

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31129
Docket No. MW-30786
95-3-92-3-577

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 Employees
(
(National Railroad Passenger Corporation
((AMTRAK) - Northeast Corridor

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Supervisor J. Warden to perform truck driver duties (picking up and delivering supplies from vendors) on October 30, 31, November 1, 2, 6, 7, 8, 9, 12, 13, 15, 20, 21, 26, 27 and 28, 1990 (System File NEC-BMWE-SD-2920 AMT).

(2) As a consequence of the violations referred to in Part (1) above, Truck Driver W. Gibson shall receive pay for seventy-four and one-half (74 1/2) hours at his respective time and one-half rate of pay."

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 waived right of appearance at hearing thereon.

As Third Party in Interest, The American Railway and Airway Supervisor's Association was notified of the pendency of this dispute, but elected not to submit a Submission.

Claimant is headquartered at Amtrak's Bear, Delaware, Maintenance of Equipment heavy overhaul facility. Claimant is

regularly assigned to a classification of Truck Driver, which Article I #26 defines as follows:

"Truck Driver- Operates highway or rail-highway vehicles assigned to the M. of W. Dept. where the duties of a position consist exclusively of the operation of such vehicles."

Agreement-covered employees at Bear primarily drive tractor trailers for the delivery of large maintenance-of-way machinery. This group also has a pick-up truck which is used for parts pickups and deliveries. The driving of that pick-up truck on several dates in October-November 1990 is the gravamen in this case.

On November 30, 1990, the Organization filed a claim for eight hours of compensation "when Supervisor J. Warden picked up a fifth wheel on November 28, 1990, in lieu of Claimant." While the claim specified the aforementioned date, the District Chairman added: "This should also be considered a continuing claim pursuant to rule 64 of the Agreement and shall cover all work performed by Mr. Warden." On December 28, 1990, the Organization filed a second claim, on behalf of Mr. Gibson, for compensation which listed a variety of hours dating back to the procedural limits proscribed by Rule 64. This listing included four hours for November 28, 1990, the date which had been previously claimed.

Carrier denied each of the claims asserting that none of the Drivers, including Claimant were available on the claim dates. Carrier went on to assert that it had "always been" the practice that different classifications of employees were used to pick up or drop off parts to vendors, and that the Organization "failed to prove that delivering supplies from vendors accrues exclusively to the BMW." Finally, Carrier maintained that the Organization's claim for eight hours pay was "clearly excessive," as the job would take "no more than three (3) hours," there was duplication in the claims for November 28, 1990, and overtime is not the appropriate measure of damages under controlling precedents on this property.

Supervisor J. Warden, who performed the work in question on claim date, submitted a statement asserting that: "Since the pick-up truck was assigned to the group in 1980, the driving of the truck had been assigned to truck drivers when they are available." However, the Supervisor went on to assert that "In most other instances, I make the pickups." The Supervisor is represented by The American Railway and Airway Supervisor's Association (ARASA). As noted above, although ARASA was given third party notice, it declined to intervene in these proceedings.

There is no dispute that Carrier assigned a contract Supervisor to perform duties which the Organization amply demonstrated are reserved by custom, practice and tradition under Article I for performance by Agreement-covered employees in the Truck Driver classification headquartered at Amtrak's Bear facility. Claimant was employed on claim dates performing work assigned by Supervisor Warden, but there is no probative evidence that Claimant was "unavailable" to perform this truck driving work. Claimant and his fellow Truck Drivers have traditionally performed the task at issue, and should have been used to do so on the dates claimed.

The violation is proven, however, the issue of the Organization's claim for damages is excessive in two respects. The claim for November 28, 1990 is duplicated and the controversy over damages at the punitive rate has been addressed and laid to rest on this property. See Public Law Board No. 4549, Award 1 and Awards cited therein. Based upon the entire record, we find that an award of one minimum call under the Call Rule for each claim date is the appropriate remedy for the proven violations.

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 26th day of September 1995.

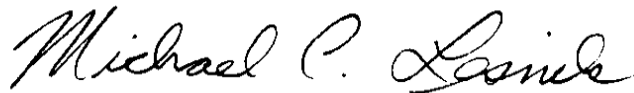
CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION
TO THIRD DIVISION AWARD 31129, DOCKET NO. MW-30786
(Referee Dana E. Eischen)

The Majority properly ruled that the controversy over damages at the punitive rate has been addressed and laid to rest on this property by Public Law Board 4549, Award 1 and Awards from this Board too numerous to mention. We concur with this aspect of the decision.

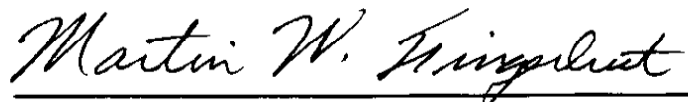
However, the Majority erred in its finding that parts pick-up like that performed by the Supervisor in this case is reserved to BMW-represented Truck Drivers at Carrier's Bear Shop. The Supervisor's statement that he had picked up parts on a number of occasions in the past stood as unrebutted testimony to the fact that many different classes of Amtrak employees, including Management personnel, drive Amtrak-owned trucks as part of their jobs and routinely pick up and deliver all manner of materials in those trucks in the course of their daily duties. The non-exclusivity of such incidental truck-driving to BMW-represented Truck Drivers has been recognized in numerous past decisions between these same parties.

Likewise, the allowance of any compensation in connection with this matter is excessive and improper inasmuch as the record also stood unrebutted that the Claimant was fully engaged in his duties and unavailable to make the contested stops on all dates cited.

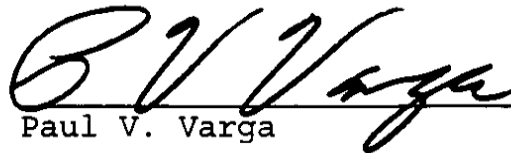
In these latter two regards, therefore, we hold this Award to be palpably erroneous and without precedent-setting value.



Michael C. Lesnik



Martin W. Fingerhut



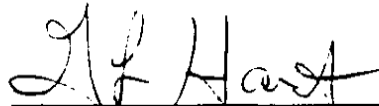
Paul V. Varga

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION
TO
AWARD 31129, DOCKET MW-30786
(Referee Eischen)

One school of thought among railroad industry arbitration practitioners is that dissents are, for the most part, not worth the paper they are printed on or the postage to send them out because they rarely consist of more than a repeat of the arguments which were considered and did not prevail in the case. Without endorsing this school of thought in general, it is foursquare on point with respect to the dissent in this case.

Inasmuch as the only dispute over the underlying facts in this case was over the extent of the work performed by supervisors and inasmuch as the Majority reached its conclusions based on sound reasoning, Award 31129 is correct and stands as the definitive precedent on the issues raised in this dispute.

Respectfully submitted,



G. L. Hart
Labor Member