

AWARD NO. 494
Case No. 494

Carrier File: 19-15057
BMWE File: 2019-22

PUBLIC LAW BOARD NO. 7163

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,
) IBT RAIL CONFERENCE
TO)
)
DISPUTE) CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when, on July 1, 2019 and continuing through July 19, 2019, the Carrier assigned Track Inspector P. Metcalf to fill a vacant temporary assistant foreman-flagman position and provide flagging protection between Mile Post Z 138.0 and Mile Post Z 94.7 on the Kingsport Subdivision (System File 2019-22/19-15057 CSX).

2. As a consequence of the violation referred to in Part 1 above, Claimant A. Jones shall now be compensated for ‘... (140) hours at his respective straight time rate of pay, (82) hours at his respective overtime rate of pay, and (5.5) hours at his respective double time rate of pay. ***’ (Employees’ 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.

It is undisputed that beginning on July 1, 2019 and continuing through July 19, 2019, the Carrier required Assistant Foreman-flagging work between Mile Post Z 138.0 and Mile Post Z

94.7 of the Kingsport Subdivision. It is also not disputed that the Carrier created a temporary vacancy for the performance of this work.

The Organization argues that the Carrier violated the parties' agreement by assigning the work to Track Inspector P. Metcalf rather than to Claimant, A. Jones, who established and held seniority in various classifications in the Carrier's Maintenance of Way Department, including Assistant Foreman. The parties apparently do not dispute that Claimant had greater seniority than Mr. Metcalf.

Before this Board, the parties disagree as to the actual issue governing whether Claimant was entitled to the disputed work. The Organization states that the Carrier allowed Mr. Metcalf to "step down" and fill the temporary vacancy even though his regular Track Inspector position carried a higher rate of pay and higher classification than the temporary flagging vacancy he was assigned to fill, and that this was a specific violation of the parties' May 9, 2007 Memorandum of Agreement (MOU).

The controlling MOU language provides:

Rule 3 Selection of Positions.

Section 4. Filling temporary vacancies

- (a) 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 (emphasis added).

MOU Question and Answer 26 explain:

Section 8. Flagging Work.

Question: May an employee step down in class to take a temporary flagging position?

Answer: No.

The Carrier asserts that the issue raised by the Organization on the property was instead whether it was required to assign the work to Claimant because of his greater seniority than Mr. Metcalf. The Carrier states that Rule 3, Section 4 of the MOU grants the senior employee a preference, not an entitlement, to such work, and according to on-property precedent, see PLB 7163, Case No. 54, the Carrier may assign the work to the most senior employee who *requests* the work. On the property, the parties disputed whether Claimant had actually requested the work.

Our review of the on-property record shows, contrary to the position taken by the Carrier, that the Organization in fact raised the argument that it should prevail because the contract prohibited Mr. Metcalf, as a higher-rated employee, from being assigned the work. In the initial claim, filed on August 5, 2019, the Organization stated, in relevant part:

Claimant had a demand right to all hours worked by Mr. Metcalf **due to Mr. Metcalf's regular assignment paying a greater rate than that of an Assistant Foreman-Flagman**. Claimant, on the other hand, makes the same rate of an Assistant Foreman-Flagman and should have been offered the opportunity for this work (emphasis added).

The Organization expanded upon this position in an October 21, 2019 post conference letter, in which it specifically cited Question and Answer 26.

The Carrier has not disputed the Organization's claims that Mr. Metcalf occupied a higher-rated position than the flagging assignment at issue, and that Claimant was the senior employee who did not. The Carrier has, therefore, failed to effectively rebut the Organization's contentions that Mr. Metcalf was not eligible to fill the assignment and the work should have been awarded to Claimant.

AWARD

Claim sustained. The Carrier will make Claimant whole for his losses suffered as a result of the Carrier's failure to assign him, from July 1, 2019 and continuing through July 19, 2019, a vacant temporary assistant foreman-flagman position between Mile Post Z 138.0 and Mile Post Z 94.7 on the Kingsport Subdivision. The Carrier will comply with this Award within 45 days.



Jacalyn J. Zimmerman
Neutral Member



Ross Glorioso
Organization Member



John Nilon
Carrier Member

Dated: 3/14/2023

**CARRIER MEMBER'S
DISSENT
To
PLB 7163 AWARD No. 494**

Brotherhood of Maintenance of Way Employees & CSX Transportation, Inc.

