AWARD NO. 24
CASE NO. 24

PUBLIC LAW BOARD NO. 4402

PARTIES TO DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
) BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF CLAIM

(1) The Carrier violated the Agreement when it assigned a truck driver from the Track Subdepartment to operate a Group 1 Combination Machine from the Roadway Equipment Subdepartment (System File #3 Gr./GMWA 87-1-18C).

(2) As a result of the violation noted in Section 1:

(a) The senior, furloughed Group 1 machine Operator shall be compensated for all wage loss suffered.

(b) Bulletin OT-81 dated December 22, 1986 shall be cancelled and all like jobs reclassified as Group 1 Combination Machine Operator positions and rebulletined accordingly.

OPINION OF BOARD

After advertisement by Bulletin OT-81 dated December 22, 1986, on January 13, 1987, the Carrier awarded a temporary position (approximately 90 days) described by the Carrier as a "truck driver +16" headquartered at Ottumwa, Iowa to a truck driver in its Track Subdepartment. The Organization takes issue with the Carrier's classification of the disputed equipment as a truck and the assignment of the operation of that vehicle to an employee in the Track Subdepartment. The Organization claims the equipment falls under the jurisdiction of Group 1 machine operators in the Roadway Equipment Subdepartment.

The parties describe the equipment in a similar fashion but with different emphasis. The Organization describes the vehicle (which it calls a "newly designed model Kershaw Combination Machine") as falling under "Combination machines (Boom, dragline, backhoe, shovel, clamshell, pile driver attachments)" under the Roadway Equipment Subdepartment:

> It is a truck with a capacity of over 16,000 pounds, the dump bed rotates to dump to either side or behind and it has a long boom attachment with a clamshell bucket for loading material into the dump bed.
>
> ... [W]ith the rotating dump bed and the clamshell bucket attachment this piece of equipment is far too technical and has far too much responsibility connected to it to consider truck driver's rate as a proper compensation. Further, this equipment would be comparable with a truck crane which is listed in Rule 5 G as a Group 1 machine.

In its submission, the Carrier asserts that the "primary use of the vehicle in question is as a truck". In the on-property handling, the Carrier described the vehicle as:

> [N]ot comparable at all ... with a truck crane which has a 15 ton capacity, because the attached clamshell bucket has a capacity rating of only one half yard. It is listed as a Hi-Rail Dump truck with a capacity of over 16,000 pounds, with a bed that rotates to either side or rear when dumping and a hydraulic operated clamshell attachment. It is state licensed for highway use like any other truck of its size. The same type of vehicle is now being used elsewhere on the system, operated by a truck driver.

Initially, the Carrier's argument that the assignment of the equipment involved in this matter to the Track Subdepartment does not constitute a "material change in work methods" or the establishment of a new position so as to bring the notification and dispute resolution provisions of Appendix F into play does not dispose of the matter. The Carrier's argument assumes the ultimate success of its position that the equipment is properly classified as a truck. In the context of this case, if the Carrier assigned sufficient work to truck drivers that properly belonged to Group 1 machine operators, we believe that such an action may well constitute a "material change in work methods" under Appendix F.

Similarly, the Organization's argument that the bulletin was deceptive because it advertised a truck driver's position does not require a sustaining award. The Organization's argument also assumes the ultimate success of its position that the equipment is properly classified as a Group 1 machine.

This is a case where labels are not dispositive. In light of what we can determine from the descriptions and photographs of the equipment, the parties' disagreement concerning the proper classification is understandable. Our review of the photographs and

the descriptions of the equipment compared to the various other pieces of machinery falling under Group 1 machines as well as those vehicles classified as trucks shows that the equipment is a hybrid and has the attributes of both a truck and a more complex machine typically found in Group 1. Consistent with the manner in which the parties have classified the differences between work in the Roadway Equipment and Track Subdepartments (i.e., through Rules 5 D and G and 55 N and P, machine operators are assigned to certain specified equipment and truck drivers are assigned by their "primary duties"), and absent agreement by the parties concerning the appropriate classification for this particular equipment, the answer to the instant dispute does not come from the generic label attached to this particular equipment, but must be determined after an analysis of how the equipment is used. *If the equipment is used on a specific job primarily as a truck typically operated by* truck drivers, then the Carrier's designation of the equipment as a truck is appropriate. If the equipment is primarily used performing the specific functions typically performed by a Group 1 machine, then the equipment is entitled to a Group 1 rating. Thus, in terms of a well-worn expression, with respect to this particular equipment it matters little if it looks or sounds like a duck. What is important is if it *acts* like a duck.

Turning to the specifics of the instant claim, i.e., that of the duties of the temporary position found in Bulletin OT-81, the record is devoid of material evidence concerning how the equipment was actually used on that particular job. Under traditional analysis in rules cases, the burden of proving a violation falls upon the Organization. We believe it was incumbent upon the Organization to make a sufficient showing that on this particular job the hybrid capabilities of the equipment were utilized in primary fashion in performing functions typically performed by a Group 1 machine. In this case, that showing was not made. Therefore, the affirmative relief sought by the Organization shall be denied. Absent agreement by the parties over how to specifically classify this hybrid machinery (which the Carrier represents in its submission is how references in the Agreement to specific equipment came to exist), each case in the future involving this equipment will necessarily

rise and fall upon a demonstration of how the equipment is primarily used. However, in order to give the Organization the ability to determine whether the equipment is being used in conformity with this award, we shall require that in the future bulletins for jobs wherein this equipment is to be used shall specify that the job includes use of this particular equipment.

The Carrier's argument that the equipment has been used by a truck driver elsewhere in the system does not, by itself, require that the claim be denied. The record does not reveal whether the truck driver operating the equipment was performing primary duties typically performed by truck drivers. Nor are we satisfied that the record reveals the extent of that use was in sufficient degree to be considered a past practice.

AWARD

To the limited extent set forth above, the claim is sustained. The affirmative relief sought in the claim is denied.

Edwin H. Benn
Neutral Member

E. J. Kallinen
Carrier Member

P. S. Swanson
Organization Member

Denver, Colorado
May 31, 1989