

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

William H. Spencer, Referee

PARTIES TO DISPUTE:

ORDER OF SLEEPING CAR CONDUCTORS

THE PULLMAN COMPANY

**STATEMENT OF CLAIM:** "Conductor F. B. Coghlan, of the San Francisco District, claims shortage of five days' pay in the month of April, 1938, and requests compensation therefor."

**EMPLOYES' STATEMENT OF FACTS:** "Conductor F. B. Coghlan was regularly assigned to Line 103, Western Pacific Trains Nos. 2 and 1, between Oakland, Calif., and Salt Lake City, Utah, in April, 1938, when there was an interruption in the service on that line. As a result of this interruption, Coghlan was held off the line for five days, beginning on April 20th. On those days the trains to which he was assigned did not operate but the assignment of conductors was not annulled by re-bulletin. The conductor remained at his home terminal subject to call.

"The conductor cites Rule 20 to prove that he is entitled to full pay for the month (Exhibit 'A'). The Management cites Rules 9 to prove that the conductor was not entitled to pay for the five days held at home (Exhibit 'B').

"This case has been handled in the usual manner under the Agreement between The Pullman Company and its Conductors. Decision of the highest officer designated for that purpose is shown in Exhibit 'C'."

**CARRIER'S STATEMENT OF FACTS:** "Conductor F. B. Coghlan was regularly assigned to operate on Western Pacific Trains Nos. 12-2 and 1-11 from Oakland, California, to Salt Lake City, Utah, and return in a six-man assignment, line No. 119 (Oakland and Chicago), on the following schedule:

Reported For Duty				Released from Duty				Elapsed		Net Ser.	
Line	Station	Day	Hour	Station	Day	Hour	Time	Rest	Hrs.	Layover	
119	Oakland	1	6:30 P.M.	S. L. City	2	9:10 P.M.	26:40	3:30	23:10	9:20	
119	S. L. City	3	6:30 A.M.	Oakland	4	8:30 A.M.	26:00	4:00	22:00	82:00	
Totals							52:40	7:30	45:10	91:20	

"The afternoon of April 20th, 1938, The Pullman Company was advised by the railroad company that the latter's train No. 12-2 had been annulled because of a landslide caused by torrential rains. Conductor Coghlan, who had been due out on train No. 12-2 the evening of April 20th, was promptly informed by telephone of the cancellation. He asked if he should go out in his regular turn in assignment when operations were resumed, and was answered in the affirmative. Conductor Coghlan expressed regret at the thought of missing this trip. Operation of Western Pacific train No. 12-2 was resumed 24 hours later, and the train departed in regular schedule the 21st

“\*\*\*courts\*\*\*have modified contracts or dispensed with their performance, simply because justice required it.

“\*\*\* In the law of common carriers fortuitous prevention of the carrier's performance does not relieve the carrier from liability unless the impossibility is due to the common-law excuses of act of God.\*\*\*”

Thus it will be seen that it has become part of this country's law, as expressed by court decisions, to remove liability from the carriers where non-performance of contract has been the result of an 'act of God.' In this case Coghlan lost five days' service due to a landslide caused by an 'act of God.' Though the Company should not be held liable for services not performed due to 'acts of God' even if non-payment were in open violation of specific contract provisions, in this case there are additional reasons for non-liability. The Agreement entered into by the Company and the representatives of the conductors fully covers the situation: where regular assignment is not completely performed throughout a month, services shall be compensated for according to the trip-rate basis of Rule No. 21; since conductor Coghlan was not 'held for service' at his home station beyond the expiration of his layover, Rule No. 9 relieves the Company of liability. The Agreement has been followed in spirit and word in paying conductor Coghlan twenty-four days' pay for four round trips in a six-man assignment.

“Conductor Coghlan's representatives have submitted no evidence proving that Coghlan has completed his regular scheduled assignment for the month of April. They have failed to show by which rule he is entitled to payment for services not performed, or that the Company has not made payment in full compliance with the rules of the Agreement. The claims advanced in behalf of Conductor Coghlan for additional pay are not substantiated and therefore should be denied.”

**OPINION OF BOARD:** The claimant in this dispute was a regularly assigned conductor within the meaning of Rule 20 of the Agreement as urged by the petitioner, and not a conductor working part time on regular assignments within the meaning of Rule 21 as urged by the carrier. During the entire month he was available and willing to make every run contemplated by his regular assignment. The fact that he was not working on April 1 and 2 is not material. His assignment did not contemplate that he would start a run on either of these days. The fact that, through no fault of his own, he was not able to start his run scheduled for April 20, thus losing the five days involved in this dispute, did not change his status from that of a “regularly assigned conductor” to that of a “conductor working part time on regular assignments.”

This Division in its Award No. 621 has said that “there is an implied guarantee of the work advertised, the men being ready and willing to perform, until such time as the assignment may be annulled by re-bulletining.” Under the doctrine of this Award, the claimant should have been compensated under Rule 20, unless, as urged by the carrier, it was excused from its obligation because “an 'act of God' or 'vis major,' in other words forces beyond the control of man, completely prevented the operation of the train.”

The doctrine here invoked is one of several modifications of an earlier rule of the common law that a common carrier was an insurer of the safety of goods intrusted to it for carriage. As is commonly said by courts the common carrier “has never been held to be an insurer against injuries occasioned by the acts of God.” This doctrine is limited in its application to cases involving the liability of a common carrier for the safe custody and transport of goods.

The general rule undoubtedly is that when a person unconditionally undertakes to do something, he is not excused from the performance of his undertaking by reason of hardship or impossibility of performance. To this general

rule there are exceptions. Impossibility of performance resulting from so-called acts of God is not, however, one of the exceptions.

Among the exceptions to the general rule, as stated by Professor Williston, is "impossibility due to fortuitous destruction or change in character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance." As another possible exception to the general rule, Professor Williston says that "the fourth class of cases, to which allusion was made above as standing on more debatable ground, comprise cases where impossibility is due to the failure of some means of performance, contemplated but not contracted for."

It is not necessary here to enter upon a detailed discussion of the controversial issues involved in the application of the doctrine of impossibility of performance. The Division, however, is strongly of the opinion that the circumstances which led to the cancellation of the run involved do not excuse the carrier from its obligation to the claimant under Rule 20.

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claimant should have been compensated under Rule 20 of the Agreement.

#### AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 16th day of March, 1939.