(Referee J.J. Zimmerman)

A review of the Award issued by the Board indicates, without doubt, the Board erred in its decision when it asserted, incorrectly, that there was a violation of Agreement Rule 3-Selection of Positions Section 4 (a) and (f), when the Carrier filled a temporary vacancy for an assistant foreman-flagman with a Track Inspector who stepped down to the lower rated position for the dates indicated in the claim.

With incorporation by reference to the Carrier submission in the case, it must be noted Claimant, notably, was working on a different Roadmaster's territory on the claim dates and never requested the opportunity to fill the vacancy. As such, preference to fill the temporary flagging vacancy was given to the employees working on the Roadmaster's territory at the time of the vacancy. Had the claimant wanted to work the vacancy, he could have notified the Roadmaster or exercised his seniority over the junior employee filling the vacancy. The Carrier is not obligated to call and offer the work to employees working at different locations on different subdivisions.

Rule 3, Section 4 provides:

Section 4. Filling temporary vacancies

- (a) 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. When furloughed employees are to be used to fill positions under this Section, the senior qualified furloughed employees in the seniority district shall be offered the opportunity to return to service. Such employees who return and are not awarded a position or assigned to another vacancy shall return to furlough status.*
- (b) An employee so assigned may be displaced by a senior qualified employee working in a lower rated position or in the same grade or class, provided displacement is made prior to the starting time of the assigned tour of duty, by notice to the foreman or other officer in charge.*
- (c) Employees temporarily assigned in accordance with the foregoing will be governed by the starting time, headquarters, tour of duty and rate of pay of the position so filled. The provisions of this paragraph (c) apply only when positions are filled by the Company in accordance with paragraph (a) of this Rule, and when an employee in the exercise of seniority displaces a junior employee. The provisions of this paragraph (c) do not apply to employees assigned by the company to fill vacancies or new positions pending advertisement after they have expressed a desire not to be assigned.*

The position of the Carrier was based on PLB 7163 Award 54 (Simon), which established that the

Carrier is not required to offer the vacancy to all qualified employees, but can use rational basis to offer the assignment to those working on a particular territory:

“...Although the Organization cites Rule 17 - Preference for Overtime Work, which requires the Carrier to offer work to employees in seniority order, we do not find this provision to be applicable. While there was an overtime component to the assignment, it would properly be worked by the employee holding the assignment. The question of who that employee is must be resolved by Section 4 of Rule 3, which governs filling temporary vacancies.

The provision is not specific as to whether the work must be offered to the senior employee or given to the senior employee who requests it. We note, however, that the parties specifically provided for offering the work in Rule 17, but did not in Section 4 of Rule 3. Rather, the provision merely states that “the senior qualified available employees will be given preference.” In the case of furloughed employees, the provision goes on to require the Carrier to offer the senior employees the opportunity to return to work. We find the absence of the requirement to offer the work to active employees to be significant. To place that requirement into the rule, where the parties could have done so if that was their intent, would effectively amend the Agreement. This Board does not have the power to do so.”

Such is the case here and the Carrier is under no obligation to call and offer the Claimant the work in question. The Organization has failed to prove that the claimant requested the opportunity to fill the vacancy or that the claimant was denied the opportunity to “bump” the junior employee filling the vacancy on his assigned territory.

Turning this in application to the instant case, the Carrier offered the work opportunity to those employees qualified and currently assigned to the assignment. None of the employees in Claimant’s similarly rated position expressed interest in filling the vacancy, resulting in the Carrier offering it to a qualified employee currently bid to a track inspector, or higher rated position. Faced with no takers, the Carrier is faced with a decision to either (a) not fill the assignment, or (b) expand the range of who will be offered the assignment-bearing in mind this is a temporary vacancy (and is in contrast to what is required as interpreted in Award No. 54 and Award No. 120), or (c) ordering an employee who refused the assignment to fill the vacancy, or (d) allowing a higher-rated position employee step down and fill the assignment-which was the course of action here.

Claimant never requested to fill the vacancy, and, based upon long-standing practice, the Carrier utilized the only employee who expressed interest **and** was on the assignment, albeit on a higher-rated position. A plain language reading of the Agreement and Q & A in relation to past-practice would produce a declination of the instant claim which would be consistent with previous awards on this Board.

The Board is limited to determine the issues authorized by the RLA, including the requirement that established a violation of the Agreement actually occurred, which the Carrier maintains the Organization has failed to do. As the Board has clearly erred in its analysis and conclusion, the Carrier dissents and asserts this Award should carry no weight in future disputes of like kind.

For these reasons, the Carrier Member respectfully DISSENTS with the Neutral’s Award.



Eric Caruth

Director Labor Relations

Carrier Member