

PUBLIC LAW BOARD NO. 2206

AWARD NO. 46

CASE NO. 28

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Burlington Northern, Inc.

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when permitting outside forces to construct 680 feet of subgrade embankment on the Lake Kapowsin Branch near Mile Post 7, January 9,10,11,12, 13,16,17,18,19 and 20, 1978. (S-P-163C System File).
- (2) That Claimants J.R. Whitver and T.J. Bradshaw now be allowed 80 hours each at Group 2 rate of pay January 9,10, 11,12,13,16,17,18,19 and 20, 1978.

OPINION OF BOARD:

In this case, the Organization alleges a violation of the Scope Rule and the Note to Rule 55 when Carrier subcontracted for outside forces and equipment to repair flood damage, without adequate notice and/or agreement of the General Chairman. The work at issue was described in a January 9, 1978 letter from Carrier to the General Chairman, reading as follows:

Mr. F. H. Funk, General Chairman
Brotherhood of Maintenance of
Way Employees
500 Northwestern Federal Building
Minneapolis, Minnesota 55403

January 9, 1978
File MW-84(c)-Track

Dear Mr. Funk:

As a result of the heavy rain and resulting flood conditions on the West Coast during the month of December 1977, the track washed out at two locations near MP 7 on the Lake Kapowsin Branch.

The washout east of MP 7 is 500 feet long and 3 feet deep with the track gone. The second washout is 200 feet west of the above washout and is 180 feet long and about 7 feet deep, with the track hanging. In order to construct the embankment for the track now that the water level in the stream has dropped, it will be necessary to work dozers in the stream to push up gravel for an embankment.

With the number of washouts that have resulted from the flood conditions, we do not have heavy equipment available to perform this work in order to restore traffic on this line. For your information, dozers and operators from St. Regis mill will be utilized to construct the embankment. After the embankment is constructed, Carrier forces will construct the track and protect it with heavy rip rap.

Sincerely,



L. K. Hall
Asst. to Vice President

The General Chairman promptly requested a conference which was held on January 19, 1978, but no agreement was reached between the parties. In the meantime, Carrier had already contracted with the St. Regis Company to perform the reconstruction of the washed out bank. The outside forces completed the embankment work in ten days between January 9-19, 1978, using three D-8 Caterpillar bulldozers, one front-end loader and three ten-yard dump trucks. Thereafter, Carrier's Maintenance of Way employees replaced the rail and secured the embankment by placing some 1,300 cubic yards of riprap.

The present claim was initiated by the Vice General Chairman on
February 16, 1978, as follows:

February 16, 1978

Mr. D. H. Burns
Superintendent
303 South Jackson Street
Seattle, Washington 98104

Dear Mr. Burns:

I am herewith filing a Claim on behalf of J. R. Whitver, S.S.# 536-50-2743, and T. J. Bradshaw, S.S.# 516-56-8610, Group 2 Machine Operators on Seniority District # 6, when the B. N. Inc. hereafter referred to as the Company, hired 2 D-8 Caterpillars from the St. Regis Mill to construct 680 foot of embankment washed out by floods in December 1977.

The Company had X71-WC659 a D-8H Cat available at Snohomish, Washington which was setting idle during the time the St. Regis cats were in use. The X71-0807 a D-8 Cat was abolished, X71-WC657 a D-7 Cat was abolished, and X71-0728 a D-7 Cat has been abolished for 1 year for repairs. There were D-7 Cats working at locations other than the washed out areas..

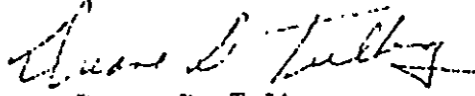
Mr. Whitver and Mr. Bradshaw had followed Group 2 roster positions until November when their Seniority would not allow them to continue, so they had to displace Sectionmen to continue working for the Company. Had the machines listed above been bulletined and assigned they would still be working in Group 2.

The Company is in violation of the including, but not limited to the following Rules, 1-B, 1-C, 2-A, 55-N and the Note to Rule 55. The Company did not ask approval to contract until the day the work began by the Contractor, which was January 9, 1978.

This Claim is for 80 hours each at Group 2 rate of pay for the above named Employees(January 9-10-11-12-13-16-17-18-19-20, 1978)

Please advise if this Claim will be allowed as presented. A conference is requested and desired at an early date.

