

PUBLIC LAW BOARD NO. 7104

BROTHERHOOD OF	)	
MAINTENANCE OF WAY EMPLOYEES	)	
DIVISION – IBT RAIL CONFERENCE	)	
	)	CASE NO. 7
vs.	)	AWARD NO. 7
	)	
CSX TRANSPORTATION, INC.	)	

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement when it failed to call and assign Mr. L.A. Mages to perform overtime service (operate stop board protection at CP Draw) in Buffalo, New York on July 30, 31, August 6, 7, 27, 28 and 29, 2001 and instead called and assigned junior employs T.M. Hull, R.C. Nesbitt and R.Y. Harbison (System File MASGESA.101).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant L.A. Mages shall now be compensated for seventy-nine (79) hours' pay at his respective time and one-half rate of pay.**

FINDINGS:

Public Law Board No. 7104, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

On September 13, 2001, the Organization presented a claim to the Carrier, seeking 79 hours' pay at time and one-half, contending that the Carrier had violated Scope Rules 1, 3, 4, 11, 17 and 29 of the parties' agreement when it used Welder T.M. Hull on July 22-26, 2001, Welder R.C. Nesbitt on July 30 and 31, and August 6, 7, 27, 28, 29, 2001, and R.Y. Harbison on August 26, 2001 to operate Rule 135 stopboard protection at CP Draw, Buffalo, New York, and failed to offer the work opportunity to Claimant, a senior employee. The claim stated that Claimant was entitled to the temporary work pursuant to Rules 3 and 17 of the parties' agreement.

The Carrier responded on November 9, 2001, stating that Claimant was an I/R Track Inspector, whose assigned duties included inspecting trackage and would not include performing Rule 135 stop board protection during his normal tour of duty. The response also stated that Messrs. Hull, Nesbitt and Harbison were not I/R Track Inspectors, were qualified to perform Rule 135 stop board protection activities, and had performed this function during their normal tours of duty in the past. The response also noted that Claimant was on vacation out of town, and thus unavailable, for the July 22, 2001 work opportunity, and that the August 26, 2001 claim was invalid, in that the work was afforded to Mr. Harbison, a senior foreman to the Claimant. The parties exchanged several other pieces of correspondence concerning these points, with the Organization pressing the claim and the Carrier denying it.

The Organization contends that, stripped to its essence, this case presents a simple seniority dispute. The Organization points out that there is no dispute the Carrier assigned employees junior to Claimant to work overtime, performing duties outside their regularly assigned hours, without attempting to secure Claimant's services to perform that work.

The Organization asserts that the relevant rules language requires a sustaining award. In particular, the Organization relies upon the following rules, which provide, in relevant part:

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.

Rule 17—Preference for Overtime Work

Section 1—Non-mobile gangs:

(a) When work is to be performed outside the normal tour of duty in continuation of the day's work, the senior employee in the required job class will be given preference for overtime work ordinarily and customarily performed by them. When work is to be performed outside the normal tour of duty that is not a continuation of the day's work, the senior

The Organization notes that Claimant was undisputedly qualified to perform Rule 135 stop board protection duties and available to do so on the dates referenced in the claim. Moreover, the Organization points out, the overtime in question was performed outside the employees' regularly assigned hours, was not in continuation of a day's work,

and was not performed in conjunction with any regular assignment, points, the Organization contends, the Carrier did not challenge in the on-property handling. It is clear, the Organization urges, that the applicable rules required the disputed temporary duties and related overtime to be assigned to Claimant.

The Organization urges this Board to reject the Carrier's assertion that Claimant took a vacation day on July 20, 2001 and was therefore unavailable for overtime worked by Mr. Hull on July 22, because, had he been offered the overtime, Claimant would not have taken a vacation day. As for the Carrier's contention that Claimant was not entitled to the work because he was working in a higher classification during the times at issue, the Organization notes that the employees who received the overtime were also working in higher classifications on the claim dates. The Organization concludes that the Carrier simply failed to assign the temporary duties based on seniority, and the claim must be sustained.

The Carrier first contends that the Organization has substantially altered the claim from the one presented on the property, in that it omits the originally claimed dates of July 22 through July 26, 2001, but requests the same compensation. The claim presented to the Board, the Carrier states, is not in compliance with Circular No. 1 because it is substantively different from the claim handled on the property, and the Railway Labor Act prohibits such amendments. Thus, the Carrier contends, the claims should be dismissed as substantively defective.

On the merits, the Carrier frames the issue as whether the provisions of the June 1, 1999 Agreement prohibit employees assigned to positions such as Welder, Welder Foreman and Track Inspector from performing flagging service, and whether the work belonged exclusively to Claimant by virtue of his assignment as Track Inspector and his seniority as a foreman. The Carrier first points out that the three employees performed the disputed work as part of their regular duties and any accumulated overtime they earned was by virtue of the continuation of the day's work. The Carrier contends that there was no vacancy, and the only work performed was an extension of their assigned work. In addition, the Carrier states, there is no evidence suggesting that Claimant ever performed flagging work.

Moreover, the Carrier states, there is nothing in the parties' 1999 Agreement which can be interpreted to restrict any Engineering Department employee from being assigned flagging work. Numerous awards, it points out, hold that flagging is not a position but a duty performed by numerous different positions. Moreover, the Carrier states, there was no evidence presented on the property to suggest that the work in dispute is exclusively reserved to any Engineering Department position or employee. Absent the specific mention of flagging work under the Agreement's provisions, it is a basic doctrine of contract interpretation, the Carrier states, that the Organization has the burden to prove a system-wide, exclusive right to such work by custom, tradition and practice.

The Board has carefully reviewed the record in its entirety, and concludes that record contains insufficient evidence to support the instant claim. In order to establish, as

the Organization contends, that this case represents a simple seniority dispute, the Organization must first demonstrate an exclusive reservation of this work to Claimant. None of the contract language cited by the Organization shows such a reservation. Moreover, there is no record evidence of a system-wide custom or practice whereby employees in Claimant's classification have performed this work to the exclusion of all other classifications. Thus, in accordance with numerous awards, including PLB 6564, Case No. 10, involving the instant parties, the claim must be denied.

AWARD

Claim denied.


JACALYN J. ZIMMERMAN
Neutral Member


MATTHEW BORZILLERI
Carrier Member

Dated this 10th day of October, 2008.


TIMOTHY KREKE
Organization Member

Oct. 10, 2008