

## SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to Dispute:	)	
	)	
BROTHERHOOD OF MAINTENANCE	)	Case No. 33
OF WAY EMPLOYES DIVISION,	)	Award No. 33
INTERNATIONAL BROTHERHOOD OF	)	
TEAMSTERS,	)	
	)	<b>OPINION OF THE BOARD</b>
Organization,	)	
	)	
and	)	
	)	
UNION PACIFIC RAILROAD	)	
COMPANY,	)	
	)	
Carrier,	)	
_____	)	

Hearing Dates: January 17, 2007 and May 24, 2007  
Hearing Location: Sacramento, California and  
San Francisco, California

### MEMBERS OF THE BOARD

Organization Members: R. B. Wehrli and Donald F. Griffin  
Carrier Members: Kenneth Gradia and John Hennecke  
Neutral Member: John B. LaRocco

### EMPLOYES' STATEMENT OF CLAIM

1. Did the Carrier violate the terms of the Job Stabilization Agreement, dated February 7, 1965, as amended September 26, 1996 (hereinafter referred to as the Feb 7<sup>th</sup> Agreement), when on October 7 and 8, 2005, it denied protected employees assigned to Maintenance of Way Department Gangs 8570, 8571, 8572, 8573, 8574, 8575, 8576, 8577, 8578, 8579 and 8597 (hereinafter referred to as the Claimants) the opportunity to work their regularly assigned 10-hour work day and denied them protective compensation benefits in connection therewith?
2. If the answer to 1 above is "yes", is the Carrier required to compensate each of the Claimants ten (10) hours of compensation for each date, October 7 and 8, 2005, i.e., a total of twenty (20) hours of compensation, at their respective protected rates?

### CARRIER'S QUESTION AT ISSUE

1. Did an emergency exist that permitted the Carrier to Reduce forces with sixteen hours advance notice and suspend protective benefits for October 7 and 8, 2005 pursuant to Article 1 Section 4 of the February 7, 1965 Agreement (Feb. 7<sup>th</sup> Agreement)?

### OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted according to the 1996 Mediation (National) Agreement and as specified in the National Mediation Board appointment letter dated August 18, 2004; and that all parties were given due notice of the hearing held on this matter.

#### I. BACKGROUND AND SUMMARY OF THE FACTS

Article IV, Section 1 of the February 7, 1965 Agreement, as amended and updated by the September 26, 1996 National Mediation Agreement, provides that the Carrier shall not place protected employees in "... a worse position with respect to compensation ... ." Article I, Section 4 of the February 7, 1965 Job Stabilization Agreement carves out an exception to Article IV, Section 1 when and where emergency conditions arise. Article I, Section 4 reads:

Notwithstanding other provisions of this Agreement, a carrier shall have the right to make force reductions under emergency conditions such as flood, snowstorm, hurricane, earthquake, fire or strike, provided that operations are suspended in whole or in part and provided further that because of such emergencies the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employees involved in the force reductions no longer exists or cannot be performed. Sixteen hours advance notice will be given to the employees affected before such reductions are made. When forces have been so reduced and thereafter operations are restored employees entitled to preservation of employment must be recalled upon the termination of the emergency. In the event the carrier is required to make force reductions because of the aforesaid emergency conditions, it is agreed that any decline in gross operating revenue and net revenue ton miles resulting therefrom shall not be included in any computation of a decline in the carrier's business pursuant to the provisions of Section 3 of this Article I. [Emphasis added.]

When Article I, Section 4 is applicable, Article IV, Section 5 provides:

A protected employee shall not be entitled to the benefits of this Article during any period in which he fails to work due to disability, discipline, leave of absence, military service, or other absence from the carrier's service, or during any period in which he occupies a position not subject to the working agreement; nor shall a protected employee be entitled to the benefits of this Article IV during any period when furloughed because of reduction in force resulting from seasonal requirements (including lay-offs during Miners' Holiday and the Christmas Season) or because of reductions in forces pursuant to Article I, Sections 3 or 4, provided, however, that employees furloughed due to seasonal requirements shall not be furloughed in any 12-month period for a greater period than they were furloughed during the 12 months preceding the date of this agreement. [Emphasis added.]

