

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44047  
Docket No. MW-44108  
20-3-NRAB-00003-170203**

**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 when, beginning on March 9, 2015 and continuing through March 20, 2015, the Carrier assigned a T&E employee to perform flagging duties between Mile Posts QFP 254.4 and QFP 256.4 on the Akron West Seniority District, Chicago Division and failed to assign such work to Mr. W. Whitehurst (System File H42404515/2015-185352 CSX).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Whitehurst shall be compensated eighty (80) hours at his applicable straight time rate of pay and twenty (20) hours at his applicable overtime rate of pay.”**

**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 established and holds seniority within the Carrier's Maintenance of Way Department in the assistant foreman classification in the Track Department. At the time of the events here, the Claimant was assigned as a Vehicle Operator headquartered on the Chicago Division in the Akron West Seniority District.

By letter dated November 4, 2014, the Carrier informed the Organization that it intended to contract out certain work that was reserved to the Maintenance of Way Department. On November 11, 2014, the parties met and discussed the matter in conference. Thereafter, beginning on March 9, 2015 and continuing through March 20, 2015, the Carrier assigned a member of its T&E Department to serve as a flagman for the outside forces.

The Organization filed a claim on April 3, 2015, asserting that the Carrier had violated the parties' Agreement by assigning a T&E employee rather than the Claimant to provide flagging protection. The Carrier denied the claim on May 29, 2015, on the basis that the work did not have the potential to undermine the integrity of the roadbed or track structure. The parties were unable to resolve the dispute on-property and the claim is now properly before this Board for final adjudication.

The Organization contends that The Memorandum of Agreement dated May 23, 2007 ("MOA#1") expressly reserves the subject flagging work to Track Department employees. The Organization contends that clear, unambiguous and mandatory language of MOA#1 § 8 A(1) Flagging Work states,

**"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 subject flagging was in connection with Track Department work and therefore, its members were to be assigned to provide protection. The Organization contends that the Carrier's own notice identified the work as track construction work. The Organization contends that the Carrier determined that a flagman was necessary because this was Track Department work, irrespective of whether the work also had the potential to undermine the integrity of the

track. Nonetheless, the Organization also contends that the record shows that the work performed did have the potential to undermine the integrity of the track.

The Carrier contends that MOA#1 is clear that the initial responsibility for determining whether a flagman is needed rests with the Carrier. The Carrier contends that if a flagman is required, the Carrier determines if the work has the potential to undermine the integrity of the roadbed. The Carrier contends that neither the Organization nor its members have the right or the responsibility to make these determinations.

The Carrier further contends that MOA#1 § 8.B identifies instances where a Flagman would not be required. It reads,

“In the application of this Section 8, it is understood that: (1) Communication and Signal Department employees may provide flagging protection for their own work; (2) pursuant to agreements with the operating crafts in effect on some former component railroads, Operating Department employees may provide flagging protection for train movements; (3) CSXT shall assign a flagman only in cases where it determines a flagman is required. The purpose of this Section 8 is to ensure that flagging work will not be contracted out and that Track and B&B Department employees shall provide flagging protection for their own work and for outside forces (utility companies, contractors, municipal workers, etc.) engaged in work on or near the right-of-way that has the potential to undermine the integrity of the roadbed, track, bridges or other railroad structures.”

Here, the Carrier contends, it determined that the flagging would only be for train movements, as there was no potential to undermine the roadbed or track. Therefore, it contends, it properly assigned the work to T&E employees, as permitted by MOA#1, Part B. The Carrier contends that the parties did not intend that a flagman must be provided for all Track Department work, as argued by the Organization.

The burden rests on the Organization to show that the Agreement was violated. The Board finds that the Agreement does not show that the parties intended that an Assistant Foreman-Flagman from the Track Department be assigned for all Track Department work, even if performed by contractors. The Carrier determined that it was not obligated to assign an Assistant Foreman-Flagman where the flagging was for train movements only and where there was no potential to undermine the integrity of

the roadbed or track structure. Where the Carrier retains the right to make this determination in the first instance, the Organization must prove the Carrier was wrong.

The Organization submitted photographs of the work and a statement by the Claimant describing the work which concluded, "Anytime you disrupt the road bed you have the potential to create surface deviations and potentially create CWR deficiencies that could lead to a buckled track condition." In response, the Carrier presented the Roadmaster's statement, "The boring work being done by contractors was about 50 feet away from the main tracks on both sides and it did not have the potential to undermine the integrity of the roadbed or track structure."

The Organization's broad statement regarding the potential to undermine the integrity of the roadbed or track structure is insufficient to rebut the Roadmaster's statement that the work was far enough from the tracks that there was no potential to undermine the track structure. The Organization has not met its burden of proving the Agreement was 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 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