

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD No. 7163**

Brotherhood of Maintenance of Way)		
Employees Division, IBT Rail Conference)		
)		
vs.)	Case No.	119
)	Award No.	119
)		
CSX Transportation, Inc.)		

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned junior employee D. Taylor instead of D. Frohnaphel to fill a temporary vacancy on Welder Team 5M71 working in the vicinity of Dothan, Alabama on the Jacksonville Seniority District beginning July 20, 2010 and continuing (System File B16134810/2010-073157).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Frohnaphel shall now be compensated at the respective and applicable rates of pay for all straight time, overtime and double time hours worked by junior employee D. Taylor on the aforesaid vacancy on Welder Team 5M71 beginning on July 20, 2010 and continuing.”

[BMWE Submission at 1]

Findings:

Public Law Board No. 7163, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employees within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute, and (3) the parties to the dispute were accorded due notice of the hearing and participated in this proceeding.

This claim was timely presented by the Organization and responded to by the Carrier at all stages of processing including conference. With the unresolved claim handled in the customary and usual manner, the record established by the parties is now before the Board for adjudication.

Claimant holds seniority in the Track and Welding Departments in the Jacksonville Division. In July 2010 he was assigned as Track Foreman on Gang 5M01 headquartered in Montgomery, Alabama. The claimed-against junior employee is a Welder Helper for the Welder on Gang 5M71 stationed near Dothan, Alabama. Claimant's Foreman job class is a lower-rated position than the Welder job class; however, based on seniority in the welder job class, Claimant is senior to the claimed-against junior employee.

Beginning on July 20, 2010 there was a temporary vacancy for the welder position on Gang 5M71. The Carrier filled the temporary vacancy with the junior employee which, BMW asserts, violates Claimant's seniority rights under Rule 1 - Seniority Classes, Rule 3 - Selection of Positions, Rule 4 - Seniority, Rule 11 - Overtime and Rule 17 - Preference for Overtime Work

because the Carrier "failed and refused to offer and/or give preference and assign the senior qualified available employee [Claimant] working in a lower rated position [Foreman]." [BMW Submission at 13]

According to the Carrier the Roadmaster informed Claimant that "he needed to show up and claim the position but...he never showed up in Dothan to claim the vacancy and I never denied him the position." [Carrier's Exh. F] The Carrier asserts it complied with Rules 1, 3, 4, 11 and 17 so it denied the claim.

On December 17, 2010 the Organization filed an appeal to the declination. BMW reiterates that the Claimant asked the Roadmaster to work this temporary vacant position but the Roadmaster refused. BMW disputes the veracity of the Roadmaster's statement and asserts that Claimant contacted the Roadmaster by telephone to confirm his availability.

Following conference on April 5, 2011, the Organization submitted a letter dated September 15, 2011 wherein it recounts the on-property exchange. The Board finds that BMW's letter does not identify or reference as part of the on-property exchange Claimant's statement dated January 8, 2011. [Employees' Exhibit A-4, Atch. 1] Even if the Claimant's letter was exchanged on property it addresses only Claimant's willingness to obtain witness statements "if more proof is needed[.]"

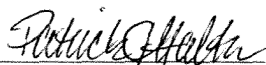
In brief the Board is confronted with competing assertions from the parties. That is, the Roadmaster asserts that Claimant did not present himself in Dothan to take the temporary vacant welder position and the Organization asserts that the Roadmaster refused to allow Claimant to work this temporary vacant welder position. These contradictory assertions address a material fact that is dispositive of the claim.

As pointed out by Referee Wallin in a similar situation on this property, when "confronted with a conflict of material fact that was not resolved in the on-property record" the Board has "no choice but to declare that the Organization's burden of proof has not been satisfied." (NRAB Third Division Award 39027 at 2)

That on-property award is instructive and persuasive in the circumstances of this claim. Therefore, this claim is denied since the Organization did not satisfy its burden of proof.

Award:

Claim denied.



Patrick J. Halter
Neutral Member

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Carrier Member
Robert A. Paszta



Organization Member
Peter E. Kennedy

Dated this 23 day of Oct, 2012