

BEFORE PUBLIC LAW BOARD NO. 7007

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
MASSACHUSETTS BAY COMMUTER RAILROAD**

Case No. 31

STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned Bridge and Building (B&B) Sub-department Foreman M. Tolson the duties of supervising and providing flag protection for outside forces working near Mile Post 17.7 on the Fitchburg Main Line on October 14, 2008 instead of Track Sub-department Assistant Foreman type Flagman R. Lutkus (Carrier’s file MBCR-BMWE-02/0109).
2. As a consequence of the violation referred to in Part 1 above, Claimant Lutkus shall now ‘. . . be compensated the difference in pay between an Assistant Foreman and the B&B Foreman’s rate of pay for a total of 8 hours.’”

FINDINGS:

The Organization filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the parties’ Agreement when it assigned a B&B Sub-department foreman to supervise and provide flag protection to outside forces, rather than assigning this work to the Claimant. The Carrier denied the claim.

The Organization contends that the instant claim should be sustained in its entirety because the Carrier violated the Agreement when it failed to assign the subject work to the Claimant, who was the regularly assigned, qualified, and available employee of the class that ordinarily performs such work; because the Carrier’s defense to the instant dispute is without merit; and because the Claimant is entitled to the requested remedy. The Carrier asserts that the instant claim should be denied in its entirety because the work

at issue accrues to the B&B forces, because the Claimant was performing other compensated work on a “billable” job on the date in question, and because neither the Agreement nor past practice precluded the B&B Foreman from performing the subject work.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the record in this case, and we find that the Organization has met its burden of proof that the Carrier violated the Agreement when it assigned a Bridge and Building Sub-Department foreman to provide flag protection for outside forces instead of the Claimant, who was the Track Sub-Department assistant foreman. The Claimant had been the person who had been performing that work in the past and was qualified to perform it. The B&B Department foreman was not qualified to perform that work. The record also reveals that the Claimant was available, although he was assigned to another location.

Consequently, the Claimant was the regularly assigned, qualified, and available employee that ordinarily performed the work of supervising and providing flag protection for contractors working on the Carrier’s right of way. Those were the Claimant’s customary duties.

The Carrier has failed to come forward with sufficient evidence with respect to its affirmative defense.

For all of the above reasons, the claim must be sustained.

AWARD:

The claim is sustained.



PETER R. MEYERS
Neutral Member



CARRIER MEMBER

I DISSENT

DATED: 12/10/10



ORGANIZATION MEMBER

DATED: 12/10/10