NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7163

Brotherhood of Maintenance of Way Employes Division, IBT	)	
	)	
vs.	)	**Case No. 144**
	)	
CSX Transportation, Inc.	)	

Statement of Claim

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier failed to call and assign Claimant R. Orr to perform trackman duties such as tree removal at Mile Post N64.7 on the Nashville Division near Waverly, Tennessee on May 29, 2012 and instead assigned Mr. M. Howell (System File I58707212/2012-128172).

2. As a consequence of the violation referred to in Part 1 above, Claimant R. Orr shall receive three (3) hours of pay at his respective overtime rate of pay."

Background

Claimant established seniority as a Trackman on November 21, 1974. In May 2012 he served as a Vehicle Operator in the area of Waverly, TN where Employe M. Howell, junior to Claimant's seniority, was a Section Foreman.

On July 26, 2012 the Organization filed a claim stating that on May 29, 2012 the Carrier assigned Foreman to perform Trackman duties on overtime with a tree removal at Mile Post N64.7. BMWE asserts this assignment violated Rule 1 – Seniority Classes, Rule 3 – Selection of Positions, Rule 4 – Seniority and Rule 17 – Preference for Overtime as Claimant was available, qualified and senior employe.

On August 7, 2012 the Carrier denied the claim. The Roadmaster instructed the Foreman to investigate the tree on the tracks and, should assistance be needed to remove it, the Foreman would contact a Trackman. "The contract does not contemplate a penalty for the Carrier for the decision made by the Foreman" to remove the tree without assistance. Without any basis for the claim the remedy is excessive.

On August 10, 2012 the Organization filed an appeal with the Carrier's highest designated officer (HDO) for such matters wherein it reiterates statements in support of the claim and responds to the Carrier's claim declination.

On October 23 and 24, 2012 a conference convened wherein the Organization provided the Carrier with Claimant's statement; however, a satisfactory conclusion was not attained so the claim remained unresolved.

On February 5, 2013 the Organization notified the Carrier as follows:

> In accordance to Rule 24 (b) of the June 1, 1999, Agreement, the Carrier is outside the sixty (60) day time limit. This claim was denied at the October 24, 2012 conference, and the Carrier has not notified me in writing their reason for denying the claim (post conference letter).

On May 22, 2013 the Carrier and Organization agreed that the claim would be submitted to this Board for adjudication.

On August 2, 2013 the Carrier responded to the Organization's statement that the Carrier had not issued an appeal declination within the 60-day time limit in Rule 24(b).

> Contrary to the Organization's contention, the Carrier did respond to the Claim appeal on November 14, 2012. A copy of the declination is attached. As the Carrier stands by its declination of the claim and appeal, this claim remains declined in its entirety.

The Organization replied on September 6, 2013:

> Regardless, of what the Carrier states in their letter dated August 2, 2013, the Organization did not receive a post conference letter within the time limits. The Carrier has not provided any proof that the letter dated November 14, 2012, was ever mailed to the Organization. The Organization never received the November 14, 2012, letter until August 5, 2013.

Findings

Public Law Board 7163, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employes 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.

A preliminary matter with dispositive implications for the claim is whether the Carrier's appeal declination letter was issued within the 60-day window in Rule 24(b). In addressing this procedural matter the Board observes there is no dispute that (1) the Organization filed a timely claim, (2) the Carrier issued a timely denial to the claim, (3) the Organization filed a

timely appeal to the claim denial and (4) the parties convened in conference on October 23 and 24, 2012 to address the claim but did not reach a resolution.

Following conference without a satisfactory conclusion to the Organization's appeal, the next stage in on-property proceedings is for the Carrier to issue its written decision. In this regard, Rule 24(b) states, in relevant part, the following:

> When a claim or grievance is not allowed, the carrier's Highest Designated Labor Relations Officer will so notify, in writing, whoever listed the claim or grievance (employee or his union representative) within sixty (60) days after the date the claim or grievance was discussed of the reason therefor. When not so notified, the claim will be allowed.

Of the sundry requirements affecting rights and obligations in the procedural thicket, none is more closely observed than time limits for filing and responding. Rule 24 displays the significance attached to perfecting compliance as the parties agreed that a response submitted after the window closes results in a procedural default. In other words, adherence to Rule 24 serves to establish an evidentiary record for the Board's review of the claim's merit whereas non-compliance mandates claim allowed as presented without regard to its merit. Within this framework the Board considers the procedural allegation lodged by the Organization.

The Board finds that the Organization notified the Carrier on February 5, 2013 that it had not received an appeal declination letter within the 60-day period in Rule 24(b); the Carrier's exhibit shows that it received the Organization's notification on February 11, 2013. The record before the Board shows no response of any kind from the Carrier as of May 22, 2013 to the Organization's default assertion.

Paragraph 6 in the agreement establishing PLB 7163 delineates the record for the Board's review once the parties agree to submit a claim to arbitration. Only "evidence and argument presented or made known to the opposing party prior to the close of the record on the property" is properly in the record for Board review. As applied in this proceeding the Board finds that the Carrier did not present "evidence and argument" to the Organization "prior to the close of the record on the property" - - May 22, 2013 - - that contests or refutes the Organization's default assertion.

Longstanding industry precedent, summarized and reflected in Third Division Award 40921, sets forth the consequence of the Carrier's not responding to the Organization's default assertion prior to the record closing. Specifically, the Organization's unrefuted assertion of an untimely appeal declination is binding on the Board as fact. Furthermore, the Carrier's letter dated August 2, 2013 in its submission is new evidence as it was not offered on-property. The Board will apply precedent noted in Third Division Award 22802 and not consider the letter at this late stage of the proceeding. The unrefuted fact results in the Board's conclusion that the Carrier did not meet the 60-day window in Rule 24(b) for issuing its appeal declination.

Therefore the Board will interpret and apply the manifest meaning of Rule 24(b) in this situation - - "the claim will be allowed" as presented.

Award
Claim sustained.

Patrick J. Halter /s/
Patrick J. Halter
Neutral Member
Award No. 144

Rob Miller
Carrier Member

Andrew M. Mulford
Organization Member

Dated on this 20th day
of August, 2014