Claimants were protected employees assigned to eleven gangs working in concert with track renewal train TRT 909 in fall, 2005. In early October, 2005, the gangs were performing rail and concrete tie renewal work on the Carrier's Geneva subdivision in northern Illinois.

Claimants were working a compressed monthly work schedule. The gang members were scheduled to work eight consecutive ten hour days from October 1 through October 8, 2005 with rest days from October 9 through October 15, 2005. The gang members were scheduled to resume the second half of the monthly compressed work schedule on October 16, 2005.

At approximately 9:00 a.m. on October 6, 2005, the Carrier notified the members of the gangs working with TRT 909 that all positions would be reduced for the remainder of the first half of the monthly work period, except for gang 8575, due to an emergency. As a result, the members of ten gangs did not work on October 7 and 8 and the members of gang 8575 did not work on October 8. At the Carrier's direction, the employees reported to work on October 16, 2005.

On October 1, 2005, a severe storm dumped ten to twelve inches of rain in eastern Kansas flooding four Carrier lines in the Topeka and Atchison, Kansas areas. These rail lines incurred flooding, extensive washouts, erosion damage and bridge damage. During the three days from October 3 through October 5, 2005, the Carrier reopened the four flooded lines to, at least, limited service.

On November 3, 2005 the Organization initiated a claim on behalf of all protected employees on the eleven gangs seeking protective benefits under the February 7, 1965 Job Stabilization Agreement for ten hours for each day (October 7 and October 8, 2005).

## II. THE POSITIONS OF THE PARTIES

### A. The Organization's Position

While the Organization contends that the Carrier did not meet its burden of showing a genuine emergency on October 7 and 8, 2005, the Organization emphasizes that the major dispute concerns the Carrier's purported failure to engage in a force reduction even if an emergency existed on those two days. The Organization stresses that the Carrier merely sent Claimants home, denying them twenty hours of work opportunity, rather than reducing forces as required by Article I, Section 4 of the February 7, 1965 Job Stabilization Agreement. If the Carrier had reduced forces, Claimants could have exercised their seniority to displace junior employees on other positions to mitigate their loss of compensation pursuant to Schedule Rules 21(d) and 21(e). The pertinent portion of Schedule 21(e) reads:

"When forces are reduced or positions are abolished, seniority will govern, and employees affected thereby may displace junior employees in any seniority class in which seniority and qualifications are held". \*\*\*

Absent a true force reduction, the Carrier was barred from claiming that Article I, Section 4 of the February 7, 1965 Job Stabilization Agreement relieved it from paying benefits to protected employees.

Article I, Section 4 of the February 7, 1965 Agreement only applies if the Carrier abolished positions. *Special Board of Adjustment 605, Award 115 (Zumas)*. Similarly, Article I, Section 4 does not cover a temporary suspension of work. *Special Board of Adjustment 605, Award No. 242 (Rohman)*. *Award No. 242* specifically held that Article I, Section 4 grants the Carrier the right to make force reductions or job abolishments but not temporary suspensions of positions. Assuming, *arguendo*, even if Article I, Section 4 is applicable to a temporary suspension of forces, such a force reduction did not occur in early October 2005 since, to reiterate, the Carrier did not permit Claimants to exercise their seniority.

Alternatively, the Organization argues that the Carrier did not experience emergency conditions in Illinois, the location of the rail renewal and concrete tie gangs. The flooding was confined to Kansas which is quite far from Illinois. Article I, Section 4 of the February 7, 1965 Agreement provides that any emergency must necessitate a suspension of operations yet, operations continued on the Geneva subdivision.

The Carrier attempts to invent an emergency on the Geneva subdivision premised on the paradoxical and faulty notion that train traffic volume increased on the Geneva subdivision. An increase in train traffic has never before been construed as an emergency. It is a paradox for the Carrier to allege that operations were suspended, in whole or in part (to trigger Article I, Section 4), and then simultaneously submit that operations actually increased. Also, the Organization objects to much of the information

submitted with the Carrier's submission purportedly showing an increase in traffic volume since such data was not supplied to the Organization on the property.

