AWARD NO. 452
Case No. 452

Organization File No. N76702218
Carrier File No. 18-85687

PUBLIC LAW BOARD NO. 7163

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,
) INTERNATIONAL BROTHERHOOD OF TEAMSTERS
TO)
)
DISPUTE) CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when, beginning on March 19, 2018 to and including March 29, 2018, the Carrier assigned B&B employes A. McMilin, J. Staggs, T. Dawson, J. Sharp and T. Hall to load and dump ballast between Mile Posts 00F324.4 and 326.0, Stanton, Tennessee, on the Nashville Division (System File N76702218/18-85687 CSX).

2. As a consequence of the violation referred to in Part 1 above, Claimants T. McCord, C. Rose and L. Banks shall now be '... allowed an equal share of the total hours worked by the B&B gang, at their respective straight and overtime rates of pay.' (Employes' Exhibit 'A-1')."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 20, 2008, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

The salient facts in this case are not in dispute. Between March 19 and 29, 2018, a bridge project was being conducted at Stanton, Tennessee. In connection with this project, bridge workers who are under the B&B Department dumped ballast, which the Organization argues is work reserved

to Track Department employees. In support of its position, the Organization distinguishes the primary duties of B&B Mechanics from those of Trackmen. Under Rule 1 of the Agreement, the primary duties of the B&B Mechanics are to "Construct, repair and maintain bridges, buildings and other structures," while Trackmen "Construct, maintain, repair, inspect and dismantle track and appurtenances thereto."

In Third Division Award No. 37319, involving these parties, the Board, with Referee Ann Kenis, held:

> The June 1, 1999 Agreement was negotiated by the parties following the Carrier's acquisition of portions of Conrail. Although the 1999 Agreement includes a Welding Department as one of the seniority classes listed in Rule 1, it must be noted that Rule 1 refers to the "primary duties," not the exclusive duties, of each classification. Had the parties intended to secure work exclusively for the Welder classification, or for any other classification, they would necessarily have had to expressly state their intent.
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> Notwithstanding the negotiated language providing for a Welding Department, the reference to "primary duties" in the first sentence of Rule 1 suggests that there is some latitude among classifications that allows employees in one classification to perform work of another classification. Absent evidence that the disputed work was intended to be performed only by Welders based on clear contract language or past practice, the Organization's reliance on Rule 1 is not sufficient to meet its evidentiary burden.

Award No. 37319 was issued on December 21, 2004 and should be binding upon any subsequent questions of this nature under the principle of *stare decisis*. In this Award, the Board reaffirms the decision.

There is a long history of arbitral decisions in this industry addressing scope rule disputes. In the absence of specific contractual language giving one class of employees the exclusive right to perform certain work, these decisions have required the Organization to establish that there has been a recognized system-wide past practice of exclusivity. In the instant case, the only evidence proffered by the Organization is a statement from the three Claimants and two retired employees to

the effect that Track Department employees have always unloaded ballast and that B&B employees had not. It may be that this was the experience of these five employees, but this evidence does not meet the requirement to show a system-wide practice of exclusivity.

Based upon the evidence before it, the Board cannot find that the Carrier's use of B&B employees to perform this work was in violation of the Agreement.

AWARD: Claim denied.

Barry E. Simon
Chairman and Neutral Member

David M. Pascarella
Employee Member

John Nilon
Carrier Member

Dated: 8/9/21
Arlington Heights, Illinois

EMPLOYE MEMBER'S DISSENT

TO

AWARD 452 OF PUBLIC LAW BOARD NO. 7163
(Referee Barry Simon)

The Majority seriously erred when it determined that the Carrier's assignment of B&B forces to perform Track Department work loading and dumping ballast did not violate the Agreement. As the violation is clear, a dissent is required for this palpably erroneous award.

Award 151 of Special Board of Adjustment (SBA) No. 1110 (CSX) reviewed the meaning of Rule 1 and confirmed that the Carrier is not permitted to assign employes from one classification to perform the work of another - which is exactly what occurred here. The record contains only evidence; i.e., five (5) employe statements, strongly showing that the practice on the property, for at least many decades and thus predating the Agreement even, has been for only Track Department employes to load and dump ballast, even when such work with ballast is done on or in connection with bridges. Based on this alone, it should have been crystal clear that the Carrier's assignment of B&B employes to perform work reserved to Track Department employes constituted a violation of the clear language of Rule 1.

However, the Majority erred when it held that the five (5) employe statements provided by the Organization did not meet the requirement to show a system-wide practice of exclusivity. Furthermore, the Majority failed to state exactly how many employe statements would establish a system-wide practice of exclusivity. In this connection, we find that the Majority's decision is in complete contrast to the findings of recent National Railroad Adjustment Board (NRAB) Third Division Award 44041, which held:

> "The Organization contends that the Scope Rule plainly and unambiguously states that *all* work in connection with the construction, maintenance, repair, inspection or dismantling of Carrier buildings, bridges, tracks, right of way, etc. shall be performed by members of the Maintenance of Way Department. Further, the Organization contends that the subject work has been historically and customarily performed by members of the B&B Department and thus should have been offered to them pursuant to Rule 17. The Organization contends that these assertions were unrefuted on property.
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> The Carrier contends that the Claimants' statements regarding who historically performed the work in question are self-serving. The two statements do not demonstrate system practice or the exclusion of other subgroups of the BMWE performing the work in question. Further, it is not within the Board's scope of review to make determinations on credibility or conflicts of fact.
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> * * *

"With respect to the merits of the claim, there is no dispute that the Claimants are senior to the Trackmen who were assigned the disputed overtime. The Carrier contends that this work was not reserved to the B&B Department under the Agreement, but it concedes that the work can be within the BMWE scope. There is no factual challenge on the record that the work has ordinarily and customarily been performed by B&B carpenters. In such case, the Organization argues that as the senior employes in the required job class, the Claimants were entitled to perform the work.

The Claimants were undisputedly senior to the Trackmen who were afforded the opportunity. The assertion that this work is ordinarily and customarily performed by the Claimants is unrefuted on this record. Therefore, Rule 17 governs the distribution of overtime and the Claimants had seniority over the employes who were offered the work. The Claimants are entitled to the requested remedy.

AWARD

Claim sustained." (Emphasis in original)

For these reasons, I must dissent and consider that the award is clearly erroneous and should not be granted any deference or precedential or persuasive value, going forward.

Respectfully submitted,

David M. Pascarella

David M. Pascarella
Employe Member