

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33149
Docket No. MW-31774
99-3-94-3-53**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Supervisor A. Mazarella to perform Maintenance of Way work on July 11 and 12 and August 9, 15, 16 and 23, 1992 (System Docket MW-2782).**
- (2) As a consequence of the violation referred to in Part (1) above, Foreman G. Davis shall be allowed seventy four (74) hours' pay at the foreman'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.

As Third Party in Interest, the United Railway Supervisors Association was advised of the pendency of this dispute, but it chose not to file a Submission with the Board.

The facts giving rise to this dispute for the most part are contested. In the Spring of 1992, Conrail advertised an Agreement-covered Foreman position to work with a contractor dismantling rail in the Pittston, Pennsylvania, area. Mr. P. Hayduk was awarded this Foreman position on May 6, 1992 and was the incumbent as of July-August 1992 when it became necessary for Carrier to work the position on several Saturdays and Sundays, the rest days of the Foreman position. The record establishes that Foreman Hayduk, as the incumbent, was offered the overtime opportunities, but he declined to work on his rest days. Nor is it disputed that, contrary to written instructions previously issued by Carrier to Supervisors, Supervisor Mazzarella did not call the senior available Foreman (Claimant Davis). Instead, he worked these weekend overtime hours himself and challenged Claimant to "file a time claim."

Under date of September 5, 1992, the BMW Vice Chairman filed the instant claim. In denying the claim on the property, Carrier Supervisor alleged that Supervisor Mazzarella did not offer the overtime to Claimant because Mr. Davis rarely worked overtime even when it was offered and that all the other Foremen declined to work overtime on the weekends in question. In rebuttal, the Organization provided Carrier with the following written response from Claimant, which was never contested or contradicted in handling on the property:

"... In reference to time claim dated 9-5-92 Mr. Mazzarella's statement is a flat out lie, to cover his operations. On 7-1-92 I informed Mr. Mazzarella that I was available and qualified to work all overtime with contractor that Mr. Hayduck (sic) did not wish to work. He told me that if this was the call he was going to work with the contractor and I would has (sic) to time claim him. From that time on, I and other Foremans have asked him on numerous occasions if there was any overtime with contractor and each time he told us that there was none that he knew of. It was a known fact that he was working all overtime, and playing games with us. ...

/S/ George Davis"

The Supervisor's action deprived the Claimant of his contractual right to be called in accordance with his relative standing within his assigned classification and allowed to work on July 11-12, August 9-15 and August 16-23, 1992. It is not disputed that Supervisor Mazarella consumed a total of 74 hours performing this rest day service. The appropriate compensatory damages is 74 hours at the overtime rate of pay Claimant would have earned absent the violation of the Agreement. See Third Division Awards 31362, 31379, 31453, 31514, 31759 and 32107.

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 25th day of March 1999.

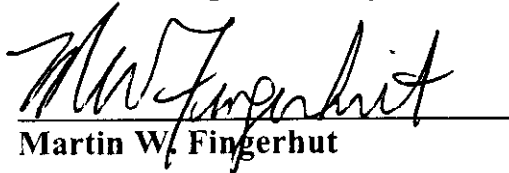
**Carrier Members' Dissent
to Award 33149 (Docket MW-31774)
(Referee Eischen)**

Claimant had previously refused to work overtime. Carrier attempted to call the incumbent, but he declined as did all the other foremen. Claimant's statement, on which this Majority relies, is lacking in evidence. It makes assertions without presenting any evidence in support. Carrier noted, in the on-property handling, that such statement was, "self-serving at best, as it fails to add evidence...." It created conflict.

Given these facts, this Award provides a windfall which will only encourage others to try the same tactic.

We Dissent.


Paul. V. Varga


Martin W. Fingerhut


Michael C. Lesnik