

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 42760  
Docket No. MW-42824  
17-3-NRAB-00003-140539

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

(Brotherhood of Maintenance of Way Employees Division –  
IBT Rail Conference

**PARTIES TO DISPUTE:** (  
(CSX Transportation, Inc.

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned a T&E employe to perform flagging and on-track protection work for contractor forces performing overhead bridge construction and demolition work at Mile Post QD 155.4 on the Erie West Subdivision near Painesville, Ohio beginning on July 12, 2013 and continuing instead of assigning J. Rosario thereto (System File ROSARIOC.513/2013-148558).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Rosario shall now be compensated for all lost compensation at the applicable straight time and overtime rates of pay beginning on July 12, 2013 and continuing until the violation ceases.”

**FINDINGS:**

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Beginning on July 12, 2013, and continuing for the duration of the project, the Carrier assigned a transportation employee to perform flagging to protect train movements in connection with work being performed by a contractor on an overhead bridge. The Organization asserts that this work should have been performed by a member of the maintenance of way craft.

The requirement to provide flagging protection is addressed in the parties' May 9, 2007 Memorandum of Agreement, which states, in pertinent part, as follows:

**"Section 8.A.1. When flagging work is required in connection with Track Department work or other work that hold the potential to undermine the integrity of the roadbed or track structure, an Assistant Foreman - Flagman from the Track Department shall be assigned in accordance with Rule 3, Section 3 or 4, as applicable."**

The Organization insists the work being performed by the contractor had the potential to undermine the integrity of the roadbed or track structure. The Carrier has denied this, asserting that all of the work being done was on an overhead bridge. It says its concern was the protection of train movements under the bridge, which is why it utilized a transportation employee.

It is the Organization's burden to prove that the contractor's work had the potential to undermine the integrity of the roadbed or track structure. A similar claim, also involving a repair to an overhead bridge, was addressed by Public Law Board No. 7163 between these parties, and with the Referee herein serving as the Neutral Member, in Award No. 123. In denying the claim therein, the Board held, "The mere assertion that the work would threaten the integrity of the roadbed was not sufficient to meet this burden." In the instant case, we similarly find that the Organization has not met its burden of proof. The Agreement was not violated.

**AWARD**

**Claim denied.**

**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.**

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

**Dated at Chicago, Illinois, this 25th day of September 2017.**