

**PUBLIC LAW BOARD NO. 7163
CASE No. 344**

**BMWE FILE No. I58703916
LCAT No. 2016-207282**

Brotherhood of Maintenance of Way Employees Division)	
Of the International Brotherhood of Teamsters)	
)	
Vs.)	Parties to Dispute
)	
CSX Transportation, Inc.)	

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement when, commencing on May 2, 2016 and continuing, the Carrier assigned junior employees J. Bell, T. Smith and A. Essary to flag for contractor forces working at Mile Post 00F324.5 on the Nashville, Division (System File I58703916/2016-207282 CSX).**

- 2. As a consequence of the violation referred to in Part (1) above, Claimants C. Rose and J. Kail shall ‘... be paid an equal share of all hours (straight and overtime) made by the junior employees, beginning on May 2, 2016, and continuing until the violation stops, at the respective straight and overtime rates of pay. Also, this position should be advertised in accordance with Rule 3, Section 3, of the June 1, 1999, Agreement.’ (Employees’ Exhibit ‘A-1’).”**

FINDINGS:

The Board, upon the whole record and all the evidence, finds that the Carrier or carriers and the Employee or Employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. The Board has jurisdiction over the dispute involved herein. The Parties to said dispute were given due notice of hearing.

The Claimants were regularly assigned to positions on the Nashville Division, and held seniority in various classification including assistant foreman. The Claimants were fully qualified to perform assistant foreman flagging duties, and maintained seniority over the employees claimed against. Commencing on May 3, 2016 and continuing, the Carrier required assistant-foreman services at or near Mile Post

00F324.5 on the Nashville Division. The Carrier created an unadvertised temporary vacancy, and utilized the services of only the employees claimed against.

On June 14, 2016, the Organization filed this claim on behalf of the Claimant. The Carrier denied the claim by letter dated August 11, 2016. The Organization requested the appeal to be listed for conference by letter dated August 18, 2016. After the conference was held on August 22, 2017, the Highest Designated Officer denied the appeal on October 21, 2017, and the Organization responded on February 19, 2018. After on-property handling between the parties, the case was mutually listed on PLB 7163 for review.

The Board has reviewed the record developed by the parties during their handling of the claim on the property, and considered evidence related to the following to make its determination of this claim:

- 1) Did the Claimant establish by substantial evidence that the Carrier violated the controlling agreement?
- 2) If so, what should the remedy be in the case?

PERTINENT PROVISIONS OF THE AGREEMENT

The pertinent provisions governing this dispute are Rule 1, Rule 3, Section 4, Rule 4, and Rule 17 of the Agreement Between CSX Transportation, Inc, and its Maintenance of Way Employees, represented by the Brotherhood of Maintenance of Way Employees, effective June 1, 1999.

MOA 1, Section 8

MOA 3

POSITION OF ORGANIZATION:

- 1) The Organization contends that the Carrier failed to properly offer preference for the temporary assistant foreman-flagman vacancy.
- 2) The Organization asserts that the Carrier violated the Agreement when it failed to advertise the position within at least twenty (20) days of the vacancy. The Organization maintains that since the Carrier did not advertise the position, the Carrier was in violation of the Agreement.

- 3) The Organization further contends that it has satisfied its burden of proof that the Carrier failed to bulletin this position within the time limits of the Agreement.
- 4) The Organization contends that the remedy requested is appropriate and proper. The Organization argues that the Claimant was deprived of work opportunities and the monetary benefits associated therewith. It is a well-established principle that the proper rates of pay for lost work opportunity are the rates the employees would have received absent the violation of the agreement. The Organization maintains that arbitral precedent supports a sustained claim.
- 5) It is the position of the Organization that the claim be sustained as submitted.

POSITION OF CARRIER:

- 1) The Carrier contends that the claim is vague and there is insufficient information to establish a prima facie case. The claim does not describe the alleged work as flagging or track protection, or the dates, hours or location. The Organization maintains a valid claim must be presented or the claim should be dismissed.
- 2) The Carrier further contends that the Organization failed to prove a violation of any rule or Agreement. The Carrier argues that the Organization must demonstrate the work had the potential to undermine the integrity of the roadbed or track structure. Mere assertions are not evidence. The Organization must also demonstrate that the Claimant is senior, qualified, and available. The Carrier maintains that the Organization has not met its burden of proof.
- 3) Moreover, the Carrier contends that the company established that the claimed against employees have not performed the work at issue.
- 4) Lastly, the Carrier contends that the Organization failed to present evidence on remedy. The Organization presented no evidence to prove the Claimant would have performed the work, worked on an overtime basis, or that the Claimant suffered any missed work opportunity. Notwithstanding, the Carrier maintains no remedy is warranted in this case because there was no violation.
- 5) It is the position of the Carrier that the Organization has failed to meet its burden of proof. This claim should be denied in its entirety.

The Organization alleged that the vacancy started May 2, 2016 and continuing. The Carrier submitted payroll verification only for May 2nd to show that the employees claimed against were not assigned as alleged. However, the Carrier did not refute the continuing nature of the allegation. The Board finds that a vacancy existed. The Claimants requested the assignment and were denied.

The written statement of the Claimants indicate that the job exceeded thirty days; this sufficiently refuted the Carrier's stance. Rule 3 Section 4 of the June 1, 1999, Agreement states that "a position or vacancy may be filled temporarily pending assignment. When new positions or vacancies occur, the senior qualified available employees will be given preference, whether working in a lower rated position or in the same grade or class pending advertisement and award..." The Board finds that the Carrier failed to properly bulletin the vacancy in accordance with Rule 3 Section 4, and denied the Claimants their right to bid upon the vacancy.


Due to the contractual violation, the Carrier shall compensate the Claimants the difference between what they earned and the earnings of any junior employee who performed the work on the un-bulletined vacancy subsequent to the 20th day following the abolishment of the vacancy.

AWARD


Claim sustained in accordance with these findings.

ORDER

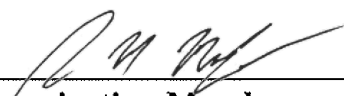
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimants be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Meeta A. Bass, Neutral Member



Carrier Member
Dated: 5/21/19



Organization Member
Dated 5/21/19