

**Public Law Board 7163**

Award No. 43

**Parties to the Dispute:**

**Brotherhood of Maintenance of Way Employees Division**

**IBT Rail Conference**

**and**

**CSX Transportation, Inc.**

**(Fortenberry, Boyd and Hatley – Claimants)**

**STATEMENT OF CLAIM:** “Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it failed to call and assign J. L. Fortenberry, W. J. Boyd and C. A. Hatley to perform overtime service (repair rail) at Mile Post ANJ 945.4 on the Lineville Subdivision of the Atlantic Division on October 15, 2006 and instead called and assigned junior employees J. M. Coker, J. W. Coker and L. Graves [System File B14147206/12(07-0303) CSX].
2. The claim\* as presented by Vice Chairman L. Smith on October 20, 2006 to Mr. M. Bossone shall be allowed as presented because the claim was not disallowed in accordance with Rule 24(a).
3. As a consequence of the violation referred to in Part (1) and/or (2) above, Claimants J. L. Fortenberry, W. J. Boyd and C. A. Hatley shall now each be compensated for seven (7) hours at their respective time and one-half rates of pay.

**Findings:**

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934. Public Law Board 7163 has jurisdiction over the parties and the dispute involved herein.

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The Organization presented a claim that alleged a violation of the Claimants' seniority rights in the assignment of overtime. The Organization claims a procedural violation that requires the Claim to be granted without addressing the merits of the Claim. According to the Organization, the Carrier violated Rule 24(a) of the Agreement when it did not respond to the claim in the manner required by Rule 24. Under that Rule, the Carrier's designated officer must respond to the Claim. Here, the Designated Officer did not respond. That improper response should be treated as no response to the Claim. Because the Carrier did not reply, the Claim is granted pursuant to the Rule.

The Organization continues that, even if the merits are addressed, the Claim must still be granted. Claimants had more seniority than the employees who were called to work the overtime assignments. Claimants should have been called.

The Carrier replies that an answer to the Claim was given within the 60 day requirement of Rule 24(a). In the Statement of Facts, the Carrier states at page 2 of the Submission:

Atlanta Division Staff Engineer C.A. Wiggins, on behalf of Division Engineer M.A. Bossone, denied the Organization's claim in a letter dated December 15, 2006. Mr. Wiggins stated: 'the claimants could not be contacted at the time of the broken rail and therefore were unavailable for the overtime.' Accordingly, the claim as presented was of no merit and was denied in its entirety, Mr. Wiggins concluded.

The Carrier continues that, because the Claim was answered in a timely manner, the Organization's procedural argument must fail. Further, because the claim of an improper response was not asserted during the handling of the Claim, the argument is waived. The Carrier further maintains that the Organization's claim is based upon allegations absent support in the record. Because there is no evidence, the unsupported allegations must fail.

This Board has reviewed the record. The Claim was filed on October 20, 2006, with Mike Bassone, Division Engineer. Mr. Bassone was the Designated Officer for receipt of this Claim from the Organization. The Carrier responded in a letter dated December 15, 2006, to Vice Chairman L.C. Smith. The Carrier letterhead lists the letter as originating as follows:

Charles A. Wiggins  
1590 Marietta Blvd, NW  
Atlanta, GA 30318  
[telephone number omitted]

The letter provided, in pertinent part:

Our investigation of this claim reveals that the claimants could not be contacted at the time of the broken rail and therefore were unavailable for the overtime. Consequently, the Organization's claim is respectfully declined in its entirety.

Sincerely,

Charles A. Wiggins  
Staff Engineer – Atlanta

The Organization replied in a letter dated February 12, 2007, to Senior Director of Labor Relations J.H. Wilson:

Dear sir,

Attached is a copy of the above referenced claim which was presented to Division Engineer Mike Bossone, via Certified Mail Return Receipt Request on October 30, 2006. As of this date, Mr Bossone has failed to respond to the claim.

Rule 24(a) of the effective Agreement provides in pertinent part. "The designated Officer, or other designated official shall render a decision within sixty (60) days from the date same is filed, in writing, to whoever filed the claim or grievance (the employee or his union representative). When not so notified, the claim will be allowed."

The above Rule is crystal clear. Account Mr. Bossone's failure to respond the claim should be allowed.

Therefore, please handle to compensate Claimants as requested in the claim, and advise as to the pay day on which Claimants can expect payment.

