

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7163**

<b>Brotherhood of Maintenance of Way</b>	)	
<b>Employees Division, IBT</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. 138</b>
	)	
<b>CSX Transportation, Inc.</b>	)	

Statement of Claim

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier offered/called to work junior employee D. Zelei to perform welding work at Mile Posts QDS 16.2 and 19.4 on the Cleveland Short Line in/near Cleveland, OH on July 8 and 15, 2011 and did not offer this work to Claimant G. Kozlowski (System File KozloC.031/2011-103577).
2. As a consequence of the violation referred to in Part I above, Claimant G. Kozlowski shall now be compensated twenty (20) hours overtime pay."

Background

Claimant is a welder on the Great Lakes Service Lane, Cleveland District. He regularly performed welder duties during his assigned work week in July 2011 for Service Lane Work Team 5P70. Employee D. Zelei, a welder for Zone Welding Team 5K61, is junior to Claimant in the welder job class. Claimant's service team and Zelei's zone team are mobile gangs. Claimant's and Zelei's work schedules are 0700 – 1730, Monday through Thursday with Friday, Saturday and Sunday designated rest days.

On July 8 and 15, 2011 the Carrier offered rest-day overtime work near mileposts QDS 16.2 and QDS 19.4 on the Cleveland Short Line to the zone team. Zelei accepted the offer. The offer was not extended to Claimant's service team.

On August 15, 2011 the Organization filed a claim stating that the Carrier violated Rule 17, Section 2 when it offered the work to Zelei as Claimant was senior in the job class, available and qualified to perform the work. Pursuant to Rule 24(i) the Organization requested to review "Zelei's payroll record along with any type records/logs pertaining or related to instant claim to aid in enforcing the Agreement."

On October 13, 2011 the Carrier denied the claim stating it “provided the work opportunity to the Team that was working there at that time” as Claimant’s team was sixty (60) miles east of Cleveland. In other words, Zelei’s team “was working in the area in the week prior to the claims and the week after the dates cited in the claim. Rule 17, as it applies to mobile gangs, was complied with as it assigned the production team to the area, then offered preference to that team.”

On November 25, 2011 the Organization appealed the denial to the Carrier’s highest designated officer (HDO). In July 2011 Claimant was headquartered in the Cleveland area and working under the direction of the Roadmaster; when he inquired about overtime the Roadmaster stated there was none available. Both mobile gangs (service team and zone team) perform the same kind of welding during the regular work week. Claimant is senior in the welder job class to Zelei and should have received preference for the overtime.

The Organization renewed its request for “relevant management records that we have previously requested” and also requested copies of “work performance records for Zelei and Claimant for the previous 2-3 weeks prior to the claim violation dates to show what type, and location of work [they] performed[.]”

A conference convened on May 4, 2012; the HDO denied the appeal on July 3, 2012. “[I]t is past practice and customary for the gang that regularly performs the work during their assigned work period to be given preference for overtime work” under Rule 17, Section 2. The Carrier stated that the Organization failed to submit evidence showing that Claimant was working in the area on the claimed dates. “The Organization’s request to review relevant records could be viewed at the Division office located in Strongsville [OH] pursuant to Rule 24(i).”

On September 5, 2012 the Organization responded to the denial of its appeal. Claimant was no more than thirteen (13) miles from Cleveland headquarters (Collinwood Yard) rather than 60 miles east of Cleveland as the Carrier asserts. The welding work performance report for Claimant’s team shows it performed welding work at QD 154 on July 7 and on July 14 the truck for Claimant’s team was in the shop in the Cleveland District; there is no documentation showing the location of the zone team. BMWE “has requested to review all pertinent management records, such as phone records/logs, throughout the handling of instant case and to date has not been offered one document or record for review in order to research issues pertaining to instant case.”

#### Carrier’s Position

According to the Carrier, the Organization failed to establish a *prima facie* case that Claimant was working in the area where the overtime occurred on July 8 and July 15, 2011. The welding reports do not show Claimant performing any work on July 8 and July 15 near mileposts QDS 16.2 and 19.4.

Although the Organization states in its appeal letter (November 2011) that the claimed work was based out of Collinwood Yard (force headquarters) and Claimant completed welds at QD 154 and 158 which places him no more than 13 miles from the Yard, the Carrier notes that Collinwood Yard is located between mileposts QD 172 and QD 175 and not at QD 167 as the Organization states. Moreover, QD 175 is the turnout for QDS so Claimant was, at least, thirty-five (35) to forty (40) railroad miles from the location of the overtime work. Additionally, the Organization's appeal identifies Collinwood Yard for the claimed work whereas the claim filed identifies mileposts QDS 16.2 and 19.4.

