

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33486
Docket No. MW-32537
99-3-95-3-438

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier allowed junior employee T. Dorsey to perform overtime work on Friday, August 19, 1994 and Saturday, August 20, 1994, instead of assigning Mr. J.E. Dascani who was senior and available (System File SPG-TC-9216/12 (94-815)

(2) As a consequence of the violation referred to in Part (1) above, Mr. J.E. Dascani shall be allowed twenty-four and one-half (24.5) hours' pay at the SPG Class 'A' Machine Operator's time and one-half rate.”

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.

Claimant and T. Dorsey both hold seniority as Equipment Operators and Laborers with the Claimant having greater seniority relative to Dorsey. At all times material herein both were employed as Equipment Operators on SPG Force 5XT6 when overtime work became available on August 19 and 20, 1994. The Carrier assigned the work to Dorsey and the Claimant then filed this claim alleging a violation of Section 7B of the parties' Agreement which reads, in relevant part:

"B. . . overtime will be performed by the senior qualified employee in the System Gang indicating a desire to work overtime. . ."

The Carrier argues that the claim must be dismissed because the Claimant did not meet the contractual requirement ". . . indicating a desire to work overtime. . .". In support of its argument it relies on a November 30, 1994 written statement from a local supervisor, J. S. Vankirk that ". . . a list was made available for all employees who wanted to work . . . weekends, even after a list was compiled, the seniority roster was still used. . .". In other words, since ". . . a list was made available . . ." and the Claimant did not sign the list or otherwise make his interest in working overtime known, he did not meet the requirement set forth by governing contractual provision. The Organization replies, however, that the proffered evidence must be rejected by the Board because the November 30, 1994 statement was not exchanged on the property. There is no dispute that the statement in question was not exchanged on the property; therefore, we will not consider it. The Carrier points out, however, that it informed the Organization in a letter of that same date that "(l)ocal supervision reports that overtime was offered...to any employee who desired it;. . ." and therefore any prejudice that might carry with its failure to exchange the statement from Vankirk was cured. We disagree. In our view the November 30, 1994 letter is so vague that it did not put the Organization on notice sufficient to enable it to reply and contest the assertion. First, it does not identify "local supervision" and second, and more importantly, it does not contain the necessary facts underlying the assertion that "overtime was offered" so that the Organization could mount a rebuttal. Thus, we can only conclude that the Claimant was not aware that overtime was available and therefore he could not indicate his desire as required. Because his inability to meet the contractual requirement was not of his own making, he cannot be expected to waive his right to the overtime as the senior qualified and available employee.

There remains then the requested remedy which the Organization asserts is 24.5 hours at the SPG Class 'A' Machine Operator's time and one-half rate. The Carrier

objects to this remedy on several bases. However, its objections were first made before the Board rather than on the property and, as such, are not properly before it.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of September 1999.