

**PUBLIC LAW BOARD NO. 6564**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**And**

**CSX TRANSPORTATION, INC.**

**Case No. 10**

**Statement of Claim:** Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement beginning on June 10, 2002 when it advertised and awarded a flagging position at Mile Post 50 on the Logan Subdivision in Big Creek, West Virginia, as an assistant foreman position instead of as a foreman position in accordance with the consistent historical past practice.
2. Claimant D. Green shall now be allowed the difference between the assistant foreman and foreman rates of pay for all straight time and overtime hours worked by the flagging position referenced in Part (1) above, beginning June 10, 2002 and continuing until the matter is resolved.

**Facts**

On May 23, 2002, the Carrier posted an advertisement for the position of Assistant Foreman at Logan, West Virginia at the hourly rate of \$18.57 effective June 10, 2002. The duration of the assignment was four months; the job was abolished on October 18, 2002. Claimant David Green, the incumbent of the position, was to provide track protection, i.e. flagging, on CSXT's right-of-way for a State of West Virginia Department of Transportation highway project, which involved mountain blasting near CSXT's railroad tracks at Mile Post 50. Apparently, the State of West Virginia rather than CSXT, contracted out the highway construction work. It is undisputed that no maintenance work

was performed on CSXT property either by its employees or any subcontractor retained by CSXT.

Claimant Green exercised seniority bidding rights and commenced his assignment on June 10, 2002. On August 1, 2002, the Organization filed a claim on Green's behalf alleging that the job should have been awarded in the foreman rank and that Green was entitled to foreman's pay of \$19.44 per hour rather than the assistant foreman hourly rate of \$18.57. In addition to the rules cited, the Organization attached to its claim various documents allegedly supporting its allegation that flagging work, as a matter of practice, had always been performed by the rank of foreman.

The Carrier denied the claim by letter dated September 23, 2002. It emphasized that the contractor was not working for CSXT, and it asserted that flagging work does not accrue to a specific class of employees. The Organization appealed the Carrier's decision, and the claim was discussed in conference on January 14, 2003, at which time the Organization sought to buttress its position by presenting various advertisement bulletins allegedly showing that flagging work in the past had been assigned only to the rank of foreman. By letter dated May 7, 2003, the Carrier again denied the claim. In support of its decision, it provided documentation purporting to show that historically it had advertised assistant foreman positions to perform flagging work, without exception by the Organization. It asserted that there was neither contract language nor a system-wide past practice to support payment of the foreman's rate to Claimant who voluntarily bid on the assistant foreman position. The parties were unable to resolve the claim, and the matter was submitted to this Board for adjudication.

**Contentions of the Organization**

The Organization contends that this case is controlled by the Scope, Rules 1, 3, and 17 of the Agreement between the parties. In particular, it focuses on the following sections of Rules 1, 3, which state, in relevant part:

**RULE 1 – SENIORITY CLASSES**

The seniority classes and primary duties of each class are:

\* \* \*

**Track Department**

\* \* \*

**B. Track Roster:****1. Track Foreman**

*Direct employees assigned under is jurisdiction*

**2. Assistant Track Foreman**

*Direct and work with employees assigned to him under the supervision of a foreman*

**RULE 3 – SELECTION OF POSITIONS****Section 1. Assignment to position**

In the assignment of employees to positions under this Agreement, seniority shall govern. The word 'seniority' as used in this Rule means, first, seniority in the class in which the assignment is to be made...

\* \* \*

**Section 3. Advertisement and award**

\* \* \*

- (h) Except as otherwise provided in this Agreement, it is understood that an employee shall be assigned duties associated with the job class he was assigned by bulletin award.

\* \* \*

The Organization also relies heavily on documentary evidence, largely bulletins and awards both pre-dating 1999 and post-dating the June 1, 1999 effective date of the system-wide Agreement. This evidence purports to show that flagging jobs historically were advertised and assigned to foremen rather than assistant foremen. Some of this evidence expressly cites Rule 83 of the former C&O Agreement, which states in relevant part:

Where maintenance work coming under the provisions of this agreement which has customarily been performed by employees of the railway company is let to contract, the railway company will place an extra foreman in charge of the work if the contracted work is roadway or track work. If the contracted work is bridges and structures work, a B&B foreman will be assigned with the contract force if the job is such as would justify assignment of a foreman if the railway company were doing the work with its own forces....

