

AWARD NO. 498  
Case No. 498

Carrier File: 19-27878  
BMWE File: GLN703919

**PUBLIC LAW BOARD NO. 7163**

PARTIES     ) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,  
              )     IBT RAIL CONFERENCE  
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 May 13, 2019 and continuing through and including May 24, 2019, the Carrier assigned a Transportation Department employee to perform Maintenance of Way flagging protection for outside forces building an overhead bridge and a roadway next to the Carrier’s right of way between Mile Posts QS 223.0 and QS 224.0 in Collinsville, Illinois on the Great Lakes Division and instead assigned a Transportation Department employee thereto (System File GLN703919/ 19-27878 CSX).

2. As a consequence of the violation referred to in Part 1 above, Claimants G. Schulte, G. Strobel and J. Kuehnel shall now be compensated for ‘... an equal share of eighty (80) hours straight time, twenty (20) overtime, at their respective straight and overtime rates of pay.’ (Employees’ Exhibit ‘A-1’)

**FINDINGS:**

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 20, 2008, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

Claimants G. Schulte, G. Strobel and J. Kuehnel have established and hold seniority in various classifications in the Carrier's Maintenance of Way Department. During the relevant time, they held and maintained seniority on the Great Lakes Division.

The instant dispute arises under Section 8 of the parties' 2007 Memorandum of Agreement (MOA). It is undisputed that from May 13, 2019 and through May 24, 2019, the Carrier required that flagging protection work be performed for outside forces building an overhead bridge and a roadway next to the Carrier right of way between Mile Posts QS 223.0 and QS 224.0 in Collinsville, Illinois on the Great Lakes Division.

It is also undisputed that the Carrier assigned a Transportation Department employee to perform this work. The Organization maintains that Claimants had a right to the flagging assignment involved and the Carrier violated the MOU by refusing to assign it to them. The Organization has the burden of proving that this is the case.

Section 8 of the May 9, 2007 MOA provides, in relevant part:

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 (emphasis added) . . .

The Organization has maintained throughout that the outside forces were engaged in work--building an overhead bridge and a roadway next to the Carrier's right of way on or near the Carrier's track structure--that had the undeniable potential to undermine the integrity of the track structure. The Organization also provided photographs which, it contended, showed that large machines were operated adjacent to and directly above the Carrier's tracks, and the outside forces and machines were in close proximity to and/or fouling the track structure. The Organization also presented a statement signed by the three Claimants indicating that the flagging work at issue was used to flag outside contractors who were building a bicycle path overhead and constructing a road along the tracks. In the process, the Claimants stated, "[T]he contractors used equipment and manpower that did undermine the integrity of the track. . . ."

The Carrier stresses that although the Organization and Claimants stated that the work had the potential to undermine the integrity of the track, they failed to explain how or why. The Carrier maintains that this is because they had no explanation to support their assertion. The Carrier notes that the photographs the Organization provided also show work being done away from the track, which does not support the Claimants' statements.

More importantly, the Carrier states, the MOU language is very clear and arbitral precedent has established that it is the Carrier's responsibility to determine if the work being performed requires flagging under Section 8 of the MOA, and also to decide whether the work involved has the potential to undermine the integrity of the roadbed or track structure. The Carrier cites NRAB Third Division Awards 44040, 44042, 44047, 44058 (VanDagens), between these parties, and Award No. 108 of this Board. Here, the Carrier argues, as is clear from a statement from a manager, the Carrier determined the work of installation of an overhead bicycle path had no potential to undermine the integrity of the track.

As the Carrier urges, the arbitration precedent on this property for this issue holds that management, not the Organization or its members, determines when flagging work is required and whether the work has the potential to undermine the integrity of the track. Since the Organization disagreed with management's assessment, it bore the burden of proving the Carrier wrong. Its conclusory statements, including those of Claimants, failed to explain why this was the case. The Organization has therefore failed to meet its burden of proof, and the claim must be denied.

**AWARD**

Claim denied.

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Jacalyn J. Zimmerman  
Neutral Member

A stylized, cursive signature of Ross Glorioso in black ink, positioned above a horizontal line.

Ross Glorioso  
Organization Member

A stylized, cursive signature of John Nilon in black ink, positioned above a horizontal line.

John Nilon  
Carrier Member

Dated: 3/14/2023