Yours Truly,


Duane D. Tulberg
Vice General Chairman

After much discussion on the property, with several conferences and cross-filing of conflicting allegations regarding the adequacy of Carrier's bulldozers and other equipment, a final denial of the claim was made on February 13, 1979, as follows:

Mr. C. H. Lindsey, Gen. Chmn.
Bro. of Maintenance of Way Employees
500 Northwestern Federal Building
Minneapolis, Minnesota 55403

February 13, 1979

File MW-84(c) 4/21/78

Dear Mr. Lindsey:

This refers to your file S-P-163C of January 29, 1979, in the claim of H. R. Whitver and T. J. Bradshaw for 80 hours each at Group 2 rate, January 19-20, 1978, when a contractor constructed 680 feet embankment washed out by floods on the Lake Kapowsin Branch.

I do not concur in your views that the D-7 caterpillars were as good as the D-8 used by the contractor. This was an emergency and we have adequately demonstrated that fact in view of which the claim is not valid and declination is, therefore, respectfully reaffirmed.

Sincerely,



L. K. Hall
Asst. to Vice President

LKH:at33

We have reviewed all of the voluminous correspondence, cited arbitration awards and other evidence submitted to us by the parties. It is plain that the work at issue normally and customarily would have been performed by machine operators, laborers and sectionmen represented by the Organization. Nor can it be seriously contested that the January 9, 1978 letter advising the General Chairman of a fait accompli was not adequate notice under the fifteen-day minimum notice and consultation requirements of the Note to Rule 55. Thus, the Organization would have made out a prima facie violation

of the Note, if that provision applied in the present fact situation.

The single exception to the notice and consultation requirements of the Note is the "emergency time requirements cases" provided for in the exculpatory language contained in the last paragraph of the Note to Rule 55, as follows:

Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employees included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible.

Thus, all of the argument and evidence regarding the conditions set forth in the third paragraph of the Note to justify subcontracting after due notice and consultation, but in the absence of agreement by the General Chairman are irrelevant and serve only to cloud the issue presented in this case. The only question properly before us in this case is whether the emergency time requirement conditions supra obtained when Carrier let the contract to St. Regis. Thus, we must inquire: Did the conditions near M.P. 7 on the Lake Kapowsin Branch constitute an emergency that affected the movement of traffic and which required additional forces or equipment to clear up in the shortest time possible? In the context of the language in the Note, the burden is upon Carrier to provide substantial probative evidence on the record to show that such emergency time conditions obtained to justify its failure to comply with the otherwise mandatory notice and consultation requirements of the Note. After careful analysis of the record we are persuaded that Carrier has carried that burden in this case.

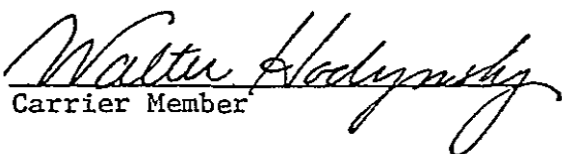
The flood damage to Lake Kapowsin Branch was only part of catastrophic damages caused by double the normal amount of rainfall in Washington state in 1977. Unrefuted record evidence indicates that flood damage resulted in

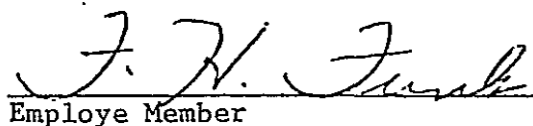
delcaration of a state of emergency by the Governor. Carrier specifically experienced bridge, culvert and roadbed damage on main line and branch trackage on the 1st, 3rd, 4th, 12th and 15th subdivisions of its Pacific Operating Division; with stranded trains, washed out bridges, impassable trackage and rerouted service throughout the area. On the Lake Kapowsin line, the Puyallup River overflowed, changed course and washed away 700 feet of track, thus cutting off rail access to the St. Regis Lumber Mill, a major user of Carrier's service. We find the foregoing persuasive evidence that an emergency condition existed which affected the movement of traffic. Moreover, the record persuades us that with the placement and occupation of Carrier's equipment and forces elsewhere repairing the extensive damage on the system, utilization of the available and willing St. Regis forces and equipment was "required to clear up the emergency condition in the shortest time possible".

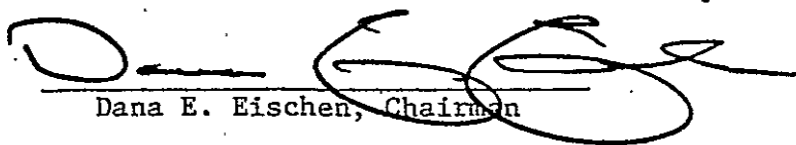
Based upon the foregoing, we find that the "emergency time requirement" conditions of the last paragraph of the Note to Rule 55 obtained in this case and, therefore, the Agreement was not violated.

AWARD

Claim denied.


Carrier Member


Employee Member


Dana E. Eischen, Chairman

Date: 10/1/6