Junior employee Zelei's mobile gang was performing work in the area of QDS 16.2 and 19.4 the week before and the week after the disputed dates. This work is the kind of work customarily performed by the gang during its regular work week. Pursuant to Rule 17, Section 2, "the gang ordinarily doing this type of work during the regularly assigned work period would be given preference for the continuation of the work outside of the regularly assigned work period." The Carrier offered the overtime to the Zelei's team working in the area on July 8 and July 15, 2011. Therefore, the claim is without merit.

#### Organization's Position

In July 2011 Claimant was working and headquartered in the Cleveland area under the direction of the Cleveland area Roadmaster. Claimant inquired about overtime and the Roadmaster informed him there was none on the claimed dates. Nevertheless, overtime occurred on July 8 and July 15, 2011 at QDS 16.2 and 19.4 on the Cleveland Short Line in or near Cleveland, OH.

On the claimed date of July 8 Claimant was not 60 miles from the Cleveland headquarters but at QDS 154 or 158 which is, at most, 13 miles from distance, and on July 14 Claimant's team truck was in the shop so no production occurred. Regardless, Claimant's location or distance from the work is not relevant as Third Division Award 36848 states that Rule 17(b) requires offering the work "within the overall seniority district based on seniority in the job class." Although the Carrier contends the Organization submitted no evidence to establish Claimant's location, the Organization submitted welding production reports for Claimant's team and it observes there is no documentation from the Carrier establishing the junior employee's location on the claimed dates.

Claimant and Zelei are assigned to mobile gangs that ordinarily perform this type of work (Boutet welding process) during their regularly assigned work week. Claimant is senior to Zelei in the welding job class, was available and qualified to perform the work so the Carrier should have offered the overtime opportunity to Claimant. The Carrier is required by the Agreement to offer and assign overtime work to the senior employee. Numerous Third Division Awards state that the Carrier is obligated to follow the Agreement as written. [Br. at 9]

Although the Organization requested documentation material to this claim, the Carrier did not provide it. Based on Third Division Award 28430, the Carrier's failure to provide material evidence should be construed against it.

Findings

Public Law Board 7163, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employees within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute and (3) the parties to this disputes were accorded due notice of the hearing and participated in this proceeding.

The claim involves Rule 17, Section 2 – Mobile gangs:

When the work involved is of a specialized nature, such as production work, rail laying, tie installation, surface, etc., the gang ordinarily doing that type of work during the regularly assigned work period would be given preference for the continuation of this work outside of the regularly assigned work period with the employees in the gang being called in the order of their seniority in the required job class[.]

Since the Organization filed the claim, it must establish a *prima facie* violation of Rule 17, Section 2. Evidence establishing a *prima facie* violation is the welding production report that shows Claimant's team at QD 154 (July 7) and Claimant's team truck in the Cleveland District shop on July 14. The Board finds Claimant was available and qualified to perform the work on the claimed dates.

The Carrier asserts that the junior employee's team was "in the area" of QDS 16.2 and 19.4 on the claimed dates so offering the overtime preference to him was consistent with Rule 17, Section 2 and past practice. This assertion is offered without support. Documents in the Carrier's control to support the assertion are not in this record. Since there is insufficient evidence (assertion) to establish the junior employee as "in the area" the matter of past practice will not be addressed. Additionally, the Board finds that the Carrier's offer to the team "in the area" of QDS 16.2 and 19.4 is a criterion or measure not referenced in Rule 17, Section 2. Given the record established by the parties and placed before the Board, the Organization's assertion and documentation supports the claim whereas the Carrier's assertion without documentation is insufficient to deny the claim.

There is no dispute that Claimant is senior to Zelei, was available and qualified and that he regularly performs the claimed work during his assigned work week. The claim is sustained.

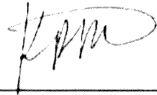
Award

Claim sustained.

Patrick J. Halter /s/

Patrick J. Halter  
Neutral Member  
Award No. 138

PLB 7163  
Case 138, Award 138  
Claimant G. Kozlowski



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Rob Miller  
Carrier Member



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Andrew M. Mulford  
Organization Member

Dated on this 20th day  
of August, 2014