Very truly yours,

L.C. Smith, Vice Chairman

In a Carrier letter dated May 24, 2007, the following relevant language appears:

Please reference Mr. Smith's letter . . . alleging that Carrier is in violation of Rule 24(a) of the effective Agreement, alleging that the designated officer did not respond within sixty days from the date the claim was filed, and also requested payment of same.

...

As stated above, this claim was dated October 30, 2006 and filed with Division Engineer Mike Bossone. It was signed for on October 23, 2006, as indicated by the organization's copy of the certified receipt card, and Mr. Bossone declined the claim on December 15, 2006. The claim was then appealed. . . and discussed in conference...

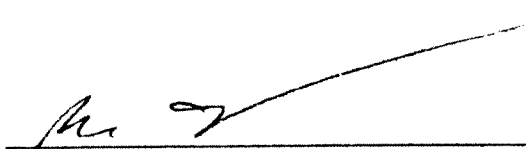
Per [the Organization's] letter, he alleges that Mr. Bossone failed to respond to the claim within the time limits and therefore the claim must be allowed. This is not accurate. As per the attached copy of the certified receipt card and letter, please note that the Division's response was dated December 15, 2006, sent certified, and signed for by Gail Smith on December 20, 2006. Mr. Bossone received the claim . . . responded to the claim on December 15, 2006. . . Therefore, all applicable time limits have been observed.

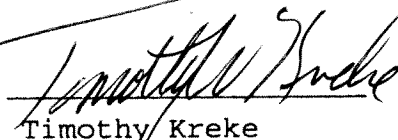
After a review of the record, and the Award citations contained therein, the Board finds that the evidence establishes that Mr. Bossone is the Designated Officer for receipt of the instant claim. He did not respond to the instant Claim, Mr. Wiggins responded. Contrary to the Carrier's correspondence in the handling of the Claim, Mr. Bossone did not respond. Further, there is nothing in the record to establish, other than the Carrier's unsupported assertion in their Submission, that Mr. Wiggins was acting on behalf of the Designated Officer, Mr. Bossone.

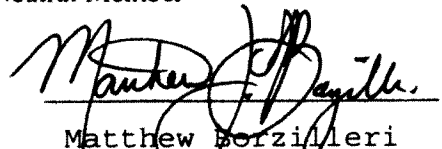
The Organization's submission cites to awards for the proposition that the operation of Rule 24(a) is clear. Those awards, and the citations contained therein, indicate that the failure of the Designated Officer to respond within the time period operates as a procedural default. The Designated Officer did not respond to the instant Claim. Therefore, the Carrier violated the Agreement and we cannot reach the merits.

Award:

Claim sustained.

  
Brian Clauss  
Chairman and Neutral Member

  
Timothy Kreke  
BMWED  
Organization Member

  
Matthew Borzilleri  
CSX Transportation, Inc.  
Carrier Member *Dissent attached*

Dated this 17<sup>th</sup> day of February 2011

## CARRIER MEMBER'S DISSENT

### PUBLIC LAW BOARD NO. 7163, CASE NOS. 43, 44 AND 47 REFEREE BRIAN CLAUSS

Dissent to the above-captioned cases is necessary due to the Majority's failure to base its decision upon the Agreement and the record evidence. In each of the three (3) cases, the Organization erroneously argued the Carrier failed to respond to the initial claims, in violation of Rule 24(a) of the June 1, 1999 BMW/CSXT System Agreement when the Staff Engineer of the Atlanta Division did respond. In deciding Award No. 43 (the decision in the remaining cases was virtually identical), the Majority stated:

*"After a review of the record, and the Award citations contained therein, the Board finds that the evidence establishes that Mr. Bossone is the Designated Officer for receipt of the instant claim. He did not respond to the instant Claim, Mr. Wiggins responded. Contrary to the Carrier's correspondence in the handling of the claim, Mr. Bossone did not respond. Further, there is nothing in the record to establish, other than the Carrier's unsupported assertion in their Submission, that Mr. Wiggins was acting on behalf of the Designated Officer, Mr. Bossone.*

*The Organization's submission cites to awards for the proposition that the operation of Rule 24(a) is clear. Those awards, and the citations contained therein, indicate that the failure of the Designated Officer to respond within the time period operates as a procedural default. The Designated Officer did not respond to the instant Claim. Therefore, the Carrier violated the Agreement and we cannot reach the merits."*

What the Majority failed to do in these cases is to consider the clear and unambiguous language of Rule 24(a) of the Agreement:

(a) A claim or grievance must be presented, in writing, by an employee or on his behalf by his union representative to the Designated Officer, or other designated official within sixty (60) days from the date of the occurrence on which the claim is based. The designated officer or other designated official shall render a decision within sixty (60) days from the date same is filed, in writing, to whoever filed the claim or grievance (the employee or his union representative). When not so notified, the claim will be allowed.

