

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 33624  
Docket No. MW-32413  
99-3-95-3-293

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

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes  
(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 Equipment Operator J. C. Taylor to perform overtime work assisting with the installation of a new work head on TRW 9101 on Tuesday, July 5, 1994, instead of assigning Mr. R. L. Spurgeon who was senior and available [System File SPG-TC-9555/12(94-655) CSX].
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. L. Spurgeon shall be allowed eight (8) hours' pay at the applicable equipment 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.

On July 5, 1994, the Carrier assigned a Mechanic, the Operator of Tamper TRW 9101 and the Operator of Tamper TRW 9103 to perform overtime work. The Claimant had greater seniority than the Operator of TRW 9103. The Organization contends that the Carrier violated Section 7 of the System Production Gang Agreement by assigning the overtime to the junior Equipment Operator.

Section 7(B) provides:

“The right to work overtime, when required on System Gangs, will accrue first to the incumbent of the position of which the overtime is required. If declined by the incumbent, overtime will be performed by the senior qualified employee in the System Gang indicating a desire to work overtime. If no employee desires to work overtime and overtime is required, the junior qualified employee in the System Gang involved will work the overtime.”

The Organization submitted a statement from the Operator of TRW 9101 stating that the only overtime work that was performed involved his machine and that the work head on TRW 9103 was not replaced. If this statement is credited, Rule 7(B) required the Carrier to offer the overtime to the Claimant because he was senior to the Operator of TRW 9103.

The Carrier submitted a statement from the Foreman relating that the Operator of TRW 9103 was required to stay late to replace the work head on his machine. If this statement is credited, the overtime was properly assigned to that Equipment Operator, as the incumbent, under Rule 7B.

The record thus presents us with an irreconcilable dispute as to the facts. As an appellate body, we are not in a position to take testimony, evaluate witness credibility and resolve such factual disputes. Faced with such a situation, we have no choice but to dismiss the claim. See e.g., Third Division Award 33416.

**AWARD**

**Claim dismissed.**

**Form 1  
Page 3**

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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 16th day of November 1999.**