AWARD NO. 522
Case No. 522

Organization File No. F42814018
Carrier File No. 18-16267

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:

1. The Agreement was violated when, beginning on June 15, 2018 and continuing, the Carrier improperly assigned Mr. H. Wright the duties of a trackman which were not associated with his bid-in job class in the Hamlet Track Panel Facility on the Florence Division (System File F42814018/18-16267 CSX).

2. As a consequence of the violation referred to in Part 1 above, Claimant H. Wright "... shall now be paid three-hundred dollars ($300) per week for every week he was assigned the duties of Trackman, until he is assigned the proper job class duties ***"

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 essential facts in this case are not in dispute. During the period of time covered by the claim, Claimant had bid on and was awarded a Machine Operator position at the Hamlet Track Panel Facility. He was, however, directed to perform Trackman duties at the Facility, and was compensated at the Machine Operator rate of pay. According to the Organization, this went on for several

months, continuing until August 8, 2018, when he was displaced. During this period, the Organization contends the only time Claimant performed Machine Operator duties was when he was filling in for another employee.

The Organization cites Rule 3, Section 3(h), which states:

> Except as otherwise provided in this Agreement, it is understood that an employee shall be assigned duties associated with the job class he was assigned by bulletin award.

The Carrier has explained that the Hamlet Track Panel Facility has its own unique seniority roster, and only the employees on that roster may bid on positions at the facility. It says there was a temporary vacancy for a Trackman, and there was no requirement that the vacancy be posted. Because Claimant continued to be compensated at the higher rate of pay, it submits he suffered no loss. It concludes that it had the right to assign these duties to Claimant and that Rule 19 recognizes that right by providing the appropriate rate of pay when it did so.

Rule 19 of the parties' Agreement states:

> An employee may be temporarily assigned to different classes of work within the range of his ability. In filling the position which pays a higher rate, he shall receive such rate for the time thus employed, except, if assigned for more than four (4) hours, he shall receive the higher rate for the entire tour. If assigned to a lower rated position, he will be paid the rate of his regular position.

The reason Claimant was worked as a Trackman is apparently explained in an email from Plant Manager Michael Small, wherein he wrote:

> Mr. Wright was awarded the Machine Operator A position, but it was posted in error. If I can remember correctly, LR wanted to send a letter saying that the bid was awarded in error, but the Union wanted the position to be abolished. Since the Hamlet Turnout Facility is a permanent catch and hold, I worked Mr. Wright in several positions until he was eventually rolled from that particular position.

> I do not have the details of what positions and or what days that he worked, but he was always paid the Machine Operator A rate. Even when he performed duties as a Trackman, Assistant Foreman and Machine Operator B.

The Organization notes that the Carrier could have utilized employees from outside of the Facility to perform Trackman work if there was a shortage of personnel. From the above email, that does not appear to have been the situation. The email suggests that Claimant was given those duties because there was no need for him as a Machine Operator.

While Rule 19 recognizes the Carrier's right to work an employee in a different class, the language used by the parties makes it clear this was intended for temporary assignments, which was not the case here. Rather, we find Rule 3, Section 3(h) to be the controlling provision in this case. When employees bid on positions, they should have the expectation that they will be performing the duties of that position. There are factors other than the rate of pay that come into play when employees decide to bid on particular positions. The Machine Operator rate of pay takes into consideration the skills and training that are required to perform the work. Trackman work, however, requires more physical labor, which is likely why Claimant was not satisfied with just the higher rate of pay. The additional pay did not make the work any less strenuous.

We find that the Agreement was violated when Claimant was consistently required to perform Trackman work despite his assignments as a Machine Operator. While a monetary remedy would be appropriate, we consider the remedy sought by the Organization to be excessive. Instead, we will direct that Claimant be compensated an additional $25.00 for each day he was required to perform Trackman duties for more than four hours.

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: 11/4/22
Arlington Heights, Illinois

CARRIER MEMBER'S
DISSENT
To
PLB 7163 AWARD No. 522

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 awarded Claimant a remedy, or penalty, not supported by any language of the Agreement. In the instant claim, which involves unique, or particularly specific elements, including the existence of a separate Agreement for the facility crafted by the parties to establish the parameters for this particular facility, there is no language which would provide a legitimate basis for the remedy imposed by the Board. For those reasons, the Carrier dissents.

