

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 33626  
Docket No. MW-32547  
99-3-95-3-453**

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

**(Brotherhood of Maintenance of Way Employes  
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 J. T. Wilson to perform overtime work on Friday, August 26, 1994 operating a spiker machine, instead of assigning Mr. D. E. Manear who was senior and available [System File SPG-TC-9223/12(94-849) CSX].**
- (2) As a consequence of the above-stated violation, Claimant D. E. Manear shall be allowed ten (10) 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.**

**On August 26, 1994, the Claimant was a Machine Operator assigned to System**

Production Gang 5XT6, assigned to operate a spike driver machine. On that date, the Carrier assigned another Machine Operator who had less seniority than the Claimant to work ten hours of overtime on the Claimant's machine. The Organization contends that the Claimant was entitled to the overtime assignment, pursuant to Section 7 of the System Production Gang Agreement.

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 Claimant relating that on August 25, 1994, he advised his Foreman that if his machine were to be used the following day, which was one of his rest days, he wanted to work overtime. However, the Carrier submitted a statement from the Claimant's supervisor relating that the Claimant was asked and refused the overtime available on August 26, 1994. 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.

### 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.