

**PUBLIC LAW BOARD NO. 7163
CASE No. 350**

**BMW FILE No. B14186316
LCAT No. 2016-211460**

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 August 1, 2016 and continuing, the Carrier assigned employee B. Johnston to a temporary vacancy which continued in existence for a significant period of time and failed to advertise such position (System File B14186316/2016-211460 CSX).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant R. Powers shall be ‘... allowed eight (sic) (10) hour straight time and all over time made by the junior employee and continuous until the violation stops please advise of the pay period when said payment will be made.’ (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 thereon.

The Claimant is regularly assigned to the B&B mechanic team 6J73 on the Atlanta/Waycross Seniority District of the Jacksonville Division. The Organization alleged that from August 1, 2016 and continuing, the Carrier assigned a B&B Department Operator to work a temporary vacancy, and the Carrier failed to advertise the position. The Organization further alleged that the Claimant was regularly assigned as a B&B Department Mechanic on team 6J73, and the Carrier

assigned the employee claimed against to work the Machine Operator position on the same team. Claimant requested the work and was denied.

On September 26, 2016, the Organization filed this claim on behalf of the Claimant. The Carrier denied the claim on November 23, 2016. The Organization requested the appeal to be listed for conference by letter dated December 27, 2016. After said conference of August 23, 2017, the Carrier denied the appeal on October 22, 2017, and the Organization responded on April 23, 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 is Rule 3 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 effective May 23, 2007

POSITION OF ORGANIZATION:

- 1) The Organization contends that the Carrier improperly assigned the employee claimed against to fill a B&B machine operator vacancy with B&B 6J73 starting August 1, 2016 and continuing. The Organization asserts that the Carrier violated the Agreement when it failed to advertise the B & B Machine Operator 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.
- 2) 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.

- 3) 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 there is arbitral precedent that supports a sustained claim.
- 4) It is the position of the Organization that the claim be sustained as submitted.

POSITION OF CARRIER:

- 1) The Carrier contends that the Organization failed to show a violation of any rule of the Agreement. The Carrier argues that the claimed against employee never worked on team 6J73 as confirmed by payroll records and the Machine Operator position on 6J73 was worked by the incumbent since July 8, 2016. The Carrier maintains there was no vacancy.
- 2) The Carrier further contends that the Organization failed to show that the Claimant was senior, qualified on the area of track, and available. The 6J73 B&B Machine Operator position requires a CDL which the Claimant does not own. The Claimant was not qualified. The Carrier maintains that no violation existed when Rule 3 requires an employee to be senior, qualified, and available.
- 3) Moreover, the Carrier contends that the Organization failed to present evidence on remedy. The Organization presented no evidence to prove that 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.
- 4) 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.

After a careful review of the record, the Board finds that the Carrier did not advertise the position in accordance with Rule 3 (a) which requires that all positions and vacancies after twenty (20) days of the occurrence be advertised. The Carrier's response, dated November 23, 2016, indicated that the 6J73 Machine Operator had been filled by the incumbent on July 8, 2016. As such, there was no vacancy to advertise. The Organization then requested a copy of the advertisement, and as of April 12, 2018, the Carrier failed to provide a copy of the advertisement.

The Board then construes the fact in the light most favorable to the Organization, and finds there was no advertisement in violation of Rule 3(a).

Notwithstanding, Rule 3 requires an employee to be senior, qualified, and available. It is not disputed that the Claimant is the senior employee. However, the record establishes that the Claimant did not possess a commercial driver's license (CDL). Section 5 Failure to Qualify-Advertised position reads:

An employee failing to qualify for a position within thirty (30) days will not accrue seniority dating on the position for which he failed to qualify and will, within five (5) working days, return to his former position unless it has been abolished or fulfilled by a senior employee, in which event he may exercise seniority.

Further clarification relating to the lack of a CDL as a prerequisite is found in Side Letter 34. Side Letter 34 confirms that both parties recognized that it is a violation of federal regulation not to have a CDL for this position. Despite the possibility of a violation, the parties realized not everyone on the crew technically needed to possess the certification as long as their actual duties during this thirty (30) day grace period did not include driving. As such, the parties agreed that the requirement of a CDL as a prerequisite would be dependent on the nature of the job, and the lack of a CDL would not be mechanically applied to screen out an employee. The example provided in the letter is when there is no valid reason that every gang member possesses a CDL. Since the advertisement indicates that a CDL is a requirement, the Organization would carry the burden of proof. There was no evidence of record to establish that not holding a valid CDL at the time of the award could be stayed for the thirty (30) day grace period to allow the Claimant to obtain his CDL. Thus, the Board finds that the CDL is a mandatory prerequisite for this position, and the Claimant who did not possess a CDL was not qualified for the position.


Therefore, the Board finds that the Organization did not meet its burden of proof.

AWARD


Claim denied.

ORDER

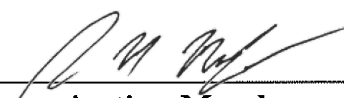
This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant not be made.



Meeta A. Bass, Neutral Member



Carrier Member
Dated: 5/21/19



Organization Member
Dated 5/21/19