SPECIAL BOARD OF ADJUSTMENT 1110

Award No. 159
Case No. 159

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

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 regularly assigned Track Inspector S. Hermiller to perform track inspector overtime service between MPBE 129.0 and MPBE 193.5 on January 31, 2000 and instead called and assigned junior employe T. J. Young [System File I52217899/12(00-0390) CSX and Carrier File I52217899/12(00-0309) CSX].

2. As a consequence of the violation referred to in Part (1) above, Claimant S. Hermiller shall now be compensated for eight and one-half (8.5) hours' pay at the overtime pay rate of twenty-seven dollars and fifty-seven cents ($27.57) per hour.

FINDINGS:

This Board, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and the Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act, as amended,; and

2. That the Board has jurisdiction over this dispute.

OPINION OF THE BOARD:

Rule 17 (Preference of Overtime Work) indicates, in pertinent part, that:

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 employee in the required job class will be given preference for overtime work ordinarily and customarily performed by them.

A recent decision involving the same parties addressed Rule 17. Specifically, the Third Division in Award No. 36848 (January 28, 2004) (Wallin, Ref.) found Rule 17 to be clear and unambiguous and observed that Paragraph (a) of Rule 17 relates to assignments in a required job class.

A careful review of the record in the present case indicates that the Claimant held a regular assignment as a Track Inspector. The junior employee, T. J. Young, held an assignment as a Machine Operator on Service Lane Work Territory Gang 6M37. The evidence reflects that the Carrier removed the junior employee from his regular assignment on SLWT Gang 6M37 as a Machine Operator to work with Track Inspector R. L. Kaufman of the Track Subdepartment to perform the disputed work on Monday, January 31, 2000, when the Claimant had a regularly scheduled rest day,

The parties disagree about the disputed work performed by the junior employee. The Organization asserts that the junior employee performed track inspection work. The Carrier denies that the junior employee performed track inspection work. The record substantiates that the junior employee performed the disputed work with Track Inspector R. L. Kaufman. In the absence of any credible evidence about the type of work the junior employee performed with Track Inspector Kaufman on Monday, January 31, 2000, the Carrier failed to prove its affirmative defense that the junior employee had not performed track inspection work during the relevant time.

Rule 17, Section 1(a) provides a preference for ordinary and customary overtime work in the required job class to the senior employee in the applicable job class. The undisputed evidence reflects that the Claimant had greater seniority than the junior employee in the applicable job class of Track Inspector at the relevant time. In fact, the record omits any evidence that the junior employee had any seniority as a Track Inspector. As a result, Rule 17, Section 1(a) did not permit the Carrier to assign the disputed work to the junior employee rather than the Claimant, who was the senior employee in the required job class of Track Inspector.

AWARD:

The Claim is sustained in accordance with the Opinion of the

Board. The Carrier shall make the Award effective on or before 60 days following the date of this Award.

Robert L. Douglas
Chairman and Neutral Member

D. D. Bartholomay
Employee Member

J. T. Klimczak
Carrier Member

Dated: April 30, 2004

Dissent Attached.

CARRIER'S DISSENT TO
SPECIAL BOARD OF ADJUSTMENT NO. 1110
AWARD NO. 159

The penultimate paragraph of the Arbitrator's findings, quoted below, correctly assessed the evidentiary gridlock in the record but replaced applicable precedent, to which the Arbitrator aspired in previous decisions, with a novel approach. The Arbitrator noted:

> *The parties disagree about the disputed work performed by the junior employee. The Organization asserts that the junior employee performed track inspection work. The Carrier denies that the junior employee performed track inspection work. The record substantiates that the junior employee performed the disputed work with Track Inspector R. L. Kaufman. In the absence of any credible evidence about the type of work the junior employee performed with track Inspector Kaufman on Monday, January 31, 2000, the Carrier failed to prove its affirmative defense that the junior employee had not performed track inspection work during the relevant time.* (underscoring added)

The Arbitrator's declaration is, *per se*, a contradiction. Also, the Board is not empowered to reconcile the obvious conflict in fundamental assertion. See Special Board of Adjustment No. 1110, Award Nos. 25 (Hockenberry), and 134, 146, 147, 155 (Douglas); National Railroad Adjustment Board (NRAB), Third Division Award Nos. 36406 (Mason), 36071 (Kenis), 36031 (N. Eischen), 31323 (Hicks), *et al.* Too, CSXT's affirmative assertion, although arguably not supported with any evidence, was not refuted by BMWE and, therefore, must be accepted as fact. See NRAB, Third Division Award Nos. 36114 (Wallin), 35552 (Carvatta), 35447 (Wesman); Public Law Board No. 5246, Award No. 83 (Zusman), *et al.* Finally, the burden of proof in cases of such nature is the responsibility of BMWE, not CSXT as the Arbitrator has suggested. See NRAB, 3-31455 (Richter), 3-31323 (Hicks), 3-21858 (Scearce), *et al.*

The Arbitrator failed to discern the record for what it is or recognize and properly apply evidentiary standards supported by copious arbitral authority. Consequently, Award No. 159 is palpably erroneous and CSXT dissents.

James T. Klimtzak
Carrier Member-SBA No. 1110
April 30, 2004

ORGANIZATION'S RESPONSE

TO

CARRIER'S DISSENT

TO

AWARD 159 OF SPECIAL BOARD OF ADJUSTMENT NO. 1110

A review of the Carrier's dissent requires only a single response, balderdash!

However, to explain why I consider it nonsense is to simply point at the sentence prior to the underlined sentence quoted in the dissent. The Organization established that the junior employe assigned that day did perform track inspection work and the burden then fell on the Carrier to provide documentation to the contrary. None was provided, which means the Carrier failed to prove its affirmative defense. Consequently, the claim was sustained as it should have been.

Respectfully submitted,

D. D. Bartholomay
Employe Member, SBA No. 1110