

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 35990  
Docket No. MW-33223  
02-3-96-3-545

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

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

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Pittsburgh Seniority District employees J. Boyer, B. Jones and P. Palandrani of the Mingo Junction, Ohio Subdivision to perform ditching work on the Youngstown Seniority District at Salem, Ohio on June 26 and 27, 1994, instead of calling and assigning Youngstown Seniority District employees R. Jarvis, L. Briones and N. Magoulick to perform said work (System Docket MW-3629).
- (2) As a consequence of the aforesaid violation, Claimants R. Jarvis, L. Briones and N. Magoulick shall each be allowed sixteen (16) hours' pay at their applicable rates.”

**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.

Although the claim alleges two dates, the record establishes the disputed work took place only on Monday, June 27, 1994. On that date, the Carrier assigned a gang from the Pittsburgh Seniority District to perform ditching work on the Youngstown Seniority District.

According to the Carrier's assertion, emergency circumstances consisting of a “high-water condition” required the promptest possible response and justified the assignment.

In its October 10, 1994 appeal on the property, the Organization contested the assertion of emergency circumstances. The appeal attached a statement signed by two of the Claimants that challenged the existence of an emergency situation. The Carrier failed, thereafter, to provide any probative evidence to support its assertion.

Given the foregoing, we are compelled to find that the record does not establish the existence of an emergency situation. We must conclude, therefore, that the disputed work assignment was for the Carrier's convenience and, as such, violated the Agreement.

In light of the arbitral precedent on this property, a remedy is appropriate notwithstanding the Carrier's contentions regarding the Claimants' full employment and lack of qualifications. See, for example, Third Division Awards 30181, 31828, 32440, 33631, and the cases cited therein.

Being an assignment of convenience, it follows that the Carrier was obligated to have sufficient qualified employees in place to perform the work. Therefore, lack of qualification is not a viable defense on this record. Indeed, Third Division Award 32440 noted that the Organization was "... privileged to name any Claimant it chooses ..." for violations of this kind to protect the integrity of the Agreement.

The Awards cited by the Carrier to the contrary are inapposite in that they involve different parties or, as in the case of Third Division Award 28889, significantly different factual circumstances.

Accordingly, the claim is sustained to the extent of eight hours of pay at the Claimants' applicable rates for June 27, 1994.

#### 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 19th day of March, 2002.

**Carrier Members' Dissent  
to Award 35990 (Docket MW-33223)  
Referee Wallin**

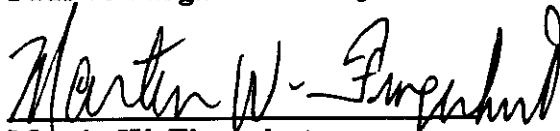
The Majority has decided this matter on the basis that there was a statement made by two of the Claimant's that was not responded to. The statement dated September 12, 1994 asserted "to our knowledge there was not a high water emergency condition in our subdivision."

The Carrier, in its October 12, 1995 letter pointed out the facts of record as follows:

"The Carrier rejects any violation occurred in this matter, as alleged. On June 27, 1994, an emergency situation developed at MP 38 along the Fort Wayne Line involving a blocked ditch that caused flooding to occur thereby threatening train operations in the area. In order to promptly resolve the situation the Carrier dispatched a Pittsburgh Ditching gang to the site, since they were working approximately 12.5 miles away and they had the proper equipment to do the job. It is noted the Youngstown Ditching gang was working 137 railroad miles away at Mansfield, OH (MP 175) and only had a backhoe and a three way dump, since the Youngstown district gradall machine was not operable. As such, the Carrier's decision to use the closest, qualified and available employees with the proper equipment to alleviate the emergency condition was fully proper and in accordance with the agreement. Numerous awards such as Third Division Awards 28650, 28651, 27915 and 24271 support that the Carrier has wide latitude to respond to emergency conditions and using available employees from across district lines is permissible in such situations."

On the basis of the foregoing, we Dissent.

  
Paul V. Varga

  
Martin W. Fingerhut

  
Michael C. Lesnik