Even if an emergency occurred on October 1, 2005, the emergency ceased when Kansas rail lines reopened on October 4, 2005 which was three days before the Carrier unilaterally and improperly deprived Claimants of compensation. The Carrier represented to the public in the October 5, 2005 issue of Union Pacific Online that all lines would open by October 5. Since the emergency ended two to three days before the Carrier ordered Claimants to go home, the Carrier cannot rely on the provisions of Article I, Section 4 of the February 7, 1965 Job Stabilization Agreement. Thus, Claimants are entitled to protective benefits.

B. The Carrier's Position

The Carrier declared that, during normal operations, sixty-five trains per day traverse the Geneva subdivision. Because the track renewal and concrete tie work requires track time over a mile of right-of-way, the Carrier reduced the number of trains on the subdivision to about forty trains per day. The Carrier submits that once flooding closed four main lines on October 1, 2005, trains were diverted to other lines which sent twenty-one trains per day on a detour through the Geneva subdivision. The Carrier also submits that it simultaneously had to return seven or eight trains to the Geneva subdivision which had been previously pulled off the subdivision, to accommodate TRT 909. Stated differently, these trains were returned to their home rail route. With its submission, the Carrier submitted information from the General Superintendent of Transportation showing that train traffic increased on the Geneva subdivision beginning

on October 4.<sup>1</sup> The substantial increase in the number of trains meant that the Maintenance of Way gangs could not perform their work. Consequently, the Carrier notified the gang members at 9:00 a.m. on October 6 that their positions were reduced for the remainder of the first half of the month of October, except for gang 8575 which worked on October 7 (but not on October 8).

The Carrier stresses that the Organization did not dispute that massive flooding occurred in northeastern Kansas during early October, 2005. The closure of four lines not only caused the suspension of operations in the area directly hit by the flood, but also had a ripple effect on many other lines on the Carrier's system. It is illogical to restrict the emergency conditions to the Topeka area when the Carrier was compelled to reroute trains over other lines including the Geneva subdivision. While the Kansas lines opened to limited train service as early as October 3, the lines could not handle the normal flow of traffic. Moreover, since trains had already been diverted, the detoured trains could hardly be called back to their normal Kansas routes. The flood and the increase in train traffic on the Geneva subdivision were hardly independent events. The unusually high volume of traffic on the Geneva subdivision rendered it impossible for TRT 909 and Claimants to perform work and so the Carrier proved a causal link between the suspension of its operations in Kansas and the diminution of Claimants' work. *Special Board of Adjustment, No. 605, Award No. 436 (Eischen)*. Article I, Section 4 does not address the location of the emergency but rather is applicable when Claimants work can be performed, regardless of Claimants' work location.

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<sup>1</sup> The threshold level of traffic on the Geneva subdivision was 42 to 45 trains per day. According to the General Superintendent, the number of trains on the Geneva subdivision was 55 on October 4; 54 on October 5; 51 on October 6; 59 on October 7; 59 on October 8; and, 70 on October 9.

When the Carrier told Claimants that they could not perform work on October 7 and 8, the Carrier reduced forces albeit it did not formally abolish positions. *Special Board of Adjustment No 605, Award No. 115 (Zumas)* is not applicable in this case since the issue before the Board in *Award No. 115* was whether the Carrier had to provide the sixteen hour notice described in Article I, Section 4 when it did not abolish jobs.<sup>2</sup> In this dispute, the Carrier provided more than sixteen hours notice to Claimants.

Article I, Section 4 speaks to both force reductions and abolishments with the conjunctive term “or”. Positions need not be abolished to invoke Article I, Section 4 so long as the Carrier engaged in a force reduction which it did. The Carrier temporarily reduced forces on October 7 until the emergency passed. Pursuant to Article I, Section 4 of the February 7, 1965 Job Stabilization Agreement, the Carrier recalled the gang members to service at the beginning of their second half of the month compressed work period. Article I, Section 4 specifically refers to “recall” at the end of the emergency. The Carrier could not have satisfied this recall procedure if it had abolished jobs. Abolishments would have required the Carrier to re-bulletin the positions which would have consumed up to two weeks to award the jobs. Therefore, Article I, Section 4 contemplates the swift reduction of positions and a rapid recall of employees back to those positions.

