

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 21090
Docket Number MW-21181

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employees**
(Board of Trustees of the Galveston Wharves

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

(1) The Carrier violated the Agreement when it assigned junior Truck Driver A. Butler for overtime service on March 16, 1974 instead of assigning Truck Driver W. B. Brown who was senior, available and willing to perform that service (System File 700-48).

(2) Truck Driver W. B. Brown be allowed nine (9) hours of pay at his time and one-half rate because of the aforesaid violation.

OPINION OF BOARD: Claimant is regularly assigned as truck and tractor driver, **Monday** through Friday.

Although Claimant was the senior available truck driver on Saturday, March 16, 1974, Carrier called a junior **employee** to perform nine (9) hours of **overtime** service.

The Organization cites Article 4, **Rule 1:**

"Right accruing to **employees** under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company as hereinafter provided."

and cites Awards which hold that said **language** contractually entitled Claimant to the overtime in question.

On the property, Carrier defended its failure to call Claimant on the day in question because, it asserts, he had reported to the Truck Dispatcher that he did not desire to work any overtime **"...at** all that week" or "over the weekend."

Claimant denies that he had so advised the Carrier. He states that he was asked to work on Friday, March 15, 1974, but was able to find alternate coverage. **However,** he claims that he made no **comments** regarding March 16, 1974.

It would appear that Claimant had made some statement to Carrier regarding a desire not to work overtime during the week because the record shows that two junior **employees** had worked considerable amounts of overtime during that time, without objection by Claimant. But, that factor is not

dispositive. Moreover, the fact that Carrier may have contacted **Grievant** to advise him that it had secured coverage (a senior **employee**) for March 16, 1974 fails to dispose of the issue.

It appears that this dispute is resolved based upon an evaluation of the evidence of record and a **determination** of which version we credit. We have noted that in the handling on the property, Carrier presented no statements **from** the Truck Dispatcher, but merely relied upon **assertions as to** what occurred. The record does contain a direct statement from the Claimant. The Carrier's position here would appear to be in the nature of an affirmative defense, and accordingly, we feel that a conflict is properly resolved in Claimant's favor.

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 Employee involved in this dispute are respectively Carrier and **Employee** 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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 28th day of May 1976.