In support of its position, the Organization emphasizes that the flagging force at issue did not work under the supervision of a foreman, and under Rule 1 could not validly be an assistant foreman. Moreover, Rule 3, which specifically states that all positions and vacancies will be advertised showing position title and pay rate, is with the understanding that the employee shall be assigned duties associated with the job class he was assigned by bulletin award. Here, Claimant was required to perform flagging duties but was assigned by bulletin award to an assistant foreman position with the attendant pay rate. The longstanding practice of the parties, however, has been to associate flagging duties with the foreman class and pay rate. Additionally, whenever overtime was assigned to

Claimant during the claim period, his monetary losses increased. Therefore, Rule 17 was violated because it expressly provides that when work is to be performed outside the normal tour of duty in continuation of the day's work, the senior employee in the required job class will be given preference for the overtime work ordinarily and customarily performed by him.

As to the fact that the contractor was not working for CSXT, the Organization contends that the flagman, however, was a Carrier employee governed by the Agreement. Furthermore, the purpose of the flagging work was to protect the Carrier's interests irrespective of whether the contractor was working for CSXT or the State of West Virginia.

In response to the Carrier's argument that flagging work does not accrue to a specific class of employees, the Organization concedes that incidental flagging work historically might have been assigned to various classes of employees. It insists, however, that whenever a flagging position has been advertised and awarded, the past practice consistently has been to assign a foreman with the concomitant pay rate.

#### **Contentions of the Carrier**

The Carrier contends that the work of providing protection from trains for other equipment and services used on its right-of-way is not work exclusively reserved to any craft, classification or position, including the position of foreman, under the Agreement. Moreover, historically when this work has been shared with the craft represented by the Organization, the work has not been exclusively performed by incumbents of the foreman position. Rather, it has been shared with such positions as Track Inspector, Assistant Track Inspector, Road Electrician, Bridge and Building Mechanic, and Assistant

Foreman.

The Carrier further argues that the flagging job had nothing to do with "Direct employees assigned under his jurisdiction" as a foreman may be required to perform. The flagging work at issue involved the coordination of traffic with the construction work, not supervision of "Scope" covered maintenance-of-way work. Moreover, one-on-one foreman to assistant foreman is not required. There is no manning or crew makeup requirement contained in the Agreement. An assistant foreman may work directly under the supervision of a Roadmaster or other officer. The amount and kind of supervision is within the prerogative of the Carrier.

In support of its position, the Carrier asserts that following the negotiation of the June 1, 1999 Agreement, one of the Organization's general chairmen proposed that the parties "establish various flagging positions assigned to (Engineering Department) Maintenance of Way Personnel that will work in conjunction with a variety of projects across the CSX Transportation property. These positions will be advertised as a 'Flagman/Foreman' on a Service Lane/Seniority District basis." This proposal was rejected by CSXT, however, and the practice of sharing this work with other crafts and positions other than foreman continued. In the Carrier's view, the Organization is now attempting to expand the terms of the Agreement and to achieve in arbitration what it did not achieve in collective bargaining.

It is the position of CSXT that neither the Scope rule nor Rule 1 of the 1999 Agreement was intended to change the duties of the Engineering department jobs, and they do not prohibit any of these employees from doing flagging work. The Scope

provision was not violated in this case because the incumbent in the assistant foreman position was covered by the Agreement. Likewise, the Organization has not pointed to any contract language indicating that flagging work belongs solely to the position of foreman.

The Carrier emphasizes that the burden of proof in this matter rests squarely with the Organization, which has been unable to cite either contract language or a consistent past practice demonstrating that flagging work must be advertised and awarded as a foreman's position. To the contrary, the Carrier claims that its payroll records buttress its claim that for many years CSXT has advertised assistant foreman positions for flagman work. Additionally, past practice demonstrates that obtaining track authority has not been exclusively reserved to any maintenance-of-way employee or position. Rather, any qualified employee may provide, and in fact has been assigned to provide, flagging protection. According to the Carrier, this principle has been recognized in numerous awards in this Division.

