

PUBLIC LAW BOARD NO. 7163

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES
DIVISION - IBT RAIL CONFERENCE**

vs.

**NMB Case No. 512
Award No. 512
Organization No. FLO503719
Carrier No. 19-49593**

CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM

“Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when, between April 6, 2019 and April 19, 2019, the Carrier failed to offer and assign employee A. Boyd to fill a temporary Bridge and Building (B&B) assistant foreman flagman vacancy and perform fire watch duties in a water truck following behind a rail grinder on the Florence Division and instead assigned Foreman B. Canady thereto (System File FLO503719/19-49593 CSX).
2. As a consequence of the violation referred to in Part 1 above, Claimant A. Boyd shall ‘... now be compensated for all hours worked by the Foreman employee, differences in expense money, and all night time pay differential; while working with the rail grinder. Also, that all time be credited towards vacation and retirement. In accordance with Rule 24(f) when a claim for compensation is allowed, the employee and his union representation shall be advised, in writing, the amount and payroll involved. ***’ (Emphasis in original) (Employees’ Exhibit ‘A-1’).”

JURISDICTION

The Board upon consideration of the entire record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; that the parties were given due notice of hearing.

FINDINGS

The Organization contends that Rule 3 of the collective bargaining agreement (“Agreement”) was violated when, between April 6, 2019 and April 19, 2019, the Carrier failed to offer and assign A. Boyd (“Claimant”) to fill a temporary Bridge and Building (B&B) assistant foreman flagman vacancy and perform fire watch duties in a water truck following behind a rail grinder on the Florence Division. Instead, the Carrier assigned the work to Foreman B. Canady, which was a step down in pay. The Organization maintains the Carrier never informed Claimant that the temporary vacancy existed.

In reaching its decision the Board has considered the entire record and finds sufficient evidence to conclude the Carrier violated the Agreement. Rule 3, Section 4 (a) states, “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 Carrier contends the Claimant did not request to work the vacancy and that he was working on a different manager’s territory on the dates in question. Therefore, the work was properly assigned to Canady. This argument is rejected. The only way the Claimant would have known to request the position is if the Carrier had properly offered the vacancy to all qualified available employees. Rule 3 is reasonably interpreted to protect bargaining unit employees’ right to temporary assignments. To assign a foreman to the work without providing the covered employees with notice of the opportunity for the assignment, would seek to undermine the apparent intent of the negotiated language.

This conclusion is further supported by the language in the February 9, 2018 B&B Fire Watch Agreement which provides, in part, “The Carrier shall assign B&B Assistant Foreman Flagman to these temporary vacancies in accordance with Rule 3, Section 4, of the June 1, 1999 Agreement.” Moreover, MOA 1-Section 8 (Flagging Work) a A.2 states, “When flagging work is required in connection with B&B Department work or other work that holds the potential to undermine the integrity of structures such as bridges or buildings an Assistant Foreman-Flagman from the B&B Department shall be assigned in accordance with Rule 3, Section 3 or 4, as applicable.” All these agreements make it clear that the work at issue was intended to be assigned to the assistant foreman flagman, not the foreman. Nowhere in the Agreement does it require the Claimant to request the Carrier to assign work in connection with an unknown vacancy.

The record reflects that Claimant was assigned to the Service Lane Work Territory (“SLWT”) where the work took place. The Carrier offered the positions as SLWT, and

therefore, Claimant should have been offered and assigned the work. Accordingly, the Board will sustain the claim.

AWARD

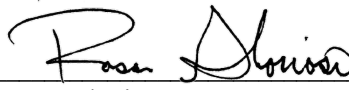
Claim sustained in accordance with the above Findings. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.



Jeanne Charles
Chairman and Neutral Member



John Nilon
Carrier Member
I dissent, see attached dissent



Ross Glorioso
Labor Member

Dated: 1-11-2023

CARRIER MEMBER'S DISSENT
TO
AWARD 512 OF PUBLIC LAW BOARD NO. 7163
(Referee Jeanne Charles)

The Carrier respectfully dissents to the Board's decision to sustain the claim. Factually, a BMW employee, B. Canady filled the temporary flagging vacancy in question instead of Claimant. It was also undisputed Claimant never requested to fill the vacancy. In the Claim the Organization argued the Carrier violated Rule 3, Section 4(a) of the Agreement because Claimant was not offered the temporary flagging vacancy. The Board sustained the claim holding the Carrier had an obligation to offer Claimant the vacancy, even when he did not request same. The Board's decision completely contradicts prior longstanding precedent on this property, which all held an employee must request the vacancy to be entitled to it, as the Carrier has no obligation under the rule to offer the vacancy to him. PLB 7163, Award 54 (Simon); NRAB Third Division, Award 43466 (Twomey); PLB 7163, Award 491 (Simon). Because the Board's decision is against all prior awards on this issue, it cannot be followed in the future, as outlined below, because it is palpable error.

Rule 3, section 4, states:

- (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.
- (f) **Vacancies which are not advertised may be filled in like manner.**

(Emphasis added).

It is undisputed the work at issue was a temporary flagging vacancy. It was also undisputed the controlling provision for assigning the work is Rule 3, Section 4, as the Carrier and Organization relied on the provision during the on property handling, in the submissions and during argument at Arbitration. The Board also cited to the provision in its ruling as the only authority to sustain the claim, as it did not cite to prior precedent to support its decision.

In their submission and during argument at Arbitration the Carrier argued it is not required to offer the vacancy to Claimant, instead Claimant must request the vacancy to receive same. PLB 7163, Award 54 (Simon); NRAB Third Division, Award 43466 (Twomey); PLB 7163, Award 491 (Simon). The Board rejected the Carrier's argument and held the Carrier is required to offer the vacancy to Claimant. However, the Agreement states, "the senior qualified employee is **given preference**." Prior awards interpreting this language have held the Carrier is only obligated to give a senior employee preference for the vacancy, while on the hand the employee is required to request the vacancy. PLB 7163, Award 54 (Simon); NRAB Third Division, Award 43466 (Twomey); PLB 7163, Award 491 (Simon).

Here, it is undisputed Claimant did not request the work as required. PLB 7163, Award 54 (Simon); NRAB Third Division, Award 43466 (Twomey); PLB 7163, Award 491 (Simon). Despite this undisputed fact, the Board held the Carrier had an obligation to offer the vacancy to Claimant, which is against the decisions in prior precedent on this property. PLB 7163, Award 54 (Simon); NRAB Third Division, Award 43466 (Twomey); PLB 7163, Award 491 (Simon). The Board's decision to require the Carrier to offer the work to Claimant adds language to the Agreement, which the Board has no authority to do. PLB 7163, Award 54 (Simon); NRAB Third Division, Award 43466 (Twomey); PLB 7163, Award 491 (Simon); NRAB Third Division, Award 28595 (Goldstein) (Dismissing claim and holding, "It is not within the power of the Board to rewrite Agreement Rules but merely to interpret them as they exist."). Therefore, the Carrier respectfully dissents to the Board's decision to sustain the claim as its decision is palpable error.

Regards,

A handwritten signature in blue ink, appearing to read "John Nilon", with a stylized flourish at the end.

John Nilon,
Carrier Member