

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38356
Docket No. MW-37422
07-3-02-3-487

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it called and assigned junior employee E. Allen to perform overtime service (repair broken rail) at Fredericksburg, Virginia on February 19, 2001 instead of Mr. J. Kincer [System File A06304701/12(01-314) CSX].
2. As a consequence of the violation referred to in Part (1) above, Claimant J. Kincer shall now be compensated for five (5) hours' pay at his respective time and one-half rate of pay.”

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.

At the time this claim arose, Claimant J. A. Kincer was regularly assigned as a Track Inspector, Foreman, and Trackman, within the Carrier's Track Subdepartment. His regularly assigned location was in the vicinity of Fredericksburg, Virginia.

Monday, February 19, 2001 was President's Day – a designated holiday. It is undisputed that the Claimant was called out to perform six and one-half hours' overtime work as a Track Inspector on the morning of February 19, 2001.

The Organization filed a claim on April 5, 2001. It alleged that the Claimant was denied an overtime opportunity on February 19, 2001 because the Carrier called junior employee E. Allen to replace a broken rail at Fredericksburg. Allen was a regularly assigned employee on an SLWT gang. As a result of this alleged violation, the Organization requested that the Claimant receive five hours' pay at time and one-half at the Track Inspector rate.

By letter dated May 30, 2001, the Carrier denied the claim. It contended that the junior employee had been compensated only his contractual holiday pay on the date in question. Accordingly, the Carrier contended that no Agreement violation had occurred.

The Organization appealed the Carrier's denial on June 19, 2001. It noted that in the Carrier's denial it "did not say [the junior employee] did not work." The Organization reiterated its position that the Claimant was owed five hours' pay at time and one-half for February 19, 2001. The appeal is somewhat confusing, however, because although the Organization claims in paragraph three of its appeal that the Claimant should have been paid at the Track Inspector rate of \$19.35, in paragraph five of its appeal, it contends that he should have been paid at the Foreman rate of \$18.35.

The claim was conferenced on the property on September 11 and remained in dispute, as noted in the Carrier's declination letter of November 8, 2001. On December 3, 2002, the Organization again protested the Carrier's declination of the claim and stated that it had attached to its appeal what the Organization asserted were a copy of a statement from the Claimant and a "daily sign-up sheet," the latter

of which, the Organization insisted, confirmed that Allen had received five hours' overtime on February 19, 2001.

On August 2, 2002, prior to the filing of the claim with the Board, the Carrier responded to the Organization's letter of December 3, 2001. It reiterated its prior position that the Claimant had earned a total of six and one-half hours' overtime on the date in question and that junior employee Allen earned no overtime on that date, but had simply been paid for the holiday. The Carrier attached a copy of its payroll record, which it contended clearly showed that Allen had received only holiday pay on February 19, 2001. Moreover, the Carrier protested that the Organization's December 3, 2001 letter had, in fact, contained no attachments despite claims to the contrary in the letter. It offered the Organization the opportunity to respond and agreed to an extension of the time limit for filing with the Board, if the Organization so wished. No subsequent response from the Organization appears in the record.

To summarize, the Organization protests that a junior employee was called for overtime work on February 19, 2001 in lieu of the Claimant, and the Carrier contends that the junior employee did not work on that day, but received only holiday pay. In light of the direct conflict of positions and the lack of probative evidence to resolve that conflict, the Board finds that the Organization failed to satisfy its burden of persuasion in this matter. As the Board held in Third Division Award 32166:

"... the appellate nature of this process precludes any attempt by the Board to resolve such 'head on' credibility conflicts. (See Third Division Awards 25962, 28790, 28794; Second Division Award 10946.)"

Accordingly, the instant claim is dismissed.

AWARD

Claim dismissed.

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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 5th day of September 2007.