

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7163**

<b>Brotherhood of Maintenance of Way</b>	)	
<b>Employees Division, IBT</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. 142</b>
	)	
<b>CSX Transportation, Inc.</b>	)	

Statement of Claim

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when, commencing on January 25, 2012 and continuing, the Carrier assigned junior Assistant Track Foreman Stepp to flag for contractors working between Mile Posts CA 662.9 and CA 665.0 on the Louisville Division and failed to assign such work to Claimant L. Miracle (System File I61702012/2012-120059).
2. As a consequence of the violation referred in in Part 1 above, Claimant L. Miracle shall now be compensated for all hours straight and overtime, beginning on January 25, 2012 and continuing until the violation stops at his respective straight and overtime rates of pay."

Background

Claimant holds seniority in various classifications such as B&B assistant foreman on the Louisville Division dating from November 29, 1994. Employee B. Stepp holds seniority as a B&B assistant foreman on the Louisville Division dating from December 19, 1994.

On March 24, 2012 the Organization filed a claim alleging that on January 25, 2012 and continuing thereafter junior employee Stepp, foreman for gang 5XJ6, performed flag duties for a contractor between mileposts CA 662.9 and CA 665.0 instead of senior employee Claimant in violation of the Agreement (June 1, 1999) and Memorandum of Agreement (August 23, 2007).

On March 29, 2012 the Carrier denied the claim stating that Employee Stepp and Claimant were both compensated at B&B Foreman rates and a flagman was not required since Stepp held track authority for the area between mileposts CA 662.9 and CA 665.0 where he was working with bridge force 5XJ6. "Mr. Stepp just happens to already be working at this location installing ties with his gang and is also holding track time for MCI installing cable across the bridge."

On April 2, 2012 the Organization appealed the claim denial reiterating its position and arguing that “[t]he Carrier has not provided any proof that Mr. Stepp was working in the area or holding track time.”

On June 5-6, 2012 the parties convened in conference wherein the Organization submitted Claimant’s handwritten statement asserting that Employee Stepp was not working with his gang but was providing flag protection for the contractor. The conference concluded without a satisfactory resolution.

On July 30, 2012 the Carrier denied the appeal stating that the work at issue was not flagging as Employee Stepp held track time for his gang which allowed the contractor to work under Stepp’s authority.

It is the Carrier’s prerogative to determine when and if a flagman is needed for a contractor working on Carrier property. In this instance, as the track was under the authority of a Carrier employee working in the area, it was not necessary to also have a flagman. Two people cannot get track time for the same area. The Claimant’s assertion that a flagging position is always bid out is incorrect. The Claimant also acknowledges that the employees and the contractor were working in the same area.

On August 7, 2012 the Organization responded to the appeal declination stating “the Carrier has not provided any proof that the Foreman of force 5XJ6 (Mr. Stepp) was working in the area and holding track time” and “Mr. Stepp was not working with his gang, and was providing flagging protection for a contractor.”

#### Findings

Public Law Board 7163, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employees within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute and (3) the parties to this disputes were accorded due notice of the hearing and participated in this proceeding.

On January 25, 2012 and continuing thereafter Employee Stepp served as foreman for Bridge Force 5XJ6, a gang in the B&B Department. During this time a contractor was installing cable across a bridge between milepost CA 662.9 and milepost CA 665.0. Foreman Stepp and his gang (Bridge Force 5XJ6) occupied this area where the contractor was present. Foreman Stepp provided flag support for the contractor.

The Memorandum of Agreement dated August 23, 2007 states in relevant part as follows in Section 8 – Flagging Work.

- A. The classification of Assistant Foreman – Flagman with a rate of pay equal to that of a Class “A” Machine Operator shall be established within the Track and B&B Departments under the June 1, 1999 Agreement. The Assistant

Foreman – Flagman (Track) seniority standing shall be based on Assistant Foreman seniority in the Track Department. The Assistant Foreman – Flagman (B&B) seniority standing shall be based on Assistant Foreman seniority in the B&B Department.

