

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33631
Docket No. MW-32296
99-3-95-3-126**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Cleveland District Machine Operator D. Schmidt to operate a gradall to perform ditching work on the Youngstown Seniority District beginning August 2 through 27, 1993 and continuing, instead of calling and assigning Youngstown Seniority District Machine Operator A. Girard to perform said work. (System Docket MW-3261).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. A Girard shall be allowed eight (8) hours' pay at the machine operator's straight time rate and three hours' travel time beginning August 2 through 27, 1993 and continuing until the violation ceases.”**

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.

This claim involves the alleged use of an employee outside his seniority district and the appropriate remedy for such violation. Claimant held the position of Track Foreman/Machine Operator with established seniority on the Youngstown Seniority District, and worked all dates within the claim period except for the six he was on vacation. D. H. Schmidt held the position of machine Operator Class 1 Gradall Operator with established seniority on the Cleveland Seniority District. There is no dispute that Schmidt was present at the Alliance Subdivision within the Youngstown Seniority District during the August 2 through 27, 1993 claim period.

The Organization contends that Schmidt performed ditching work with the Gradall on the dates in question. It submitted a written statement from three employees dated August 8, 1994 attesting to the fact that Schmidt ran the Gradall himself and did not instruct employees on its operation. The Organization proffered Claimant's MW-200 qualification card showing that he was qualified to operate the Gradall. It argues that Claimant was available despite his vacation days and that he lost a work opportunity by not being assigned to this work, noting that violations of seniority district provisions on this property have resulted in monetary damages, even when an employee was fully employed during the claim period, citing Third Division Awards 29381, 29564, 30181, 31828, 32440.

Carrier argues that the Organization failed to meet its burden of proving a violation of the seniority district provisions, since Schmidt did not perform any ditching work on the Youngstown Seniority District, but merely instructed employees on the Alliance Subdivision on the operation of the Gradall. It submitted an undated Timeclaim Fact Sheet from a Cleveland Track Engineer stating that Schmidt was to instruct employees on the Alliance Subdivision on the operation of the Gradall. On the property, Carrier contended that Claimant was not qualified and could not have instructed others. It asserts that his fully employed status precludes a monetary remedy, and his vacation status shows that he was unavailable during that time period, citing Third Division Awards 30844, 28923, 28889, 26481, 18305. Carrier notes that there is no evidence that this is a continuing claim.

The seniority district violation in this case turns on whether Schmidt performed ditching work off his seniority district or merely instructed others how to operate the Gradall. A careful review of the record convinces the Board that this is not a case of irreconcilable dispute in facts. The Organization presented a letter from three eyewitnesses (including Claimant) who stated that on the dates in issue Schmidt performed ditching work by operating the Gradall by himself, and did not instruct others. Carrier submitted a statement from a Track Engineer not at the location, indicting that Schmidt's assignment was to instruct employees on the operation of the Gradall. He was not present at the job site, and was not further identified when the Organization noted that it did not know who he was. Further, the Track Engineer statement did not note the dates of the training assignment. Schmidt's presence on the Youngstown Subdivision for almost a four week period was not disputed. Carrier did not explain why it would have taken Schmidt that long to train employees in the operation of the Gradall, especially since Claimant was already qualified in that piece of equipment. Accordingly, we find that the Organization met its burden of proving a violation of the seniority district provisions of the Agreement.

With respect to the remedy, there are a number of on property awards which require monetary payments in cases of seniority district violations. See Special Board of Adjustment No. 1016, Award 41; Third Division Awards 32440, 31828, 30181, 29381. As noted in Third Division Award 29381:

"... The rationale behind these decisions is that bringing employees from one district to work in another district deprives employees with seniority rights in the district where the work is performed of contractually secured work opportunities. If Carrier is permitted to move employees from one district to another, without payment to employees deprived of the work opportunity, the seniority provisions, mutually developed by the parties and written into their Agreement, is vitiated."

As noted in Third Division Award 30181, Claimant is not disqualified from receiving monetary compensation for the six days he was on vacation during the claim period, since it is possible that he could have benefitted from a proper work assignment, especially since he was shown to be qualified on the Gradall. However, the rationale for awarding compensation to preserve and protect the integrity of the Agreement does not extend to travel time requested by the Organization herein. See Special Board of Adjustment No. 1016, Award 41.

Accordingly, Claimant shall be compensated for eight hours at his straight time rate of pay for each working day Schmidt operated the Gradall on the Youngstown Subdivision between August 2 and 27, 1993.

AWARD

Claim sustained in accordance with the Findings.

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 16th day of November 1999.

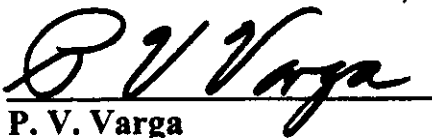
**Carrier Members' Dissent
to Third Division Award 33631 (docket MW-32296)
Referee Newman**

While this Award appears to turn on conflicting evidence, the fact of this matter is that Claimant's and the 2 other individuals statement comes more than a year after the fact and is no more credible than the unknown supervisor statement.

In the on-property handling it was pointed out that Claimant "could not have served to instruct others." He was not qualified. The Organization has the burden of proof not conjecture. Instead, the statement was dated August 8, 1994 and was subsequently provided to the Carrier some 2 months later. It lacked any evidence and was obviously self-serving.

Claimant was on vacation for six days of the claim. The Majority, relying on Third Division Award 30181, concludes that, ". . . it is possible that he could have benefitted. . ." It is unfortunate that one on vacation is nevertheless available for penalty payments. Such hypothetical justification does nothing but encourage further claim making.

We Dissent.


P. V. Varga


M. W. Fingerhut


M. C. Lesnik