

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

Brotherhood of Maintenance of Way)	
Employees Division, IBT)	
)	
vs.)	Case No. 141
)	
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 J. Byrd to work extra and perform unassigned bridge tender duties at the Three Mile Creek Draw Bridge on August 17, 24 and 31, 2011 and continuing thereafter, without offering it to senior qualified employees as required by the Agreement (System File B11144511/2011-107263).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Dailey shall now be compensated at his overtime rate for any and all hours worked by Mr. Byrd on the Three Mile Creek Draw Bridge on August 17, 24 and 31, 2011 and continuing thereafter."

Background

Claimant maintains seniority as a bridge tender in the B&B Sub-Department. In August 2011 Claimant occupied a bridge tender position with Gang 5M5L at the Three Mile Creek Draw Bridge, Mile Post 000664.1, near Mobile, AL. His hours of work were 10:00 p.m. to 6:00 a.m. on a five day, eight (8) hour schedule.

Employee J. Byrd, junior to Claimant, was directly hired into an open (no-bid) bridge tender position in the B&B Sub-Department.

On September 29, 2011 the Organization filed a claim alleging that the Carrier violated Rule 3 – Selection of Positions, Rule 4 – Seniority and Rule 17 – Preference for Overtime Work, when it assigned bridge tender duties on overtime to junior employee Byrd on August 17, 24 and 31, 2011 and continuing thereafter instead of assigning the overtime to Claimant. According to the Organization, the Carrier directed Byrd to work extra and cover an open, unassigned bridge tender position which was not part of Byrd's regular assignment and he did not work the position temporarily pending assignment.

On November 18, 2011 the Carrier denied the claim as follows:

... J. Byrd was hired as a bridge tender to fill vacant jobs and stood for these vacant shifts. The specific shifts claimed by [Claimant] were open shifts not assigned to a regular job. During the time specified in this claim, we had a surplus of bridge tenders. This was due to the fact that we had vacancies that went no-bid and unfilled and we hired new bridge tenders, including Mr. Byrd, in response. During the time it took to hire and train these new bridge tenders, employees from other crafts in the B&B department bid some of the vacancies in. This created a surplus of bridge tenders. Had we not assigned Mr. Byrd to these open shifts, he would have had to have been furloughed. He was not 'called in' as the claim states, but was assigned these shifts on a straight time rate.

On December 8, 2011 the Organization filed an appeal reiterating its position that the Carrier assigned a junior employee to work overtime and responded to the Carrier's statement that Byrd was hired to fill vacant jobs:

... Rule 3 (a) is clear and states;

All positions and vacancies will be advertised within thirty (30) days previous to or within twenty (20) days following the dates they occur.

M. O. A. 12-006-09 and M. O. A. 12-010-11 Section 1 (A) states. If CSXT advertises a position in the B&B Sub-department under Rule 3, Sections 1 and 3 of the June 1, 1999 Agreement and no applications are received from current employees, CSXT may hire new employees directly into the B&B Sub-department as a Bridge Tender or B&B Mechanic. These rules are clear ... [.]

On June 6, 2012 the parties convened in conference wherein the Organization provided the Carrier with Claimant's statement dated September 27, 2011:

I HAVE TWO ISSUES

#1 On these dates 8/17/11, 8/24/11, and 8/31/11 JD Byrd ... worked the open shift at 3-Mile Creek Bridge in Mobile, AL. Instead of me[.]

#2 Jeff Chaffin, our boss is not bidding out open jobs per agreement. There are two jobs on our bridge that have never been bid out. There are new hires who he has just assigned to the job without ever putting it out for bid. In the last two months he's hired 5 new bridge tenders and I suspect that none of these men have made bids on their jobs. As bridge tenders we need a fair and open bidding process. And for our seniority rights to be protected for the purpose of determining overtime[.]

On July 10, 2012 the Carrier denied the appeal. "Our investigation revealed that on all three (3) days of this claim, Mr. Byrd was working and he was paid straight time, never overtime."

