

AWARD NO. 123  
Case No. 123

Organization File No. I53756710  
Carrier File No. 2010-075909

**PUBLIC LAW BOARD NO. 7163**

PARTIES     ) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION,  
              )     INTERNATIONAL BROTHERHOOD OF TEAMSTERS  
TO            )  
              )  
DISPUTE     ) CSX TRANSPORTATION, INC.

**STATEMENT OF CLAIM:**

1.     The Agreement was violated when the Carrier assigned a Transportation Department conductor employe to perform Track Department assistant foreman-flagman duties between Mile Posts BE 58.2 and BE 58.6 near Dayton, Ohio beginning on August 3, 2010 and continuing.
2.     As a consequence of the violations referred to in Part 1 above, Claimant A. Travis shall now be compensated for all straight time and overtime hours expended by the Transportation Department conductor employe that improperly performed the described Track Department assistant foreman-flagman work.

**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.

On August 3, 2012 a contractor, unrelated to the Carrier, started a repair project on an overhead vehicular bridge near Mile Post BE 58.6 in Dayton, Ohio. The contractor used heavy equipment in and around the Carrier's trackage in the vicinity of the overpass. The Carrier utilized

a flagman from the trainman-conductor craft to control the movement of trains through the work area. The instant claim was filed on September 28, 2010 contending Claimant, a track inspector in the Track Department, should have been used for the flagging duties.

The parties are in agreement that this dispute is governed by Section 8.A.1. of the Agreement, which 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.

While Section 8.B. reserves to the Carrier the right to determine when a flagman is required, the fact that it used a flagman is dispositive of the question of whether one was required. The only question before this Board is whether the work held “the potential to undermine the integrity of the roadbed or track structure.” If it did, the Carrier was required to use a flagman from the maintenance of way craft. It is undisputed that the flagging work was not in connection with Track Department work.

The burden of proof rests with the Organization. When the claim was first filed, the Organization merely asserted that the assignment of a conductor, instead of Claimant, was a violation of the Agreement. In its initial denial of the claim, the Carrier argued that there was no potential to undermine the integrity of the roadbed and, therefore, the work could be assigned to operating employees. Upon appeal, the Organization asserted that “the work that was being done clearly had the potential to undermine the integrity of the roadbed.” Subsequent to a conference on the claim, the Organization contended that pictures of the work site “clearly show that the work had the potential to undermine the integrity of the roadbed.” In response to the Carrier’s reply that the

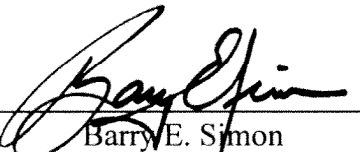
Organization had done nothing more than furnish the pictures, and had not shown how the work threatened the integrity of the roadbed, the Organization reiterated that the pictures establish the basis for the claim. It was not until its presentation before this Board that the Organization offered specific reasons why the work performed by the contractor might impact the integrity of the roadbed. The Carrier objected to the Organization's new facts and argument.

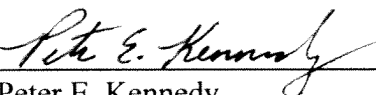
The Board finds that the Carrier's objection has merit. Accordingly, pursuant to Paragraph 6 of the Agreement establishing this Board, the statements offered for the first time in the Organization's submission will not be considered. That provision states, "The Board will only consider evidence and argument presented or made known to the opposing party prior to the close of the record on the property when the parties agree to mutually add cases as provided in paragraph 2 above."


Based upon the record properly before us, we must find that the Organization has failed to meet its burden of proof. 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. The explanation offered in the Organization's submission would have, at the very least, presented contentions that the Board could evaluate to make a determination as to the merits of the claim. Had that information been presented during the handling of the claim on the property, the Carrier would have had the opportunity to rebut the Organization's assertion. Alternatively, it might have determined that the Organization's claim had merit. The purpose of the restriction against the introduction of new evidence and arguments is to permit the parties to discuss, and possibly resolve, grievances before they reach arbitration. Advocates at the arbitration stage should

not be required to address contentions that have been raised for the first time before them. For these reasons, we cannot find that the Agreement was violated in this instance.

AWARD: Claim denied.

  
Barry E. Simon  
Chairman and Neutral Member

  
Peter E. Kennedy  
Employee Member

  
Robert Paszta  
Carrier Member

Dated: January 7, 2013  
Arlington Heights, Illinois