PUBLIC LAW BOARD NO. 7163

AWARD NO. 31

CASE NO. 31

Carrier File: 12(06-0415)

BMWE File: I56700206

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes
Division - IBT Rail Conference
vs.
CSX Transportation, Inc.

ARBITRATOR: Gerald E. Wallin

DECISION: Claim denied

STATEMENT OF CLAIM:

"1. The Agreement was violated when the Carrier assigned other than Henderson Seniority District employes M. Cronin, F. Moore, Jr., T. Burggraf, C. Moody, J. Ziminski, M. White, L. Woodrum, J. Watson, C. Armenta, D. Carby, M. Spears, D. Cross, G. Smiley, R. Kidd, T. Overton, J. Ice and W. Raney to perform derailment repair work on the Henderson Seniority District, near Nortonville, Kentucky beginning on December 12 and continuing through December 22, 2005 [System File I56700206/12(06-0405) CSX].

2. As a consequence of the violation referred to in Part (1) above, Henderson Seniority District employes O. Cotton, W. Jones, R. Williams, E. Elgin, G. Kennedy, D. Orten, J. Rhodes, R. Soyk, N. Harris, T. Templeton, J. Dunbar, D. Hardesty and M. McCarty shall now '*** be paid an equal and proportionate share of one thousand three hundred and sixty (1360) straight time hours and the overtime expended during these same dates. The Organization is hereby requesting the opportunity to review the time sheets to determine the amount of overtime claimed, per Rule 24(I). Otherwise, the amount of overtime claimed is one thousand three hundred and sixty (1360) hours."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

The instant claim arose after a car derailed on Carrier's mainline near Nortonville, Kentucky. The area is in the Henderson Seniority District. It is undisputed that the car traveled some 2.7 miles after it derailed. This required the replacement of approximately 1,800 wooden ties that were damaged or destroyed by the derailed car. To assemble sufficient staffing to perform the repair work, the Carrier imported several employes from outside of the seniority district. The recovery

work apparently took approximately six weeks to complete. A local agreement was reached on December 22, 2005 to prospectively settle all competing contentions concerning the use of the employes from outside of the seniority district. The local agreement, however, did not apply to the initial period of work performed immediately after the derailment was discovered. Accordingly, the work performed by the outside employes from December 12 through December 22 remained subject to traditional claim handling under the applicable provisions of the parties' Agreement.

The on-property record before us deals with a number of competing contentions about rights and responsibilities. It also describes a number of efforts to settle the matter that were accompanied by time limit extensions to permit due consideration of those settlement efforts. It is clear that the Organization, in its initial claim dated January 26, 2006, requested the ability to review payroll records pursuant to Rule 24(I) to ascertain the magnitude of any remedy considerations. It is undisputed that the Carrier made payroll records available to the Organization for that review at a conference of the claim on October 3, 2006. This was at least the second time that the claim was formally conferenced. According to the Carrier's November 17, 2006 letter on the property, records were produced "... for each employee listed in the claim ..." In this regard, it is noteworthy to recall that the initial claim named not only each claimant but also each outside employe who allegedly worked. A squabble arose shortly after the conference because the Carrier did not provide the Organization with copies of the payroll records. In response, the Carrier cited the precise text of Rule 24(I) in its July 2, 2007 letter on the property. By its terms, the rule does not explicitly require the Carrier to provide copies; the Carrier is required only to permit the Organization's representative to "... review relevant management records ..." In its July 16, 2007 response, the Organization did not take issue with the Carrier's interpretation of Rule 24(I). Interestingly, neither the July 2, 2007 Carrier letter nor the July 16, 2007 Organization letter are included in the Organization's submission.

While it is clear that the Carrier did not actually exchange copies of the referenced payroll records for each employe listed in the claim while the matter was handled on the property, it did include 68 pages of payroll records in its submission. The Organization objected to the material as being "new" because it was not made a part of the record developed on the property. After careful consideration of the matter, we must agree with the Organization's objection. It is well settled that Public Law Boards may not receive new evidence in a submission that was not a part of the record developed by the parties on the property. On the record before us, descriptive references to the records made available to the Organization at the parties' October 3, 2006 conference are too general to establish that the records included in the Carrier's submission are precisely the same batch of records that were made available at the conference. Without the requisite identification precision established in the on-property record, we must treat the Carrier's Submission Exhibit E as new material. Accordingly, we have not considered it in making our findings.

Notwithstanding the exclusion of Carrier's proffered payroll records, we find the record to establish certain material facts that allow us, indeed compel us, to make a dispositive finding. From a long line of prior awards too numerous and lengthy to require citation, it is well-settled that

emergency circumstances permit a rail carrier considerable latitude in marshaling recovery forces to restore its operations. That latitude, however, does not allow the carrier to ignore the rights of local forces. On the record before us, it is undisputed that Rule 17 of the parties' Agreement grants employes within the applicable seniority district preference for overtime opportunities when the employes are available.

On this record, the Carrier made two assertions that bear on the remedy issues. One asserted that not as many hours were worked by the outside employes as claimed because many of them were on vacation during the claim period. The Carrier stated that only 696 straight time and 23 overtime hours were worked by the outside employes. These figures were never effectively challenged by the Organization on the property. In addition, the Carrier asserted that many of the claimants were similarly unavailable to work the claimed hours because they were on vacation during the claim dates. This assertion was also not effectively refuted by the Organization on the property.

Concerning the Carrier's alleged liability on the merits issue, we note that the Carrier's initial reply to the claim asserted, "The carrier called all local forces that they could find to put together enough people to install approximately 1800 ties that it took to get this track back to normal speed." The Organization's April 18, 2006 appeal did not effectively refute the assertion that the Carrier called all local forces that it could find. The Carrier renewed this assertion in its November 17, 2006 denial of the claim. Once again, the Organization did not effectively take issue with the assertion in its next correspondence or at any time thereafter while the handling remained on the property. Under the circumstances, we are compelled to find that the Carrier properly undertook efforts to call all available local forces to have them work in the recovery effort. After exhausting those calling responsibilities, the resulting lack of available local forces permitted the Carrier to exercise the latitude allowed by the exigent circumstances to use the outside forces as it did.

Given the foregoing discussion, we do not find that the Organization has proven a violation of the Agreement as alleged in the claim. Accordingly, the claim must be denied.

AWARD:

The Claim is denied.

Gerald E. Wallin, Chairman
and Neutral Member

R. C. Robinson,
Organization Member

N. V. Nihoul,
Carrier Member

Date: Feb. 11, 2009