

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35505
Docket No. MW-34719
01-3-98-3-376

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned junior employes H.J. Davis, C.B. Curry, J. Williams and S.C. Hunt to perform overtime service on SPG Gang 6XR1 from May 1 through June 30, 1997 and continuing instead of calling Assistant Foreman D. Gatlin who was senior and available [System File 21 (53) (97)/12 (97-1525) CSX].
2. The claim as presented by General Chairman F.N. Simpson on June 30, 1997 to J.H. Wilson-Director Employee Relations shall be allowed as presented because the claim was not disallowed by him in accordance with Rule 40 of the Seaboard System Agreement.
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. D. Gatlin shall be allowed compensation at the SPG assistant foreman’s rate ‘ . . . for all overtime hours expended, by Carrier’s use of the junior employees, for the period May 1, 1997, and continuing, plus any and all additional loss suffered, as a result of this Carrier’s action.’”

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.

The Claimant established and holds seniority as an Assistant Foreman. At the time this issue arose, the Claimant was assigned as such to SPG Gang 6XR1, a track maintenance gang. The Gang, which was divided into several portions, included a "front end," "center portion," surfacing gang portion and road crossing unit. Of note, and pertinent to this dispute, the Claimant was assigned to oversee the "front end" of the gang operations, Monday through Thursday, with rest days of Friday, Saturday and Sunday.

On June 30, 1997, the Organization filed a claim on behalf of the Claimant asserting the Carrier violated Section 7 - Overtime of the September 28, 1993 SPG Agreement when it "allowed or otherwise permitted" junior employees to perform overtime maintenance work in lieu of the Claimant. According to the Organization, the Carrier "disregarded" the Claimant's request for overtime, thereby denying his "contractual rights" and "damaging" him monetarily. The Organization specified that the overtime being claimed was "generic" in nature, and did not "specifically accrue" to any particular Assistant Foreman position.

As a consequence of the Carrier's alleged violation, the Organization contended the Claimant should be compensated, at the "pro rata time and one-half rate," for all overtime hours expended for the period May 1, 1997 and continuing. In that connection, the Organization requested payroll records for each of the junior employees whose services the Carrier allegedly used in lieu of the Claimant.

In the meantime, on or about May 29, 1997, the Claimant sent the General Chairman the following correspondence:

"I am a assistant Foreman on 68R1 rail gang under the supervision of team supervisor Jim Van Kirk and foreman J. F. Sapp. These two

supervisors have discriminated against me repeatedly to the point where it has been a total mental stress on this job. Mr. Sapp appoints his white assistant foreman to sections in the rear of the team where they can make overtime and black in the front of the team to get off on time. I am the senior assistant foreman on the team and denied overtime. I talked to Mr. Sapp about the situation and he told me he would correct this problem but has not done so. Instead he put a white trackman in a overtime position paying him assistant foreman foreman (sic) pay unloading rock on the concret (sic) tie project he has Assistant Foreman come and work on week ends. I never was asked did I want to work. Mr. Sapp told me in W. Hargroves presence I could work on Sunday on May 11 because he heard claims might be filed on his discriminating yet this has gone on for two months and continues. I think Mr. Sapp is prejudice (sic) against black supervisors with total disregard for seniority or rank. I am claiming time on the following assistant foreman and your attention to this matter will be greatly appreciated. (H. J. Davis, C. B. Curry, J. D. Williams and S. C. Hunt).”

In a September 3, 1997 reply to both the Organization’s claim and the Claimant’s correspondence, the Carrier stated, in pertinent part:

“While the claim here is predicated upon interpretation of the SPG Agreement, Section 7(B), the statement by Mr. Gatlin which is attached to the claim contends that he has been discriminated against based on his race. Mr. Gatlin’s charges have been investigated and he has been notified that there is no basis upon which to conclude that he has been discriminated against due to his race. CSXT is an equal opportunity employer and Mr. Gatlin has failed to provide any evidence that demonstrates otherwise.

Regarding the alleged violation of the SPG Agreement, you have failed to identify the nature of the overtime which Mr. Gatlin was allegedly denied the right to work, or the specific dates of the alleged occurrences. Therefore, it is impossible to determine whether the junior employees were incumbents of the positions that worked the overtime, or if the work was ‘generic’ as you contend. Nonetheless, we do not agree with your interpretation of Section 7(B) regarding so - called ‘generic’ overtime. The

rule clearly states that overtime will first accrue to the incumbent of the position, then to the senior qualified employee in the gang indicating a desire to work overtime. Our investigation of this claim reveals that contrary to your claim and Mr. Gatlin's written statement, he had not 'indicated a desire' to work overtime on weekends to Foreman J. F. Sapp. According to Mr. Sapp, until recently Claimant had not shown any desire to work weekend overtime.

Mr. Sapp also advises that Mr. Gatlin is assigned to the front of SPG 6XR1 because the quality of his clean up work at the rear is unacceptable. While you assert that Carrier should consider seniority when placing employees on various positions, nothing in the Agreement prohibits the assignment of Assistant Foremen to their positions based on their performance.

* * *

Mr. Gatlin worked less overtime than some junior employees in May and June, 1997, because he had not indicated a desire to work weekends, and because his assignment to the front of the gang is based on his performance. Therefore, your claim is denied in its entirety."

The Organization asserted that the Carrier failed to timely respond to the initial claim letter dated June 30, 1997, thereby violating Rule 40, Section 1(a) of the Agreement. The evidence is the record does not support the Organization's contention.

At the outset, both the Organization and the Claimant alleged discrimination against the Claimant because of his race. This type of discrimination is clearly unlawful and the Carrier correctly notes that the correct venue for such a complaint is under the Federal Civil Rights Act through the Equal Employment Opportunity Commission and/or the Carrier's designated EEOC Officer.

Turning to the merits of this dispute, Section 7(B) of the SPG Agreement states:

"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.”

This portion of Section 7 of the SPG Agreement covers overtime that would normally accrue to a specific position or assignment, and is not applicable in these circumstances. Notwithstanding, the Organization failed to identify the nature of the overtime that the Claimant was allegedly denied, or the dates and/or hours the alleged overtime was worked.

In that connection, although the Claimant maintains that he made his desire to work overtime known to his Supervisor, said Supervisor contends that, prior to the time this dispute arose, the Claimant had not verbalized his desire for overtime, and had not done so until “very recently.” Supervisor Sapp further stated that the overtime that he could offer the Claimant was “restricted” to the front end because his work at the rear end was “unacceptable.” Clearly, in these circumstances, it was not incumbent upon the Carrier to seek out the Claimant for overtime he had heretofore refused and may or may not have been qualified to perform.

Based on all record evidence, this claim must be denied.

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 21st day of June, 2001.