As the record established, a Machine Operator 'A' position was posted in error for the Hamlet Track Panel Facility. In an effort to preserve the opportunity for Claimant to receive his bid-in position, the posting was not cancelled, and Claimant received the Machine Operator 'A' rate for the entire period of claim. As Claimant was available and qualified, he was utilized for a number of positions during the claim period including Machine Operator 'A', Machine Operator 'B', and Trackman. Without evidence in the record, there is nothing to support the assertion that Claimant performed trackman duties the majority of the claim period, and there is also no evidence to support the assertion by the Board that trackman duties are any more, or less, physically demanding that the other duties performed by Claimant. The Agreement pertaining to this facility limits the use of employees to those with seniority on the facility roster. Only when the Carrier determines a need exists to supplement the forces at the facility, will those not on the roster be offered an opportunity to perform service in the facility. The Agreement for the facility is mutually beneficial to both the employees and the Carrier, as it provides bid opportunities which may not otherwise be available to junior employees, and provides for a consistent work force in the facility to help ensure consistent quality control.

As the record in this matter established, Claimant was compensated at his bid-in rate, or in plain language-compensated at a rate in excess of the rate required for the services performed. The higher rate of compensation is of particular note, as the Carrier has already provided a 'penalty' or premium for directing Claimant to perform other than his bid-in job duties during the period of claim. The long-standing practice of making an employee whole for an alleged Agreement violation has been to pay the difference from what he was entitled to under the Agreement, and what he actually was paid. In this case, Claimant already received a penalty payment for the brief period when he performed service out of his bid-in position. There is no other remedy provided for in the Agreement, and no basis for the penalty imposed by the Board on the Carrier.

The Board is reminded that remedy is an essential element of a claim, which the Organization has failed to establish. See NRAB Third Division Award 37489 (Perkovich), which held:

> *There remains then the question of remedy. Because the instant claim alleges a violation of the parties' Agreement the Organization bears the burden of proof on all essential elements of the claim, including the remedy.*

At this late juncture, there has still been no evidence of a basis for any additional penalty payment as awarded by the Board. The Organization, and seemingly the Board, relied on the language from a

completely unrelated side agreement, which explicitly provided a remedy basis for a violation of the SPG Agreement, which is in no way applicable here. The Hamlet Track Panel facility is a unique arrangement between the parties-with its own Agreement, designed to maintain a consistent workforce with uniquely skilled employees.

Additionally, the Organization has failed to make any correlation between the damages incurred (which the Carrier maintains there were none), and the remedy sought. The Agreement makes no reference to remedy or penalty for an alleged breach of any of the rules cited in the Statement of Claim presented to the Board, and thus, the Board has no basis to award the penalty as it has. The sole remedy provided is contained in Rule 19, which has already been paid to Claimant, as he has been fully compensated at the higher rated position.

To require the Carrier to compensate Claimant the additional 'penalty' payment for the matter at issue would improperly rewrite the Agreement to include a penalty where one does not currently exist. Further, such penalties exceed the authority of the Board and set a dangerous precedent.

Of particular relevance is the language in NRAB Third Division Award 10963 (Dorsey):

> *The jurisdiction of the National Railroad Adjustment Board, insofar as here material, is limited to the interpretation or application of Agreements entered into by the parties through the process of collective bargaining. The Board may not add or subtract from the terms of such an Agreement. The words 'interpretation or application of agreements' are persuasively convincing that the law of contracts governs the Board's adjudication of a dispute. The law of contracts limits a monetary Award to proven damages actually incurred due to violation of the contract by one of the parties thereto. This is not to say that the contract by its terms may not provide for the payment of penalties upon the occurrence of specified contingencies; but, the contract now before us contains no such provision.*

The Board acted in direct opposition to the cited language above, and also:

> *We approve the reasoning set forth in Third Division Award No. 10963, and the Court decisions quoted in Carrier's submission,…In substance, the Award and the Courts state that damages and compensation, if any, must be the proven loss arising from violation of contract provisions or agreements.*
>
> *This Board has not the power to fashion remedies or to create sanctions other than as set forth in or flowing from the agreements of the parties. NRAB Second Division Award 6355 (Bergman).*

Finally, on this significant point, Neutral Norris stated:

> *It is well settled by controlling authority that this Board has no power to impose principles of 'equity' or 'justice.' Our responsibility and obligation is to interpret and apply the provisions of the Agreement between the parties as written. Nor are we clothed with any authority to rewrite the Agreement in favor of either side to the dispute*. NRAB Third Division Award 20844 (Norris).

With incorporation by reference to the Carrier submission in the case, it must be noted Claimant, notably, was fully employed and compensated at the rate for his bid-in position, even though he performed duties for the lower rated position. It is clear from the language of the Agreement that positions may be temporarily filled for periods of up to twenty days-and then must be posted, within another several days, yet that issue was not raised by the Organization.

Claimant suffered no loss of wages or compensation during the claim period, and was, in fact, compensated at his bid-in rate, effectively receiving a penalty payment. There was no evidence contained in the record to establish Carrier's utilization was deemed either wanton or willful misconduct, which are necessary elements for any sort of punitive monetary award outside of language contained in any Agreement between the parties.

The Board is limited to determine the issues authorized by the RLA, including the requirement that the Organization prove the remedy is contained in the language of the Agreement, 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