

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33163
Docket No. MW-32265
99-3-95-3-75

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Trackman C. D. Cherry to perform machine operator’s duties on August 19, 20 and 21, 1993, instead of assigning Machine Operator H. Mullen to perform the work (System Docket MW-3238).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. Mullen shall be allowed thirty (30) hours’ pay at the 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.

On the dates in question both the Claimant and C. D. Cherry were assigned to a Machine Operator Class I (Torsion Beam) position, but on different gangs. Of the two, Cherry had greater seniority in the class and, in reliance on that fact, the Carrier assigned Cherry to work overtime on the days in question to move a ballast regulator. The Organization contends that the Claimant should have been assigned the work because he "... ordinarily and customarily performed machine operator work." The Carrier on the other hand asserts that "(n)either the Claimant nor Employee Cherry normally or customarily operated the Class two ballast regulator...."

As has been well established on this and other Boards, because of the appellate nature of these proceedings, the Board is without power to resolve irreconcilable contradictions in determinative "facts." Accordingly, this Board has no choice but to dismiss the instant claim. (See, e.g., Third Division Award 31350.)

AWARD

Claim denied.

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 25th day of March 1999.