

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7163

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| Brotherhood of Maintenance of Way |) | |
| |) | |
| Employees Division, IBT Rail Conference |) | Case No. 307 |
| |) | Award No. 307 |
| and |) | |
| |) | |
| CSX Transportation, Inc. |) | |

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when, on May 17 and 18, 2014, the Carrier offered preference to and assigned employees J. Johnston and J. Mellotte to perform overtime welding work at Mile Post BAA 18.0 on the Baltimore Service Lane Work Territory instead of assigning senior welders S. Piunti and R. Campbell thereto (System File A02407314/2014-170293 CSX).

2. As a consequence of the violation referred to in Part 1 above,

Claimants S. Piunti and R. Campbell shall ‘...now be compensated for

twenty (20) hours each, at their respective overtime rates of pay. Also,

that all time be credited towards vacation and retirement. ***'

(Employees Exhibit 'A-1')."

FINDINGS:

The Organization alleges that the Carrier assigned Junior employees to perform overtime welding work instead of assigning the Claimant's, that this mis-assignment was in violation of the Scope Rule in the Controlling Agreement. The Organization notes the Carrier does not dispute that the work was performed by Junior employees. The Organization's request for records to resolve the matter was not acted upon by the Carrier. The claim should be sustained in its entirety.

The Carrier responds that the Organization has failed to show that the Carrier violated any rules or agreements. That the language in Rule 17, Section 2 mobile gangs is controlling in this case. The Organization has not fulfilled its burden of proof. The claim should be denied.

The Board has carefully reviewed the record before us and finds no fatal procedural errors. The Board is puzzled regarding the request for records not being acted upon. This possibly could have immediately resolved this issue. With that said, based on the record before us the Organization has not, to the satisfaction of this Board, met their burden of proof. The claim will be denied.

AWARD:

Claim denied.

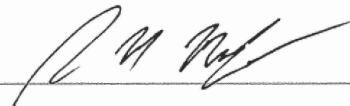


Don A. Hampton

Neutral Chairman and Referee



Katrina Donovan
Carrier Member



Andrew M. Mulford
Employee Member

****Written Dissent to Follow**

DATED: July 13, 2018

LABOR MEMBER'S DISSENT
TO
AWARD 307 OF PUBLIC LAW BOARD NO. 7163
(Referee Don Hampton)

The Majority seriously erred when it denied the claim on the basis of the Organization allegedly failing to meet its burden of proof. In doing so the Majority's decision is clearly palpably erroneous and worthy of no positive deference or citation.

In Award 307, the Majority reasoned:

“*** The Board is puzzled regarding the request for records not being acted upon. This possibly could have immediately resolved this issue. With that said, based on the record before us the Organization has not, to the satisfaction of this Board, met their burden of proof. The claim will be denied.”

As referenced above, during the on-property handling of the dispute the Organization requested that the Carrier provide records to support its affirmative defense that the junior employees assigned to the claimed against overtime were merely working in continuation of their assignment. The fact that the Organization requested this information is undisputable, with the Majority stating earlier in Award 307 that:

“The Organization alleges that the Carrier assigned Junior employees to perform overtime welding work instead of assigning the Claimant's, that this misassignment was in violation of the Scope Rule in the Controlling Agreement. The Organization notes the Carrier does not dispute that the work was performed by the Junior employees. The Organization's request for records to resolve the matter was not acted upon by the Carrier. ***”

It is a longstanding and widely accepted Section 3 arbitral notion that the failure to provide evidence to support an assertion (especially when challenged) is fatal. Attention on this point is directed to National Railroad Adjustment Board Third Division Award 36959 (CSX), which states:

“A Carrier cannot refuse requests for information from an Organization which information forms the basis of the Carrier's defense to a claim and then take the position that the Organization has not carried its burden. That is precisely what happened here. Under the Scope Rule, the type of work involved falls ‘... within the scope of this Agreement’ and, if in the Carrier's control, requires the Carrier to give advance notice to the Organization of its ‘plans to contract out [such] work....’ The Carrier's defense to the subcontracting claim is that the location where the disputed work was performed was previously leased to NYRTA and therefore the

work was not within its control or for its benefit. On the property, the Organization repeatedly requested that the Carrier provide a copy of the Agreement between the Carrier and NYRTA. **However, on the property, the Carrier did not comply with that request, but took the position as stated in its June 8, 1999 letter that '[t]he Organization has not carried its burden of proving that a violation of the BMW Scope occurred on the above dates.'** The Carrier cannot take the position that information exists which is in its control; and assert that information disposes of the claim; refuse to produce that information after requested to do so; and then take the position that the Organization has not carried its burden." (Emphasis in underscoring in original)

As set forth above, when the Carrier responded to the claim at issue in Award 307 by asserting that the junior employees performed the overtime work merely in continuation of their week's assignment *and* the Organization requested evidence to support this assertion the burden shifted back to the Carrier to produce evidence to support its position. The Carrier's failure to produce the evidence (especially in light of the fact that the Organization requested the information) dictates that the Carrier cannot defend that the Organization failed to meet its burden of proof under the so-called adverse (or negative) inference principle.

An additional issue further reinforces the palpably erroneous nature of Award 307. When the Organization requested the information during the on-property handling, it also staked its request upon Rule 24(i). For reference, Rule 24(i) states:

"RULE 24 - CLAIMS AND GRIEVANCES

* * *

(i) It is understood the duly accredited Organization representative, upon request, will be permitted to review relevant management records for the purposes of researching issues related to enforcing the collective bargaining agreement. The following includes claims, appeals, hearing/investigation records, statements, and safety records."

As cited above, the Organization exercised *its contractual right*, upon request, to access to and review Carrier records regarding what work the junior employees actually performed on the work in question. As such, regardless of the adverse inference principle discussed above, the Carrier was in violation of the clear terms of the Agreement in this case when it failed to provide the requested records.

Labor Member's Dissent to
Award 307 of PLB No. 7163

Accordingly, the Majority's decision is palpably erroneous. For this reason, I strongly dissent to the Majority's findings in this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. M. Mulford", written in a cursive style.

Andrew M. Mulford

Labor Member

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