### **Findings**

This Board has carefully studied the very comprehensive Record in this case. For the reasons set forth below, it is compelled to conclude that there is neither sufficient contract language nor a clear and consistent past practice on a system-wide basis to support the Organization's claim that the flagging work in question had to be performed only by a foreman at the concomitant rate of pay. To the contrary, the documentary evidence produced by both parties shows that in the past, CSXT has advertised assistant foreman positions to perform flagging work. In fact, the evidence shows that at least during the

past decade, flagging work has not been performed by any particular craft, class or position. Such titles as Track Inspectors, Assistant Track Inspectors, B&B Mechanics, Road Electricians, and Assistant Foremen have all performed flagging service.

None of the contract language cited upon by the Organization shows a reservation of flagging work to the position of foreman. While the Organization relies on the first and third paragraphs of the Scope Rule and the former C&O Rule 83, there was nothing in the on-property handling of this case to establish that the flagging work performed was on former C&O property. It was the State of West Virginia that contracted with Wayne Concrete Construction to blast a hillside for a highway project, and according to the Record, CSXT did not have any contract with this outside firm to do any work on a railroad project.

As to the Organization's additional contention that the Carrier violated Rule 1 because assignment of flagging work to an assistant foreman is legitimate only if he works "under the supervision of a foreman," there is no support in the Agreement. In the instant case, Claimant did not require any direct supervision to perform the flagging work. Furthermore, Claimant did not direct any employees assigned under his jurisdiction to perform any maintenance of way work. Thus, there is no evidence that Claimant acted as a foreman or that he needed supervision in order to perform his duties. Given the circumstances, there is no justification to award Claimant foreman's pay. Simply stated, Claimant functioned as a one-man gang because his role was to be a coordinator for the safety of rail traffic and construction work. He was required to be



Federal Railroad Administration and CSXT Operating rules qualified to perform this work. There is no claim that Claimant was not qualified or that he performed a foreman's supervisory work.

Additionally, the Carrier argues persuasively that one-on-one foreman to assistant foreman was not required. There is no manning or crew make-up requirement set forth in Rule 1 of the Agreement. Furthermore, the words "under the supervision of a foreman" do not establish a mandatory manning level in the instant case where the work was properly performed by a one-man crew. Based on the Agreement and past practice, the Carrier did not err in advertising and awarding the flagging job as an assistant foreman position. Indeed, the payroll information introduced by CSXT indicated in that in the past, many flagging jobs were established as one-man gangs without the assignment of a supervisory foreman.

Despite the broad contentions made by the parties in support of their respective positions, it is important to emphasize that this case is not about the exclusive assignment of flagging work to members of the BMW. Thus, the Board makes no ruling on exclusivity for the purpose of preservation of work exclusively for the craft.

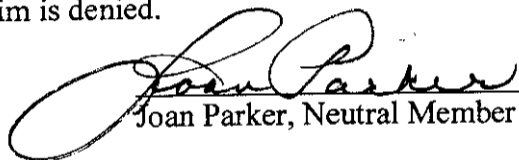
What this case is about is the Organization's contention that when track protection is needed, the Carrier must assign the work to a foreman at the foreman's rate of pay. The Organization has failed to sustain its burden of proof with respect to this central issue, largely because it has been unable to cite any past practice or provision of the system-wide Agreement of 1999 that preserves flagging work to the foreman position. The Organization attempted to achieve this objective through a proposed side letter dated

September 19, 2000. But this proposal was rejected by CSXT, and this Board cannot now award it through arbitration.

Given that assistant foremen have performed flagging work in the past, there was no violation of the Agreement or past practice when Claimant Green performed flagging work as an assistant foreman at the assistant foreman's rate during the period of June 10 through October 18, 2002. Therefore, the claim must be denied.

Award

The claim is denied.

  
Joan Parker, Neutral Member

  
Carrier Member

Dated: March 24, 2004

  
Organization Member

Dated: 3-24-04