving him was contacted by truck radio and instructed to contact the foreman, pick up the motor cat and proceed to a derailment in **Brownsville**, Texas. The Apprentice Foreman did as instructed and picked up the Foreman and two laborers at **10:30** P.M. and drove to Brownsville (about 37 miles). After the retailing was completed the Foreman drove the truck and the group back to their headquarters point where they went off duty at 7:00 A.M. September 27, 1970.

Other than the facts above, which are apparently agreed to by both the Petitioner and the Carrier, the record is devoid of any evidence to support the contentions of either party. We must look to the Agreement, therefore, and the relevant Rules are first that portion of Article 11 Section 1(i) (Unassigned Day Rule)':

"Work on Unassigned Days: Where work is required by the Carrier to be performed on a day which is not part of any assignment, it may be performed by an available extra **or** unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee."

Also relevant is Article 23 dealing with Laborer-Drivers:

"When a motor vehicle for use on the highway is assigned to a track gang for the purpose of transporting men and material in connection with their work, one position of 'Laborer-Driver' shall be established for each such vehicle so assigned and such positions shall carry an hourly rate of six (6) cents above the laborer rate on the gang.

The establishing of a Laborer-Driver position on a track gang does not **preclude** other members of the track gang above the rank or class of Laborer-Driver who is assigned to the gang from driving a motor vehicle assigned to the track gang, for which they will receive no additional compensation."

The issue in this case is whether the driving from **10:30** September 26th to 7:00 A.M. September 27th should have been **reserved** for Claimant; that is should he be compensated for this time, when the vehicle was driven by higher ranked members of the gang.

Petitioner cites a number of awards in support of its position, none of which we believe are directly applicable to this case. For example, in Award 14029 the driver who did the driving was not a higher classified employee from the same gang as Claimant. In Award **13824** there was no rule comparable to Article 23 cited above. Similarly in Awards 14703, **8414** and others, there were no special Rules comparable to Article 23 and this Board properly held that the specific Rule on Unassigned Days was controlling.

Carrier contends that the work in question was the work of the employees who performed it and that they **were** the "regular" employees referred to in the Unassigned Day Rule quoted above. In a series of cases we have held that the Unassigned Day Rule is applicable for the "regular" employee when it is demonstrated that the work is done solely by him during his regular hours. In Awards 11227 and 15072 we said: "It must be concluded that the Claimants have not convincingly demonstrated that they were the sole employees doing this work on weekdays and thus the sole employees entitled to do it on Sundays and Holidays."

It is clear that Petitioner has the burden of proving that **Claimant is** the "regular employee". In this case the Petitioner has failed to produce any evidence, not even a statement by Claimant, in support of its position or in denial of Carrier's contentions. In view of Article 23 and the lack of any evidence, we must dismiss the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within **the** meaning of the Railway **Labor** Act, as approved **June 21**, 1934;

That this Division of the Adjustment Board has jurisdiction over **the** dispute **involved** herein: and

That the Claim should be dismissed.

A W-A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By **Order** of Third Division

ATTEST :

E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this **23rd** day of March 1973.