

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44040
Docket No. MW-44093
20-3-NRAB-00003-170171**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 on September 30, 2015 and October 2, 2015 when the Carrier assigned a T&E employee to flag for contractors boring under the tracks and digging large holes near the tracks at Mile Post DC 11.7 on the B&OCT Seniority District instead of offering and assigning such work to Mr. S. Mosley (System File H40408715/2015-194987 CSX).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Mosley shall be compensated sixteen (16) hours at his straight time rate of pay, four (4) hours at his overtime rate of pay. In addition, all time shall be credited towards vacation and retirement.”**

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.

The Claimant holds seniority in various classifications in the Carrier's Maintenance of Way Department. During the time in question, he was regularly assigned as a track inspector and was fully qualified to perform assistant foreman flagging duties. On September 30, 2015 and October 2, 2015, outside forces used machines and hand tools to dig a hole next to and bore under, the Carrier's mainline tracks on the Barr Subdivision. The Carrier determined that a Carrier flagman was necessary to provide track protection and assigned an employee from the T&E Department. That employee performed a total of sixteen hours of straight time work and four hours of overtime work while flagging for the outside forces.

The Organization filed a claim asserting that the Carrier violated the Agreement by failing to assign the Claimant to the disputed work, and instead assigning a T&E employee to flag. The Carrier denied the claim asserting that it had properly assigned the work. The parties were unable to resolve the dispute on-property and the claim is now properly before this Board for final adjudication.

The Memorandum of Agreement ("MOA") between the parties dated May 23, 2007, states, in part:

"Section 8 - Flagging Work

(A)(1) When flagging work is required in connection with Track Department work or other work that holds 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 contends that the flagging work in question is expressly reserved to the Track Department Assistant Foreman-Flagman and that this work did not meet any of the exceptions in the MOA. It also contends that it presented photographs and statements purporting to show that the work done by AT&T had the potential to undermine the integrity of the roadbed or track structure because large machines dug next to and under the Carrier's main line tracks and outside forces and machines were in close proximity to and/or fouling the track structure. Thus, the Organization contends, the work was reserved to the Track Department.

The Carrier contends that it retains the responsibility of determining the need for a flagman and whether the work has the potential to undermine the integrity of the roadbed. The Carrier contends that its Roadmaster determined the work in question did not have the potential to undermine the integrity of the roadbed or track structure. The Carrier contends that the mere assertion that there was potential to threaten the integrity of the track is insufficient to meet the Organization's burden. Further, in situations where cross contentions are gridlocked, the claim must be dismissed for failure to establish a prima facie case.

On the record before this Board, there is no dispute that the Carrier determined that a Flagman was necessary but did not assign the work to the Track Department. Whether this violated the MOA depends on whether the work had the potential to undermine the integrity of the roadbed or track structure. The Carrier submitted a statement from Roadmaster Carreno that the work did not have such potential and the Organization submitted a photo and statement from Track Inspector Mosley that the hole that was dug was detrimental to the stability of the track, especially in light of the amount of rain that had fallen.

The Carrier has the responsibility to determine that flagging is required in the first instance, which it did here. Then it must determine whether the work had the potential to undermine the integrity of the roadbed or track structure, which it decided it did not. Since the Organization disagreed with this determination, it was incumbent on the Organization to prove that the Carrier's decision was wrong. Public Law Board 7163, Award No. 108. This Board is presented with two differing opinions regarding the potential to undermine the integrity of the track. The single statement offered by the Organization was insufficient to prove wrong the Carrier's determination was wrong. Under such circumstances, the Board must find that the Organization has failed to satisfy its burden of proof, and the claim must be denied.

AWARD

Claim denied.

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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 18th day of June 2020.

LABOR MEMBER'S DISSENT TO
AWARD 44040 DOCKET MW-44093;
AWARD 44047 DOCKET MW-44108; and
AWARD 44058 DOCKET MW-44442

(Referee Kathryn Van Dagens)

The Majority erred in its application of the Memorandum of Agreement ("MOA") in these cases. Specifically, the MOA, states, in part:

(A)(1) "When flagging work is required in connection with Track Department work or other work that holds 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."

In these Awards, the Majority improperly held that the Carrier was afforded the ability to determine if the work had the "potential to undermine the integrity" of the track and once that determination was made, it was incumbent upon the Organization to establish that the Carrier's determination was wrong. Instead, the Majority should have analyzed the evidence and made a determination itself on whether or not the work had the potential to undermine the integrity of the tracks. Instead, it authorizes the Carrier to create a default position that the track would not be undermined, which the Organization would have to overcome in every case, which was not the intent of the MOA. In these cases, both parties submitted evidence in the form of photographs and statements, the Majority should have looked at the evidence and made its own determination and not simply deferred to the Carrier's.

For these reasons, I must dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Zach Voegel', with a stylized flourish at the end.

Zachary C. Voegel
Labor Member