

SPECIAL BOARD OF ADJUSTMENT 1110

Award No. 154  
Case No. 154

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 Agreement was violated when the Carrier failed and refused to bulletin a B&B mechanic position on Gang 6M87 [System File S153705099/12(99-0944) CSX].
2. As a consequence of the violation referred to in Part (1) above, B&B Mechanic M. E. Mizzell shall now be compensated for all loss of wages beginning August 2, 1999 and continuing.

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 1 (Seniority Classes) provides, in pertinent part:

The seniority classes and primary duties of each class are:

B & B Department

. . . . .

B. Bridge and Building Roster

1. B & B Foreman- In charge of Plumbers and B & B Mechanics

Direct employees assigned under his jurisdiction.

2. B & B Assistant Foreman  
Direct and work with employees assigned to him  
under the supervision of a Foreman.
3. B & B Mechanic-Carpenters, Painters, Masons  
Construct, repair and maintain bridges, buildings  
and other structures.

Rule 3 (Selection of Positions) provides, in pertinent part:

Section 3. Advertisement and award.

. . . . .

(h) 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.

Rule 1 contains clear, explicit, and plain language to identify the "primary duties" of each class. The critical clause "primary duties" signifies that the parties carefully agreed to limit the range of the "primary" tasks that the employees in different classes perform. By using the term "primary" in Rule 1, the parties recognized that employees may perform secondary tasks beyond the fundamental and most important purpose of the class.

A careful review of the present record indicates that the Carrier created a permanent position of a Bridge and Building Foreman on Gang 6M87 on the Atlanta Service Lane. In doing so, the Carrier decided not to assign any other employees to Gang 6M87. As a result, the sole Foreman necessarily worked alone. By working alone, the Foreman lacked any employees to direct. Without any employees to direct, the Foreman could not perform the Rule 1 "primary" duties of directing employees assigned under his jurisdiction because no such employees existed. In the absence of any such employees, the Foreman could not perform the "primary duties" of the class of Bridge and Building Foreman.

Instead, the record reflects that the Foreman performed the work of a Bridge and Building Mechanic, which includes the construction, repair, and maintenance of bridges, buildings, and other structures. Rule 1 requires that a Bridge and Building Mechanic perform such "primary duties" of the Bridge and Building Mechanic class. In the absence of anyone for the Foreman to direct, the sole Foreman must have performed the work ordinarily and customarily performed by a Bridge and Building Mechanic. The record reflects that such disputed work did not constitute incidental work or insignificant work. On the contrary, the record contains unrefuted evidence that the disputed work

constituted a substantial amount of the primary work performed by a Mechanic. In the absence of an emergency situation or any other extenuating circumstances, a Mechanic constituted the appropriate employee to have performed the disputed work pursuant to the Rule 3 requirement that provides for the assignment of duties "associated with the job class . . . ."

In reaching this conclusion in the context of the present record, the May 23, 1999 Strongsville Agreement and Side Letters (Appendix "U") do not negate the requirements of Rule 1 and Rule 3. The Strongsville Agreement provides in Section 4.a.:

Twelve (12) new "Service Lane Work Territories" ("SLWTs") are hereby established for "floating; i.e. other than point headquartered" Track and Bridge and Facility positions falling into the category between System Production Gang work and basic point headquartered maintenance work; e.g., an AFE gang that would perform work over multiple seniority districts. Such gangs consisting of any number of employees may perform any work covered by the scope of the new Maintenance of Way Agreement and may be established effective on "split date". It is recognized that as these gangs are established a corresponding number of positions in floating district or other similar type gangs may be abolished. It is also understood that the establishment of SLWT gangs will not diminish the carrier's right to retain or establish seniority district floating gangs where warranted. On the other hand the establishment of SLWT gangs will not be used as a device to eliminate basic maintenance forces (See Side Letter). A copy of a map and a listing of seniority districts contemplated in each SLWT are attached (Attachments "E" and "F"). Employees holding seniority on a seniority district that is split between more than one SLWT will only be obligated for protective benefit eligibility, including but not limited to SUB, to protect SLWT work on one SLWT, whichever is nearest in proximity to the employee's place of residence.

Section 4.a. provides substantial and important flexibility and discretion to the Carrier. Section 4.a., however, must be read with care. Section 4.a. refers to "gangs consisting of any number of employees" and also specifies that "the establishment of SLWT gangs will not be used as a device to eliminate basic maintenance forces . . . .". These provisions of Section 4.a. reflect the special care that the parties demonstrated to achieve a delicate balance of increasing the Carrier's flexibility to assign work while also preserving work opportunities for the members of the bargaining unit. The use in the May 23, 1999 Strongsville Agreement of the language "any number of employees"

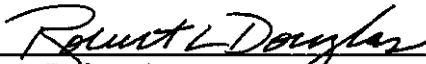
and the reference to "gangs" coupled with the clear description of the "primary duties" of the classes in Rule 1 and the reiteration of the method for assigning duties in Rule 3(h) preclude finding that the collective bargaining agreement authorized the Foreman to perform the disputed work under the specific facts and circumstances set forth in the present record. Any change to this arrangement is a matter for collective bargaining, not arbitration.

In reaching this determination, the references in the record to the treatment of the performance of flagging protection fail to provide persuasive guidance. The record indicates that flagging protection constitutes a special type of work that has a long history on the property because of the distinct character and significance of the work involved and the method that the work is performed. For example, the record reflects that flagging protection cases often arise in the context of the presence of outside contractors on the property. As a result, the treatment of flagging protection by the parties fails to provide persuasive evidence to resolve the present dispute. Any other arguments raised by the parties are not material to the proper resolution of the Claim.

As a consequence, the Organization proved by a preponderance of the evidence that a violation occurred under the unusual circumstances reflected in the present dispute and that the Claimant should receive the difference between the wages he would have received as a Bridge and Building Mechanic and the wages he did receive as a Trackman for the relevant period of time.

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

Dated: April 30, 2004

  
J. T. Klimtzak  
Carrier Member

*Dissect attached*

CARRIER'S DISSENT TO  
SPECIAL BOARD OF ADJUSTMENT NO. 1110  
AWARD NO. 154

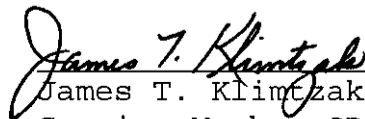
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The Brotherhood of Maintenance of Way Employees (BMWE) in its claim asserted that a Bridge and Building Department (B&B) Foreman working alone violated the Agreement.

The Arbitrator rationalized that because there was no B&B Mechanic assigned to a Gang, there must have been a violation of the Agreement. The Agreement does not provide exclusive rights to any work for any particular Class of worker in the Craft and no manning levels or Gang complement requirements. Yet, the Arbitrator's decision is based on such premises. Too, the Arbitrator's decision, for lack of clear contract language or a fully developed record of restrictive assignment and performance of work, as well as a BMWE position based solely on refuted assertions, is based on conjecture, hypothesis and speculation.

The Board was apprised during the hearings of contemporary arbitral decision, adding to the wealth of precedent cited in the Carrier's submission supporting that the claim be denied. See Public Law Board No. 6564, Award No. 10 [BMWE v. CSXT (Parker), 03/24/04].

Award No. 154 is palpably erroneous and CSXT dissents.

  
James T. Klimetzak

Carrier Member-SBA No. 1110  
April 30, 2004