

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 25468
Docket Number NW-25451

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: { /Brotherhood of Maintenance of Way **Employees**
(Burlington Northern Railroad Company
{ former St. Louis-San Francisco Railway Company

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

"(1) The Carrier violated the **Agreement** when it assigned junior **Trackman** T. O. **Earney**, Jr. to perform overtime service on August 29, 30 and 31, 1982, instead of calling and using **Trackman** G. A. Webster "ho was senior, available and willing to perform that service (System File **B-1400/MWC 83-1-21B**).

(2) **Trackman** G. A. Webster shall **be** allowed twenty-four (24) hours of pay at his time and one-half rate because of the violation referred to in Part (1) hereof..

OPINION OF BOARD: Claimant is a **Trackman** assigned to Gang 410. On Sunday, August 20, 1982, and on one **more** day immediately following, another Gang 410 employee, junior to the Claimant, "as assigned to **work** overtime. The junior employee holds seniority as a Trackman-Driver.

The Claimant argues that he should have been called for the overtime work in place of the junior employee.

Applicable rules are as follows:

"Rule 57

(b) When overtime service is required, the foreman of gangs needed will be called and the foreman will call, in seniority order, the number of men in the gang necessary to perform the work for which called.

"Rule 18. Trackman-Driver

(a) The classification of trackman-driver is established for track gangs in the Track Sub-department and in the System Rail Laying Sub-department in accordance with the following:

. . .

(4) When motor vehicles for use on the highway are assigned to a gang in the Track Sub-department or in the System Rail Laying Sub-department for the purpose of transporting men and **material** in connection with their work, one or more positions of **trackman-driver** shall be established in each such gang. . . .

(5) An **employee** occupying position of trackman-driver shall receive an hourly rate of 66 above the **trackman** rate in that gang. The establishment of trackman-driver positions does not grant such **employees** the exclusive right to the driving of trucks, and does not preclude other members of the gang from driving a motor vehicle assigned to the gang for which they will receive no additional compensation; however, trackman-driver, when available, shall be used for this purpose in preference to other **trackmen** in the **gang**."

While not holding the position of Trackman-Driver, the Claimant is qualified to drive a truck and, in fact, did so, on one of the days involved in the Claim.

As noted by the Carrier, there is a fundamental discrepancy in the allegation of circumstances in this instance. The Organization argues that a truck was not used in the overtime assignment, while the Carrier alleges that the employee assigned to overtime did drive a truck as part of his work. It is not the responsibility of the Board to determine questions of fact. Nevertheless, the burden in Rule Claims such as this rests with the Organization to provide evidence of its contention.. Such is lacking here.

Absent such evidence, the Board may only resolve the matter on the Carrier's defense that the Trackman-Driver did operate **a** truck and, as such, was properly called as **a** Trackman-Driver for the work. While Rule 18 does not grant exclusive rights to driving for a Trackman-Driver, it does establish "preference" for this purpose. Thus, the Carrier may not be found to have improperly called a Trackman-Driver in preference to a Trackman. If the Board, in the alternative, simply leaves the essential fact as unresolved, there would have been no other path but to dismiss the Claim. See Award No. 23834 which states:

"**Thus**. . . . there are disputed facts which were not resolved by evidence developed on the property, and which this Board, is, therefore, unable to resolve. That being the case, this Board has consistently held that when such conflicts in evidence arise in essential aspects of a Claim, there is no alternative but to dismiss the Claim. See e.g., Awards 19501, 19521, 19702, and 20053. Accordingly, since we cannot properly decide the merits of this Claim without resolving these issues, we have no choice but to 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;

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

That the Agreement was not violated.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary .

Dated at Chicago, Illinois this 23rd day of May 1985.