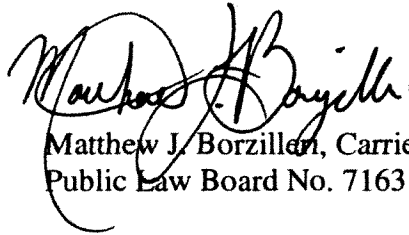
In the instant dispute, the "other designated official", the Staff Engineer of the Atlanta Division responded to the claim within the sixty (60) day period. It is common knowledge, this official may respond to claims on behalf of the Division Engineer. In support, the Carrier cites National Railroad Adjustment Board (NRAB), Third Division Award No. 28487 with Marty E. Zusman sitting as Referee:

*"As to the procedural issue, Rule 4-K-1 refers to the 'Supervisor – C&S (or other designated official).' Carrier maintains no violation in that the Division Engineer was known as the other designated official to respond. The Organization never refutes the Carrier's assertion. As such we conclude that no procedural violation occurred."*

See, also, NRAB Third Division Award No. 26547 (Roukis).

On a regular basis, the Carrier provides the Organization with an update of the administrative staff at each of its Divisions. These note the Division Engineer as well as the Staff Engineer. Clearly, as the Organization is made aware of these two officers, it is conceivable, under the clear language of the Agreement, that the Staff Engineer, acting as the "other designated official" may render a decision in claims.

For the reasons cited above, the Carrier must respectfully dissent to the Award. The reasoning and holding are clearly palpably erroneous and cannot be referred to in any future disputes on the property.

A handwritten signature in black ink, appearing to read "Matthew J. Borzilleri". The signature is stylized with a large, looping initial "M" and a cursive "B".

Matthew J. Borzilleri, Carrier Member  
Public Law Board No. 7163

LABOR MEMBER'S RESPONSE  
TO  
CARRIER MEMBER'S DISSENT  
TO  
PUBLIC LAW BOARD 7163, CASE NOS. 43, 44 AND 47  
(Referee Clauss)

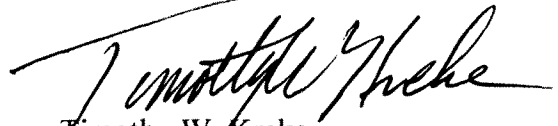
The Majority considered the arguments and evidence raised by each party, applied Rule 24(a) to the facts and properly found for the Claimants and nothing found in the dissent detracts therefrom. Instead, the Carrier's dissent to Cases 43, 44 and 47 to Public Law Board No. 7163 is based on false premise and argument never raised during the on-property handling of the dispute.

The Carrier premised its dissent on the false premise that "\*\*\*\* the Organization erroneously argued the Carrier failed to respond to the initial claims \*\*\*\*" The Organization correctly argued and the Majority correctly determined that the Designated Officer (the Division Engineer) failed to respond to the initial claims.

The dissent went on to state that the Staff Engineer may respond to claims on behalf of the Division Engineer as the "other designated official" contemplated by Rule 24(a). That issue was never argued during the on-property handling of the disputes. Rather, the Carrier defended its violation of Rule 24(a) asserting that the Designated Officer timely denied the claims and the Majority's decision correctly concluded that Designated Officer did not respond to the claims.

As the Carrier Member is well aware, this Board is constrained to consider only arguments and evidence which are raised during the handling of a claim while it is "on the property". Inasmuch as the reader of the award and this post-decision exchange does not have access to the record of handling on the property and the submissions of the parties, it is of the utmost importance that those dissenting and responding take care that their statements as to the contents thereof are accurate. In this case, the Carrier Member simply misconstrued the arguments and evidence presented during the proper handling of the claim.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Timothy W. Kreke", written over a horizontal line.

Timothy W. Kreke  
Labor Member