

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30798
Docket No. MW-30636
95-3-92-3-408

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (.
(Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company

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

- (1) The Agreement was violated when Mr. J. Armstrong was assigned to the position of 6-ton truck driver on February 22, 1990 and thereafter the Carrier assigned him to operate a Class 3 Roadway Equipment Operator's service truck on Gang 9001 and failed to pay him at the proper rate for such work (System File S-395/910045).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be '... allowed the difference in straight time and overtime pay between that of Group 19 and 20 Service Truck Operator and that of Truck Driver 6-Ton. This pay should be in accordance with the hours worked and Rule 33(e) of our Current Agreement. This claim must be considered retroactive sixty (60) days from (sic) the filing thereof in accordance with Rule 49 of our Agreement and must be considered continuous until this position is Bulletined correctly as Roadway Equipment Service Truck Operator and assigned in accordance with Rule 20 of our Current Agreement.'"

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The record on the property reveals that the Carrier issued Vacancy Bulletin #NSD00191 for a Truck Driver Over 6 Ton position with System Gang 9001 effective February 22, 1990, and that Claimant and another employee were awarded the job. Claimant was assigned to work on Gang 9001 on February 22, 1990, and continuously operated the same piece of equipment, which the Organization asserts is a Group 20 Class (a) 3 Roadway Equipment Operators Service Truck. This claim for a wage rate differential made on behalf of Claimant, a Group 26 Truck Driver, was filed on September 21, 1990, alleging a continuous violation and seeking a remedy commencing 60 days prior to the filing.

Carrier initially argues that the claim is untimely filed under Rule 49(a), and must be dismissed. With respect to the merits, the Carrier contends that the Claimant was assigned, and has been working in the bulletined Truck Driver position. The procedural issue involves a determination of whether this is a case appropriately categorized as a continuing violation. The issue on the merits is whether the truck the Claimant was operating on a daily basis since February 22, 1990, is in the Group 20 Service Truck classification.

The correspondence between the parties reveals that the Organization asserted that the truck in question is a 6 ton tandem axle unit equipped with compressor, oil and lube hoses and all types of service equipment which, after viewing, the Organization stated was designed for the sole purpose of servicing equipment. On March 4, 1991, the Carrier responded, in part, as follows:

"... an investigation of this claim reveals the truck to which Claimant Armstrong was assigned is nothing more than a 6-ton truck utilized on all system gangs and similar trucks which possessed the same equipment, but which were more archaic and used on flatbeds, have been used in the past. This is simply a more modernized version.

Furthermore, the 'service truck' listed under Appendix 'O', Group 20, Class 3 was an entirely different piece of equipment when that classification was put on in the early 1960s and how you can compare that piece of equipment to the one described in your letter is beyond my comprehension since 30 years have elapsed."

We need not determine the procedural issue in this case, since, even if the Organization were to overcome the timeliness hurdle, they have failed to meet the burden of proving an essential element of its claim -- that the truck operated by the Claimant was, in fact, a Group 20 Service Truck under Appendix "O". This assertion was directly refuted by the Carrier on the property. It is a fundamental principle that the Board will not weigh or attempt to resolve conflicts in evidence, or make findings when there are factual disputes. See Third Division Awards 30414, 30259, 30212. We must conclude that there is an irreconcilable dispute of fact that dictates denial of this claim.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of April 1995.