On December 7, 2012 the Organization responded to the Carrier's appeal declination by asserting its arguments lodged in the claim and appeal. That is, the Carrier is required to fill the open shift or vacancy with Claimant on overtime as he was available and qualified and ordinarily performs this work.

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.

In the claim placed before this Board for adjudication, the Organization asserts that the Carrier violated the June 1, 1999 Agreement, specifically - -

... by assigning junior employee J. Byrd to work extra and perform unassigned bridge tender duties at the Three Mile Creek Draw Bridge on August 17, 24 and 31, 2011 and continuing thereafter, without offering it to senior qualified employees as required by the Agreement.

The Board assesses the allegations in the claim within the framework noted in Third Division Award 29630 at p. 2:

In disputes of this nature, it is well settled that the Organization has the burden of proving, by submission of probative evidence, that the Carrier has violated the parties' Agreement[.]"

There is no dispute that Employee J. Byrd was a direct hire "into a [bridge tender] position" under the terms in the Memorandum of Agreement 12-006-09 (September 1, 2009) at Section 1 – B&B Sub-Department Hiring, paragraph A:

- A. If CSXT advertises a position in the B&B Sub-department under Rule 3, Sections 1 and 3 of the June 1, 1999 Agreement, and no applications are received from current employees, CSXT may hire new employees directly into the B&B Sub-Department to fill such positions. An employee entering service within the B&B Sub-department will acquire seniority in the class from the date assigned to an advertised position (hire date) and will establish seniority as of the same date in lower classes on the same seniority roster. Except as otherwise stipulated herein, such employee will be required to maintain that position for a six (6) month period except to bid on and be assigned to a promoted position in the B&B sub-department.

A direct hire employee, such as J. Byrd, occurs only after the Carrier advertised the bridge tender position in the B&B Sub-Department under Rule 3 – Selection of Positions, Section 1, Assignment to position (seniority governs in the assignment of an employee to a position) and Section 3, Advertisement and award (all positions and vacancies are advertised within thirty (30) days previous to or within twenty (20) days following the dates they occur).

Notwithstanding the Carrier's acting under Rule 3, there were no applications, e.g., no bids, from "current employees" for the advertised bridge tender position. Having advertised the position as required by Section 3 and receiving no bids for it, the Carrier was authorized to proceed with a direct hire. Byrd's hire date established his seniority for the bridge tender position. In these circumstances, the Board finds that the Carrier acted in accordance with Rule 3, Section 1 and Section 3 as the direct hire in the B&B Sub-Department fills vacancies not bid by "current employees." Furthermore the wording in Rule 3, Section 4 - - "[a] position or vacancy may be filled temporarily pending assignment" - - accords discretion to the Carrier to assign direct hire Byrd into an unassigned bridge tender position that was advertised but not bid.

BMWE asserts that the Carrier violated Rule 17 – Preference for Overtime Work, when it did not assign overtime work to Claimant. Rule 17, Section 1 – Non-mobile gangs states:

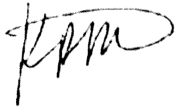
(a) When work is to be performed outside the normal tour of duty in continuation of the day's work, the senior employee in the required job class will be given preference for overtime work ordinarily and customarily performed by them. When work is to be performed outside the normal tour of duty that is not a continuation of the day's work, the senior employee in the required job class will be given preference for overtime work ordinarily and customarily performed by them.

Time and attendance records show that J. Byrd was not "called in" for "extra" work on the unassigned shift as it involved only straight time and not overtime. In other words, the work was not performed beyond "the normal tour of duty in continuation of the day's work" or "performed outside the normal tour of duty that is not a continuation of the day's work[.]"

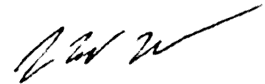
Having assessed this claim within the framework noted in Third Division Award 29630, the Board concludes that "[o]n the record before us, ... the Organization has not satisfied [its] burden [of proof]. Accordingly, the Claim must be denied." [Award at 2]

Award
Claim denied.

Patrick J. Halter /s/
Patrick J. Halter
Neutral Member
Award No. 141



Rob Miller
Carrier Member



Andrew M. Mulford
Organization Member

Dated on this 6th day
of October, 2014