Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39619
Docket No. MW-39155
09-3-NRAB-00003-050672
(05-3-672)

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned junior Assistant Foreman J. Gange to perform assistant foreman overtime duties beginning on June 25, 2003 and continuing through December 10, 2003 instead of Assistant Foreman R. DeSmith (System File C-03-290-047/8-00219-112).

(2) As a consequence of the violations referred to in Part (1) above, Claimant R. DeSmith shall now be compensated for any and all overtime allowed junior employe J. Gange in the performance of the aforesaid work beginning June 25, 2003 and continuing through December 10, 2003."

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.

The instant claim arose as a result of the Carrier's assignment of primary versus secondary timekeeper duties to a junior Assistant Foreman. The theory of the case is that the primary duties provided more overtime opportunities than the overtime required for the Claimant's secondary duties. Careful review of the record, however, does not reveal any evidence whatsoever that some amount of such incremental or extra overtime was actually performed by the junior employee. Despite this shortcoming in the record, there is another overriding substantive issue *that controls the disposition of the matter.*

The record is clear that the Carrier split its crew into two separate gangs at the start of the work season on or about March 31, 2003. At that time, the Carrier's Supervisor discussed the priority of the timekeeping duties with the Claimant and the junior employee. Because of the gang split, both employes served as Assistant Foremen for their respective portions of the divided gang and each performed related secondary timekeeping duties. However, the junior employee was also designated as the primary timekeeper between the two. This required the junior employee to receive the timekeeping information from the Claimant and then make computer entries to combine the information with his own data and send it to the Carrier's headquarters.

The record presents us with a material factual dispute about the content of the discussions between the Carrier's Supervisor, the Claimant, and the other Assistant Foreman. According to the Carrier's view of the dispute, the Claimant declined the opportunity to be assigned the primary duties on two occasions at the start of the work season. According to the Organization's view of the dispute, the Claimant did not so decline the opportunity.

Given the nature of the instant controversy, we are compelled to find that the foregoing evidentiary dispute creates an issue of material fact that we have no

proper authority or means to resolve. Such irreconcilable conflicts require us to dismiss the claim without deciding the merits.

AWARD

Claim dismissed.

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.