

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

Brotherhood of Maintenance of Way)	
Employes Division, IBT)	
)	
vs.)	Case No. 139
)	
CSX Transportation, Inc.)	

Statement of Claim

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned junior employee D. Neuspickel to perform trimming/winterization duties on a tamper on December 30, 2011 through February 24, 2012 and failed to assign such work to Claimant E. Herring (System File S21146612/2012-119143).
2. As a consequence of the violation referred to in Part 1 above, Claimant E. Herring shall now '... eight (8) Straight time and for two (2) hour each date overtime beginning December 30, 2011 through February 24, 2012 and continuing until the violation stops at his respective rate Production Foreman (25.06). ***'."

Background

Claimant maintains seniority in certain classifications within the Track Department. On November 3, 2011 Claimant's regular assignment as production foreman on Production Construction Team 5NCT was abolished whereupon Claimant displaced to a position on System Production Team 6XT8 on November 14, 2011.

Working with Claimant on Production Construction Team 5NCT was Employee D. Neuspickel. His regular assignment was machine operator that involved, among other duties, movement of equipment. On December 30, 2011 the Carrier instructed Employee Neuspickel to move a tamper machine for winterization from milepost OBA 262.1 Ardmore, AL to milepost 0005.0 Louisville, KY.

On February 24, 2012 the Organization filed a claim with the Carrier's highest designated officer (HDO) alleging a violation of the June 1, 1999 Agreement, CSXT Labor Agreement 12-072-10, File No. 6018-12 CSXT Amended Clarification to Appendix S, Section 26 and Memorandum of Agreement dated August 23, 2007. Specifically - -

... the carrier assigned junior employee D. Neuspickel ... to trimming a Tamper from Ardmore, AL milepost OBA 262.1 to milepost 0005.0 Louisville, KY to winterize this machine the Claimant ... and Mr. Neuspickel were assigned to this team 5NCT floating worked from Monday thru Thursday 0700 to 1730 the Nashville Seniority District of the Nashville Division. The claimant was assigned to gang 5NCT as a foreman and the team was cut off and the Claimant was not called for this work instead the carrier called and assigned a junior employee Neuspickel to preform [sic] this work.

The claimant is qualified, were available, and should have been assigned this work, but was not offered it by the carrier.

On June 6, 2012 the parties convened in conference to discuss this claim but without reaching a satisfactory conclusion.

On July 5, 2012 the Carrier denied the claim and reiterated its position presented during conference. That is,

Our investigation of this case revealed this claim should be denied based on the fact that [Claimant's] position was abolished on 11/03/11, and then made a displacement to a position on a System Production Team on 11/14/11, which took away any rights to the 5NCT winterization.

Notwithstanding the above, The June 1, 1999 Agreement, Appendices S does not apply the 5NCT, Program Construction Team, therefore we will continue to deny this claim.

On December 4, 2012 the Organization filed a response to the HDO's claim denial as follows.

The claimant was assigned to gang 5NCT as a foreman and the team was cut off carrier assigned junior employee D Neuspickel ... to trimming a Tamper from Ardmore, AL ... to ... Louisville, KY to winterize this machine. When team 5NCT was cut off Carrier did not inform the Claimant that the Tamper was needed to trim to another to be winterize. The carrier create a vacancy when the Tamper work from December 30, 2011 thru February 24, 2012 and continuing.

* * * * *

Further 5NCT was advertised as a Zone Surfacing Team and should have been cut-off at the end of the 2011 production season instead the tamper work thru February, 2012.

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 issue is whether the Carrier's assignment for Employee Neuspickel to move the tamper violates the Agreement. The issue is not whether 5NCT should have ceased to function as of the end of calendar year 2011.

Employee Neuspickel encumbered the position of machine operator as his regular assignment on the 5NCT Production Construction Team. As a machine operator, he moved equipment including the tamper in this claim. Claimant's position as production foreman on 5NCT Production Construction Team was abolished November 3, 2011; he exercised his seniority on November 14, 2011 to a position on the 6XT8 System Production Team. The Carrier states that it properly instructed Employee Neuspickel to move the tamper as part of his regular assignment. The Board finds that the Carrier's assignment to Employee Neuspickel was consistent with duties he performed as a machine operator during his assignment to 5NCT.

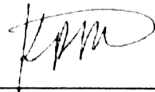
In rendering these findings as part of this claim adjudication, the Board has considered the record established during on-property processing and each party's submission in the context of the issue for adjudication. In this regard, each party's submission contains an exhibit which is the Organization's letter, dated December 4, 2012, issued to the Carrier seven (7) months after the appeal declination (July 5, 2012). The exhibit letter, with two (2) attachments, in the Organization's submission is significantly different from the exhibit letter in the Carrier's submission. That is, the Organization's exhibit letter contains references to previously non-disclosed statements which are shown in the two (2) attachments. As the noted by the Carrier at the hearing, it never received the Organization's exhibit letter with attachments.

There is no explanation by the Organization in the on-property record or its submission to the Board for the significantly different exhibit letter and attachments. Prior letters issued by the Organization during on-property processing do not include the attachments and do not reference and Claimant's e-mail and written statement or the written statement by Employee Neuspickel. The Organization did not issue an amended letter to revise the letter that was received by the Carrier. The attachments are the only documents that may support the assertions lodged in this claim.

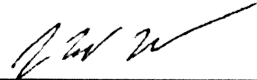
Presented with these circumstances, the Board finds that consideration of the attachments is problematic given the rules of this proceeding. Notwithstanding that consideration, the attachments are self-serving and lack probative evidentiary value. This renders the Organization's allegations of violations of the Agreement and other referenced documents unsupported by corroborative evidence. Since the Organization carries the responsibility to prove its allegations and it has failed to do so, the claim will be denied.

Award
Claim denied.

Patrick J. Halter /s/
Patrick J. Halter
Neutral Member
Award No. 139



Rob Miller
Carrier Member



Andrew M. Mulford
Organization Member

Dated on this 20th day
of August, 2014