\* \* \* \* \*

2. When flagging work is required in connection with B&B Department work or other work that holds the potential to undermine the integrity of structures such as bridges or buildings an Assistant Foreman – Flagman from the B&B Department shall be assigned in accordance with Rule 3, Section 3 or 4, as applicable.

- B. 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 the 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.

The Carrier determines “[w]hen flagging work is required in connection with B&B Department work[.]” Once the Carrier exercises its prerogative to “assign a flagman only in cases where it determines a flagman is required,” the assignment must be exercised in a manner that complies with the Memorandum of Agreement and the June 1, 1999 Agreement.

Foreman Stepp of gang 5XJ6 provided flag support for the contractor between milepost CA 662.9 and milepost CA 665.0. This shows that, under Section 8.B., the Carrier determined a flagman was required “for outside forces [contractor] ... 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.” Having determined that a flagman was required, the Carrier must assign flag duties in accordance with Section 8.A.2 (Rule 3, Section 3 or 4) in the Memorandum of Agreement.

The Carrier states that Foreman Stepp possessed track authority for his gang in the area where the contractor was installing cable. Based on his track authority Foreman Stepp could provide flag support for the contractor. The Carrier relies on Question and Answer 22 in Questions and Answers Concerning the Interpretation and Application of the Memorandum of Agreement for its position that only one employee can hold track authority for a given location and time thereby showing it was not required to assign flag duties to Claimant.

#### Question

If the Foreman of a two-man gang consisting of the Foreman and a Machine Operator has 707 authority and another gang is assigned to work within the Zone covered by the 707 authority, is an Assistant Foreman – Flagman necessary?

Answer

No, both gangs may work within the Foreman's 707 authority.

As for whether Foreman Stepp possessed track authority the Carrier did not submit any document that supports that proposition. BMW requested it; CSX did not provide it. Aside from the matter of track authority, Claimant's written statement shows that Foreman Stepp received the assignment based on his proximity to the mileposts and not based on seniority.

... they took the closest foreman [Foreman Stepp] off a gang and had the assistant foreman of the same gang [5XJ6] Herman Tackett run the gang, Mr. Stepp is involved with overtime and his team is not receiving any of this. Even though Mr. Stepp and his team are both in the same area they are not working together or getting the same hours[.]

On the basis of Claimant's statement, the Board finds that the Organization established a *prima facie* violation of the Memorandum of Agreement and Rule 3 in the June 1, 1999 Agreement as alleged in the claim. This is a colorable claim of disputed work.

As Arbitrator Goldstein observed in Third Division Award 28759, "[o]nce the Organization establishe[s], as a *prima facie* matter, a violation of the Agreement, the burden shift[s] to the Carrier to support its assertion[.]" Within that framework the Board finds that there is an assertion of track authority for Foreman Stepp but no corroboration of that assertion such as a record documenting 707 authority for the area between mileposts CA 662.9 and CA 665.0. As the creator and custodian of records the Carrier is distinctively positioned to access the business documents maintained in the ordinary course of business operations as a foundation for its assertion. The record placed before the Board contains no probative evidence of Foreman Stepp's track authority.

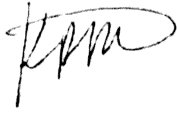
In view of the foregoing the Board concludes that the Carrier did not comply with Section 8.A.2 (Rule 3, Section 3 or 4) in the Memorandum of Agreement. Part 1 of the claim is sustained and the remedy in Part 2 is granted.

Award

Claim sustained in accordance with the findings.

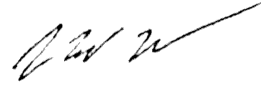
Patrick J. Halter /s/

Patrick J. Halter  
Neutral Member  
Award No. 142



---

Rob Miller  
Carrier Member



---

Andrew M. Mulford  
Organization Member

Dated on this 20th day  
of August, 2014