

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36068
Docket No. MW-34855
02-3-98-3-559**

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Clinchfield Railroad)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Effler Construction) to clear approximately one thousand (1,000) feet of right of way at Mile Post 76.1 on the Kingsport Subdivision on February 11 and 12, 1997 [Carrier's File 12(97-1307) CLR].**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance written notice of its intent to contract out said work as required by Rule 48.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. J. C. Turner shall be allowed twenty (20) hours' pay at his respective straight time rate.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This claim arose out of clean-up work required after a slide of soft earth and debris occurred on January 27, 1997, on the Carrier's right-of-way at Mile Post 76.1 on the Kingsport Subdivision. Similar slides had occurred in the past and the clearing of such slides had been customarily, traditionally and historically assigned to Track Subdepartment forces. In that connection, the Claimant was assigned to operate a Carrier-owned backhoe on January 27, 1997 to clear some of the mud and rock slide from the track, but he was not utilized to finish the job. Instead, the Carrier assigned him to move with his backhoe to a different job and subcontracted for a front end loader and operator from Effler Construction to complete the work.

The history of case handling in this matter is best demonstrated by quoting, from beginning to end, the chain of appeals on the property:

"SUBJECT: Claim for Time - J. C. Turner (ID 609898)

The above named claimant has advised our Office that the Carrier has contracted out work belonging to the M/W Department. On February 11 and 12, 1997, the Carrier hired Effler Construction to perform work at MP 76.1, Kingsport Subdivision on the Clinchfield Railroad. The work consisted of a front end loader and operator to clear approximately 1,000 feet of right of way where a slide had occurred on January 27, 1997. This contractor worked ten (10) hours on these dates to accomplish this project. Mr. Turner used a Carrier backhoe to clean up the slide the day it occurred and could have accomplished this project while his equipment was at this location.

In view of the above, we are requesting that claimant be paid twenty (20) hours at his applicable rate of pay.

We are citing Rules 1, 2, 3, 4, 5, 6, 7, 48, and the Letter of Understanding from the December 11, 1981 National Agreement in support of this claim.

*** * ***

This office has received your claim letter dated April 2, 1997, your certified mail no. 491-544-637, in which you claim twenty hours on behalf of J. C. Turner at his applicable rate of pay.

Account of the Carrier contracting with Effler Construction to perform work on February 11 and 12, 1997 at M.P. Z 76.1.

The area in the vicinity of M.P. Z 76.1 is a constant threat (impedance) to normal railroad operation (train operation) and to maintaining the slide fence and ditch line. Larger machinery, which the Carrier did not have available, was needed to make the bluff area ready for falling materials.

J. C. Turner did a superb job in clearing the rails at a specification. However, he did not make the total area ready for additional falling materials.

During the period of your claim J. C. Turner did not loose (sic) time or wages he worked and was paid for the claimed days.

The Carrier did not violate rules 1, 2, 3, 4, 5, 6, 7, 48 or the letter of understanding from the December 11, 1981 National Agreement and your claim is totally declined.

*** * ***

We handled the above and attached with your subordinate on April 2, 1997.

This claim was declined by your subordinate in his letter of May 12, 1997, however, we do not agree with all the statements contained in his declination. The Carrier had dozers, backhoes, crawler backhoes, and gradeall along with dump truck working in the vicinity of MP Z 76.1. The unstable conditions at MP Z 76.1 has been an on-going problem over the years and the employes have taken care of the problems by clearing the ditch line, cleaning rock and debris from the slide fence, also, removing

loose rock that may cause a disruption in the fence. Also, in his letter declining our claim, Division Engineer Ramsey states that J. C. Turner did a superb job at one location and did not make the total area ready for facing materials. Mr. Turner was not instructed to clean the entire area. He was instructed to clear one area and move back to St. Paul, Virginia, as quickly as he could.

We, are, therefore, appealing this claim to your Office for a favorable decision. However, in the event you do not allow this claim, then we desire to discuss same with you in conference, requesting that you advise of date, time and place for said conference.

* * *

This is in response to the letter dated June 13 (received June 17), 1997, appealing a claim on behalf of J. C. Turner because CSXT hired Effler Construction Company to clear approximately 1,000 feet of right of way at MP 76.1 on the Kingsport Subdivision of the former Clinchfield Railroad on February 11 and 12, 1997. The original claim for 20 hours was declined by Division Engineer M. D. Ramsey on May 12, 1997.

As explained in Mr. Ramsey's declination, the front end loader was hired because we did not have available machinery large enough to perform the work of clearing the bluff area. Although you take issue with that explanation, you have not provided any proof that Mr. Ramsey's explanation was not accurate. It is apparent that Claimant was not instructed to clean the entire area where the slide occurred because the backhoe he operates was not large enough to handle the rock and debris safely and efficiently. The implication that CSXT hired the front end loader for some other reason is entirely without merit.

Further, Claimant was fully employed and under pay on February 11 and 12, 1997, and suffered no loss of work opportunity due to the use of the front end loader. The claim for additional compensation is excessive, and you have not shown that any agreement rule was violated which might justify payment of a claim.

For the reasons stated here and in previous correspondence, the claim is excessive, without merit or agreement support, and your appeal is declined.

* * *

This is in response to your letter dated August 11, 1997 (received August 18, 1997) File No. 12 (97-1307) declining claim on behalf of J. C. Turner for twenty (20) hours because Effler Construction was used at MP 76.1 clearing approximately 1,000 feet of right-of-way.

In February, 1997, a conference was held with Mr. N. V. Nihoul of your office and we did agree to waive the fifteen (15) day advance notice requirements for drilling and blasting of a rock that we talked about. Also, at this time, we stated to Mr. Nihoul that a dozer was parked at Erwin, Tennessee, not being used and two crawler backhoes on the Clinchfield Railroad Property that could have been used to perform this work. At no time in our telephone conference was it stated that this contractor would be clearing the Carrier's right-of-way.

As for assuming that the claim is excessive, is without merit as this contractor was used the twenty (20) hours at Mile Post 76.1. Therefore, we are requesting to discuss with you this matter in conference."

The matter remained deadlocked following conference and was appropriately appealed to the Board for final determination. The Organization has demonstrated that the subcontracting occurred without any notice or conference in violation of Rule 48 and that the Carrier not only failed to persuasively support its assertions of unavailable adequate equipment, but never rebutted the Organization's evidence to the contrary. The presumptions underlying Rule 48 and the December 11, 1981 Hopkins-Berge Letter of Understanding mandate procedural propriety and a persuasive showing of good and sufficient justification by the Carrier for the subcontracting of Agreement-covered work, neither of which are shown on this record.

AWARD

Claim sustained.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 18th day of June, 2002.