

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

<b>Brotherhood of Maintenance of Way</b>	)	
<b>Employees Division, IBT Rail Conference</b>	)	
	)	<b>Case No. 177</b>
<b>and</b>	)	<b>Award No. 177</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 assigned Employees J. Corley and E. Vert to perform overtime welding service on November 16, 2012 and failed to assign such work to Claimants M. Radtka, S. McKinley and R. Earl (System File H46713612/2012-136924 CSX).
2. As a consequence of the violation referred to in Part 1 above, Claimants M. Radtka, S. McKinley and R. Earl shall '... be allowed an equal share of sixteen (16) hours overtime, at their respective overtime rates of pay.' (Employees' Exhibit 'A-1')."

**Background**

Claimant Radtka holds seniority as a welder and Claimants McKinley and Earl each hold seniority as a welder helper. The Organization alleges that on November 16, 2012 the Carrier assigned Employees Corley and Vert to make a field weld at Mile Post CH 72.5 in Williamston, Michigan on the Chicago Division. At the time of the field weld, Employee Corley's assigned position was foreman and Employee Vert's assigned position was vehicle operator.

On December 13, 2012, the Organization filed a claim alleging violations of Rules 1, 3, 4, and 17 and the Memorandum of Agreement (MOA) dated August 23, 2007. Section 1(a) in Rule 17 states that "[w]hen 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." The Carrier, BMW states, never disputed that Claimants ordinarily and customarily perform welding duties and, on the basis of seniority, were entitled to perform the claimed work. Claimants were qualified, available and willing to perform the claimed work but the Carrier assigned it to a foreman and vehicle operator.

The Carrier's assertion that Employees Corley and Vert did not perform welding work is rebutted by Employee Corley's statement included with the Organization's post-conference letter wherein the employee states he was instructed by the Roadmaster to make field welds. The foreman and vehicle operator are disinterested parties as the outcome of this case has no bearing on them.

The Carrier's defense that no welding occurred because payroll records show Employees Corley and Vert compensated for overtime at the rate for a foreman and vehicle operator is not determinative of

whether the Carrier violated the rules as alleged. The claim focuses on welding work and not work of a foreman or vehicle operator.

On February 11, 2013, the Carrier denied the claim. It maintains that Employees Corley and Vert did not perform any welding work. Each employee worked eight (8) hours overtime on November 16, 2012; they were compensated consistent with their assigned classifications (foreman and vehicle operator). In denying the claim the Division Engineer stated "[i]t is always the practice to pay the employee working overtime at the rate of pay of the position he is working unless he is working a lesser paying position" and "[b]ased on this information, it does not make sense that these men were performing any type of welding work since they were paid at a lower rate."

As for Employee Corley's statement (July 2, 2013) that he performed welding work as instructed by the Roadmaster, the statement surfaces almost a year after the Division Engineer's statement (February 11, 2013). Based on Third Division Awards 20773, 24965 and 35600, the foreman's statement is untimely and not credible as it appears a month prior to the record closing. Since the statement was not disclosed during on-property processing the Carrier did not have a reasonable opportunity to respond. The Carrier concludes there is an irreconcilable dispute of facts which weighs against the Organization and shows a lack of proof.

#### 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 dispute were afforded due notice of the hearing and participated in this proceeding.

Having reviewed the evidentiary record established by the parties in this proceeding, including the arbitral precedent relied upon by each party, the Board finds that the claim was timely and properly presented and handled by the Organization at all stages of appeal up to and including the Carrier's highest appellate officer.

The Board finds, further, that the dispositive fact in this claim is whether Foreman Corley and Vehicle Operator Vert performed welding duties on overtime instead of Claimants. In denying the claim, the Division Engineer stated "[i]t is always the practice to pay the employee working overtime at the rate of pay of the position he is working unless he is working a lesser paying position" and "[b]ased on this information, it does not make sense that these men were performing any type of welding work since they were paid at a lower rate." The Organization does not dispute or contest the Carrier's practice; the Board credits the practice. Work performed on the claim date was compensated in accordance with the practice, e.g., Employee Corley received overtime compensation at the appropriate rate of pay in exchange for performing foreman duties and Employee Vert received overtime compensation at the appropriate rate of pay in exchange for performing vehicle operator duties.

Employee Corley's statement dated July 2, 2013 is considered in the context of Third Division Award 35600. The statement was presented to the Carrier for the first time in a post-conference letter dated July 9, 2013. When the claim was initially presented, subsequently appealed and placed in conference thereafter, the Organization did not allude to or otherwise notify the Carrier that any statement was forthcoming even though the on-property exchanges pointedly focused on welding work and who


performed it. The statement is a defining piece of evidence critical to the Organization meeting its burden of proof to establish facts showing the alleged rules violations.

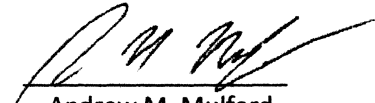
The Board finds that the statement's debut after on-property exchanges and conference invites strict questions about its probative value as there is no indication the statement will be presented for inclusion in the record. Aside from probative concerns associated with the statement's late arrival, Employee Corley writes that he performed welding work on the claim date but he does not address receiving less compensation than warranted for such work under the Carrier's practice. The statement is non-responsive to the pivotal defense in the claim denial. Probative concerns and a non-response do not offset the Carrier's practice which establishes that the appropriate rate of pay was provided for the work performed on August 24, 2012. That is, Employee Corley performed foreman duties and Employee Vert performed vehicle operator duties. Since there is insufficient evidence to find that the claimed work was performed as alleged, the claim will be denied.

Award

Claim denied.

  
Patrick Halter  
Neutral Member

  
Rob Miller  
Carrier Member

  
Andrew M. Mulford  
Organization Member

Signed on this 26<sup>th</sup> day  
of January, 2016