

AWARD NO. 521

Case No. 521

Organization File No. 2019-23

Carrier File No. 19-61255

**PUBLIC LAW BOARD NO. 7163**

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

STATEMENT OF CLAIM:

1. The Agreement was violated when, between August 27, 2019 and September 10, 2019, the Carrier assigned Track Inspector P. Metcalf to fill a vacant temporary assistant foreman - flagman position and perform flagging protection between Mile Post Z 138.0 and Mile Post Z 111.1 on the Blue Ridge and KP Subdivision instead of Machine Operator T. Schmidt (System File 2019-23/19-61255 CSX).
2. As a consequence of the violation referred to in Part 1 above, Claimant T. Schmidt shall now be compensated for "... (300.5) hours straight time and (156.5) hour overtime at the respective straight time and overtime Assistant Foreman-Flagman rates of pay.\*\*\*\*"

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.

This claim has been presented on the basis that a temporary vacancy for an assistant foreman - flagman was filled by a Track Inspector who stepped down to the lower rated position during the

dates of claim. The Organization asserts that Claimant, a Machine Operator, was qualified and available to perform this work.

The relevant Agreement provision in this case is Rule 3 - Selection of Positions, reading, in pertinent part, as follows:

Section 1.       Assignment to position

In the assignment of employees to positions under this Agreement, seniority shall govern. The word "seniority" as used in this Rule means, first, seniority in the class in which the assignment is to be made, and thereafter, in the lower classes, respectively, in the same group in the order in which they appear on the seniority district roster. . . .

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.

\* \* \*


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


Also relevant to this dispute is Question and Answer No. 26 to the parties' August 23, 2007 Memorandum of Agreement concerning flagging work. In answer to the question "May an employee step down in class to take a temporary flagging position?" the parties answered "No, see Rule 3, Section 4(a) of the June 1, 1999 Agreement."

On the basis of this Question and Answer, the Board finds that it was a violation of the Agreement to allow a Track Inspector to work this lower rated position. If the Carrier had no other employees who had requested to work the vacancy, it had an obligation to offer the work to the senior qualified employee. In this case, it is evident that Claimant should have been offered the

vacancy. He is, therefore, entitled to the difference between what he would have earned on that assignment and what he actually earned on the dates of claim.

AWARD: Claim sustained in accordance with the above Findings. Carrier is directed to comply with this Award within forty-five days.

  
Barry E. Simon  
Chairman and Neutral Member

  
Ross Glorioso  
Employee Member

  
Eric Caruth  
Carrier Member  
I dissent

Dated: 9/29/22  
Arlington Heights, Illinois

**CARRIER MEMBER'S  
DISSENT  
To  
PLB 7163 AWARD No. 521**

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

**(Referee B.E. Simon)**

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.



Eric Caruth  
Carrier Member

November 4, 2022