Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44058
Docket No. MW-44442
20-3-NRAB-00003-170570

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

(Brotherhood of Maintenance of Way Employes 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 Maintenance of Way Track Department work (flagging) between Mile Post DC 22.9 and Mile Post DC 23.0 on the Blue Island Subdivision, B&OCT Seniority District, Chicago Division beginning on October 12, 2015 and continuing (System File H40409215/2015-196308 CSX).

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Amador shall now '... be compensated for all hours worked by the T&E employee performing this Flagging work beginning on October 12, 2015 and continuing until the violation stops at each of his respective rates of pay. Also, that all time 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 established and holds seniority in various classifications in the Carrier's Maintenance of Way Department. The Claimant was fully qualified as an assistant foreman and was regularly assigned as a basic track foreman on the Chicago Service Lane Work Territory, which included the B&OCT Seniority District.

On October 12, 2015 and continuing, outside forces used heavy duty machines, hand tools, and other equipment to dig a hole next to and bore under, the Carrier's quadruple mainline tracks between Mile Posts DC 22.9 and DC 23.0 on the Blue Island Subdivision - part of the B&OCT Seniority District. The Carrier assigned an employe from the T&E Department to perform flagging for the outside forces.

The Organization filed a claim on October 28, 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 December 14, 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 employes. The Organization contends that clear, unambiguous and mandatory language of § 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 outside forces were digging a large hole next to the Carrier's four main line tracks and then boring that hole under the Carrier's track structure. The Organization contends that there can be no doubt that they were engaged in work on or near the Carrier's track structure that had the undeniable

potential to undermine the integrity of the track structure and thus a BMWE-represented employe must be assigned to provide protection.

The Organization contends Public Law Board 7163, Award 123, is palpably erroneous and is distinguishable from the facts herein. In that on-property award, the board held that "The mere assertion that the work would threaten the integrity of the roadbed was not sufficient to meet this burden. The pictures, without any further explanation, were also insufficient." In that case, the Public Law Board refused to consider evidence that was presented after the on-property handling. Here, the Organization contends that it has offered overwhelming evidence that conclusively established that the work had the potential to undermine the integrity of the track structure.

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 has the right or the responsibility to make these determinations.

The Carrier contends that Roadmaster Luis Carreno, in his professional opinion, 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 evidence presented by the Organization to rebut the Roadmaster's statement is unpersuasive.

The burden rests on the Organization to show that the Agreement was violated. 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."

This 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. Where the Carrier retains the right to make this determination in the first

instance, the Organization must prove the Carrier was wrong. This record is insufficient to meet that burden.

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,

Zachary C. Voegel
Labor Member