The Organization relies on Schedule Rule 21, but this Board is without jurisdiction to interpret and apply the Rules of the Schedule Agreement. Also, whether the Claimants could exercise their seniority is not an issue mentioned in Article I, Section 4 since the emergency provisions therein are outside the normal seniority process.

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<sup>2</sup> Also, *Special Board of Adjustment No. 6005, Award No. 242 (Rohman)* implicitly held that the ruling in *Award No. 115* was palpably erroneous.



The Carrier properly invoked Article I, Section 4 of the February 7, 1965 Job Stabilization Agreement due to the emergency precipitated by the flooding of its lines and therefore the Carrier was not obligated to pay Claimants protective benefits in accord with Article I, Section 5 of the February 7, 1965 Job Stabilization Agreement.

### III. DISCUSSION

The Carrier denied this claim for protective benefits under the February 7, 1965 Job Stabilization Agreement, as amended, because an emergency ostensibly prevented Claimants from performing their regular assignments on the last two days of their compressed work schedule for the first half of October, 2005.<sup>3</sup> Article IV, Section 5 of the February 7, 1965 Job Stabilization Agreement allows the Carrier to forego paying protective benefits to protected employees if the provisions of Article I, Section 4 are fully satisfied. Since the Carrier invoked Article I, Section 4, the Carrier must prove that it met the requirements therein. *Special Board of Adjustment 605, Award No. 436 (Eischen)*.

Article IV, Section 4 gives examples of emergencies followed by two provisos. A close examination of the language in Article I, Section 4 reveals that the Carrier must demonstrate: 1) an event occurred which is either enumerated in the first sentence of Section 4 or is equivalent to one of the emergency events listed in that sentence; 2) the Carrier suspended its operations in whole or in part; 3) the work which Claimants would have performed on October 7 and 8, 2005 either no longer existed or could not be performed; 4) the Carrier engaged in a force reduction and/or abolished positions; and, 5)

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<sup>3</sup> The minor exception is that the Carrier apparently utilized and compensated the members of gang 8575 on October 7 but not October 8, 2005.

the Carrier afforded sixteen hours advance notice to affected employees. *Special Board of Adjustment No. 605, Award No. 454 (LaRocco)*.

In this particular case, the Carrier indisputably proved the first, second and fifth requirements. A foot of rainfall in the Topeka, Kansas area on October 1, 2005 precipitated widespread flooding which damaged bridges and track precipitating the closure of four main rail lines. A "flood" is one of the events expressly listed in the first sentence of Article IV, Section 4. The Carrier afforded Claimants more than sixteen hours advance notice when it told them, at 9:00 a.m. on October 6, that the Carrier would not be utilizing their services on October 7 and 8. The Carrier also demonstrated that it wholly suspended operations over the four rail lines in northeastern Kansas due to track washouts, roadbed erosion damage and bridge damage. The questions become whether the Carrier proved the remaining two requirements to invoke the emergency provisions set forth in Article I, Section 4 of the February 7, 1965 Job Stabilization Agreement, as amended.

Before this Board can address the issue of whether the Carrier engaged in a force reduction and/or whether it was required to abolish positions, this Board must determine if the Carrier proved "... that because of such emergencies the work which would be performed by ... the employees ... no longer exists or cannot be performed." As the Carrier persuasively argues, this proviso in Article IV, Section 5 does not presumptively confine an emergency condition to the precise location of the "... flood, snowstorm, hurricane, earthquake, fire or strike ...." However, the requirement that the Carrier must prove that the work to be performed by Claimants vanished or could not possibly be performed due to an emergency means that the Carrier must prove that the emergency

flood conditions in northeast Kansas spilled over to northern Illinois to render it impossible for Claimants to perform track renewal work on the Geneva subdivision. Stated differently, the second proviso in the first sentence of Article I, Section 4 obligates the Carrier to show that an emergency extended to the point where the allegedly affected employees were performing service. It is plausible for an emergency at one location on the Carrier's system to be restricted to that location. It is equally plausible for an emergency at one location to have a demonstrable snowball effect disrupting work over other parts of the Carrier's system or even its entire system.

