

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39615
Docket No. MW-38203
09-3-NRAB-00003-040068
(04-3-68)

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to bulletin a Group 20, Roadway Equipment Operator machine in accordance with the Agreement and instead bulletin the machine as a Track Machine Operator machine beginning sixty (60) days retroactive to December 6, 2002 and continuing (System File D-0220-3/1351958).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall allow “*** the junior furloughed Group 20 Roadway Equipment Operator who is (1) furloughed or (2) working in a lower class must be allowed the loss in compensation in straight time hours and overtime hours that employees who have been assigned to this equipment as track machine operator of speed swing cranes are being allowed and/or assigned to work in operation of these Front End Loaders/Swingloaders in question. This compensation and this claim must continue until these machines are appropriately bulletined in accordance with the terms of our Current Working Agreement. Further, any Group 20 employee which is deprived of displacing on one of these positions because they are not**

bulletined properly on the Gang consist and therefore are invisible to NPS representatives or who is denied to displace a junior employee because of the lack of qualifications or seniority associated with this claim must be allowed the appropriate compensation for the loss of work opportunity.”

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 were given due notice of hearing thereon.

This claim arises out of the Carrier's decision to bulletin work on what has been variously described as a "speed swing" or a "swingloader" with the Track Machine Operator (TMO) title. The Organization contends that the equipment at issue should have been bulletined with the Roadway Equipment Operator (REO) title, which is paid at a higher rate.

The Organization contends that the piece of equipment at issue is properly considered a diesel tractor loader (DTL). It argues "[f]rom pictures, diagram, equipment manual excerpts and equipment managers' descriptions, such machines are diesel powered front end loaders . . . basically John Deere Model 544 diesel powered front end loaders. . . ." The Organization offered evidence from an REO who estimated that the boom is used 40 percent of the time, the forks 40 percent of the time and the bucket attachment 20 percent of the time.

The Carrier argues that the piece of equipment at issue is a "Speed Swing" (SS) and is appropriately considered under the Track Machine Operator (TMO) classification as part of Group 26. The Carrier describes the equipment, through a Manager of Track Projects, as smaller than a DTL and, while acknowledging that the SS "... was being operated with a bucket, the boom and tie forks . . .," it argues that the equipment should not be classified as a DTL. In support of its position, the Carrier points out that "... the speed swing had been paid at the TMO rate of pay for some time . . ." and that "... the machine weighed approximately the same as the other . . . units of equipment also tagged as 'SS' and had a turret that allowed the turret to swing independently. The front end loaders did not have such a turret. . . ." Additionally, the Manager of Track Projects indicated that the machine is "... utilized no differently than any 'speed swing' on the system to perform the same tasks with the same attachments. . . ."

This claim turns entirely on the classification of the equipment. The Organization's argument is appealing, but the record evidence fails to establish that the equipment at issue can be properly classified as simply a front-end loader. While it may have capabilities that clearly overlap with an ordinary front-end loader, its speed swing capability clearly makes it a different piece of equipment.

It is well-accepted in this forum that the Board is required to hold the Organization to prove its case by preponderant evidence and where there is a question of fact, it must be resolved in the non-moving party's favor based on the record developed on the property. There is no practice evidence that suggests that this equipment has historically or exclusively been used by REOs and some evidence that TMOs have used it in the past. Based upon careful review of the evidence, there is a significant factual dispute that goes to the heart of the result. Accordingly, the Carrier's position must prevail.

AWARD

Claim denied.

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ORDER

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 1st day of April 2009.