

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33440
Docket No. MW-32505
99-3-95-3-399**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen 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 Foreman D. Faulk to perform overtime work (replacing rubber brushes on a ballast regulator) on Friday, August 26, 1994 instead of assigning Equipment Operator C. Wallen, who was senior and available [System File C-TC-5869-SPG/12(94-769) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Mr. C. Wallen shall be allowed ten (10) hours' pay at the applicable Class A 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.

Mr. C. Wallen ("Claimant") and Mr. R. Meredith both established and hold seniority as Equipment Operators. At the time the incident involved here occurred, each was assigned as such to SPG Force 5XT3, a system track surfacing gang. Both men worked under the supervision of Foreman D. Faulk. The gang was regularly assigned to work ten hours per day, Monday through Thursday with Friday, Saturday and Sunday designated as rest days.

On Thursday, August 25, 1994, the Claimant made his supervisor aware that he was interested and available to perform rest day overtime work on the upcoming rest days. On Friday, August 26, 1994, a rest day for the gang, the Carrier determined it was necessary to perform repair work (replacement of rubber brushes on the broom attachment) on the ballast regulator to which Mr. Meredith was regularly assigned as Equipment Operator. As the regular operator, Mr. Meredith was offered and accepted that overtime work on his machine and Foreman Faulk also worked a full ten hours that day, but Claimant was not called.

By letter dated September 15, 1994 the Organization submitted a claim directly to the Manager Employee Relations seeking ten hours pay at the time and one-half rate on behalf of Machine Operator C. Wallen based on the contention the Carrier violated Section 7 - Overtime of the SPG Agreement on Friday, August 26, 1994 when it allegedly used "... Foreman Dave Faulk to work on a Ballast Regulator replacing Brushes on Broom Attachment which is Operators work." The claim went on to say that the Foreman "... worked with operator Ronnie Meredith ... putting the Brushes on the Broom." Attached to the claim was a statement from Machine Operator R. W. Meredith, which read as follows: "On August 26, 1994 Foreman Dave Faulk and myself replaced brushes on a Ballast Regulator. Mr. Faulk did not get track time and we were performing Operator's work. We worked ten (10) hours OT."

Under date of November 9, 1994 the Senior Manager Employee Relations denied the claim, asserting, inter alia, that Foreman Faulk "was simply overseeing the operation and did not perform the work himself." Following conference on January 17 and by letter dated January 23, 1995, the General Chairman reaffirmed the Organization's position that "... Mr. Faulk the Foreman was not overseeing the operation and he did perform the work himself." The matter remained unresolved on the property and was eventually appealed to the Board for final disposition.

At issue in this case is the interpretation and application of the System Gang overtime rule, which reads as follows:

"Section 7 - Overtime

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."

Carrier moves that we dismiss this claim without reaching the merits due to alleged "conflict of material facts" as to whether Foreman Faulk actually performed any of the physical work involved in changing out and replacing the brushes on Equipment Operator Meredith's assigned ballast regulator. The Organization presented a written statement from Equipment Operator Meredith that Foreman Faulk actually did work along with him performing the physical work; whereas Carrier offered in rebuttal only a bare assertion to the contrary by the Senior Manager Employee Relations. Significantly, that hearsay assertion was not even attributed to Foreman Faulk let alone accompanied by any written statement from Foreman Faulk contradicting the written statement of Mr. Meredith. In rejecting the denial of the claim, the General Chairman specifically rebutted the assertion by the Senior Manager Employee Relations and reiterated the facts as set forth in Mr. Meredith's statement.

On balance, we conclude that the facts are not materially in conflict. The Organization made out a prima facie case of a Rule 7 violation, which was not effectively rebutted by Carrier on the property. As to appropriate remedy, it is by now well established that the measure of "make whole" remedial damages is the actual loss incurred by the Claimant due to the proven contract violation. In this case, Mr. Wallen was deprived of overtime pay for the ten hour day on August 26, 1994 and therefore the measure of his damages is overtime pay for those hours.

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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 23rd day of August 1999.