After carefully reviewing the record, this Board concludes that although the Carrier may have (or it may not have) proven that the flood emergency spilled over to the Geneva subdivision in its submission, the Carrier failed to marshal proof of causation during the handling of the claim on the property. This Board must disregard new evidence proffered by the Carrier for the first time with its submission before this Board. Rather, we must evaluate the evidence submitted by both parties on the property. Based on that evidence, the Carrier fell short of its burden of proving its affirmative defense to these claims for protective benefits.

On the property, the Organization submitted evidence strongly suggesting that the emergency ceased on or before October 5, 2005 when rail lines reopened in Kansas. Although the reopening concerned limited rail service, nothing in the Carrier's Online newsletter indicates that the continuing, partial curtailment of operations extended beyond the four rail lines. Once the Organization presented proof that the emergency for, all practical purposes, was substantially alleviated, it was incumbent upon the Carrier to show that the emergency continued to endure through October 7 and 8, 2005 and that the

emergency conditions geographically extended from northeast Kansas to northern Illinois. *Special Board of Adjustment No. 605, Award No. 454 (LaRocco)*. On the property, the Carrier obliquely referred to detouring trains, originally scheduled to traverse through Kansas, to other locations with an increase in the number of trains on the Geneva subdivision. However, the Carrier failed to explain two important points. First, if the train detours started on October 1, the Carrier failed to explain why Claimants could still perform their work on October 2 through 6 if more trains were rerouted over the Geneva subdivision. The Carrier did not demonstrate why Claimants could perform their assignments on October 6 and yet it suddenly became impossible for them to perform their work on October 7. Second, the Carrier failed to explain why the resumption of limited service in northeastern Kansas did not conclusively end the emergency. More importantly, on the property, the Carrier was quite vague as to when the emergency ceased implying that it ceased on October 16 which conveniently coincided with the resumption of Claimants normal second half of the month compressed work schedule. This timing makes it appear as though the Carrier is fitting the duration of the emergency to be compatible with the end of Claimants rest days. Rather, emergencies endure for an unpredictable period of time without any correlation to any particular gang's scheduled assignment. Absent an explanation on these two critical points on the property, the Carrier did not prove that the emergency extended to the Geneva subdivision and endured on the subdivision through October 7 and 8, 2005.

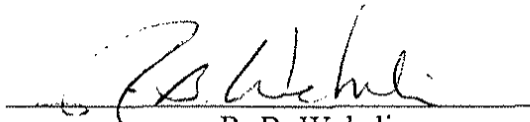
Inasmuch as the Carrier did not prove that emergency conditions existed on the Geneva subdivision on October 7 and 8, 2005, this Board need not address the

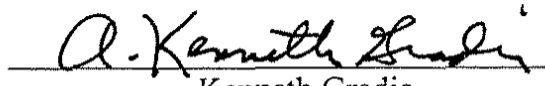
Organization's contention that the Carrier did not engage in a force reduction on October 7 and 8, 2005.

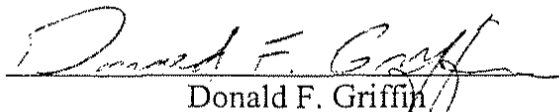
**AWARD AND ORDER**

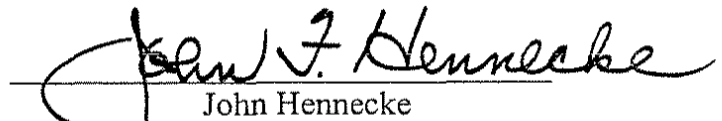
1. The Answer to the first statement of the employees' claim is Yes;
2. The Answer to the second statement of the employees' claim is Yes, except for gang 8575 whose protected members are restricted to compensation for October 8, 2005;
3. The Answer to the Carrier's question at issue is No.

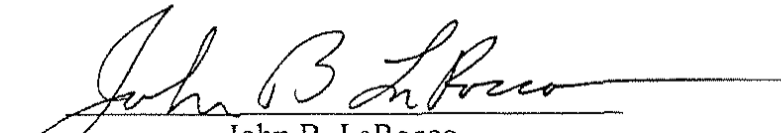
DATED: 10-3-07

  
R. B. Wehrli  
Organization Member

  
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