

PUBLIC LAW BOARD NO. 3460

Award No. 71
Case No. 71

PARTIES
TO
DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Burlington Northern Railroad Co.

STATEMENT
OF CLAIM:

- "1. The Agreement was violated when the Carrier failed to bulletin the Bridge Tender position at Clatskanie, Oregon, following the retirement of Bridge Tender, J. Guidry.
2. As a consequence of the aforestated violation, Furloughed Bridge Tender, R. M. Benton, shall be allowed eight (8) hours' straight time pay for each day the Relief Bridge Tender, L. M. Brecht, performed service at Clatskanie Bridge, and he shall be allowed time and one-half pay for all overtime bridge tender work performed by Mr. Brecht at Clatskanie Bridge, beginning sixty (60) days retroactive from the date of the Vice General Chairman's claim, dated August 9, 1982.
3. The Carrier shall bulletin the position of Bridge Tender at Clatskanie, Oregon."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

The history of the drawbridge in question goes back to approximately 1916 when the Astoria and Columbia River Railroad was constructed. In the early years following the construction of

that road, there was a heavy incidence of passenger and freight trains crossing the drawbridge and it was necessary to have the bridge operated and manned seven days a week. According to Carrier's material, it was apparent that the passenger and freight service diminished to the point, in the 1950s and 1960s, when a full-time Bridge Tender appeared to be unnecessary. In fact, during the first six months of 1981, the bridge was opened a total of 26 times over the six-month period. Some months it was opened as few as twice, and at most seven times, in one month. On September 23, 1981, the regularly assigned Bridge Tender on the particular bridge was dismissed from service. He subsequently elected to take early retirement in June of 1982, rather than the disciplinary action of Carrier. However, effective September 23 Carrier made the determination that it would not have a full-time Bridge Tender assigned to the task in question but simply use another Maintenance of Way Employee to accomplish the opening of the bridge, when needed, as a secondary aspect of his job. Therefore, following September 23, 1981, the position was not bulletined or filled by the assignment of a regular full-time Bridge Tender. It was this action of Carrier which gave rise to the claim herein.

Petitioner bases his claim on the provisions of Appendix L of the Agreement which was entered into in 1962 and provides, in pertinent part, as follows:

"Memorandum of Agreement between Spokane, Portland and Seattle Railway Co. and Brotherhood of Maintenance of Way Employees with respect to "Accumulation of Rest Time and the Granting of Longer Consecutive Rest Periods" under Rule 27 (b) F (3) of Schedule No. 4.

As presently constituted, the Bridge Tender positions at Clatskanie, BlindsloUGH and John Day are filled seven days per week, effective on the date shown below, and continuing as long as it is necessary to fill those positions seven days per week...."

The remainder of the rule set forth the work day and rest day cycles, which were rather unique, and were to be observed by the three regularly assigned Bridge Tenders and one relief Bridge Tender assigned to the three bridges.

Petitioner relies totally on the provisions of Appendix L as indicated above and maintains that the claim in question herein is a continuing one, in view of the Carrier's failure to bulletin the Bridge Tender vacancy. Petitioner argues that Carrier's unilateral action was violative of the Agreement and was arbitrary and improper. In fact, the Organization specifies that the last portion of Appendix L states that the Agreement would remain in effect until changed in accordance with provisions of the Railway Labor Act, as amended. With respect to Carrier's position that the claim was not timely filed, Petitioner notes that Carrier waived any right to question the timely presentation, in view of the fact that the issue was not raised until the final level of appeal on the property (citing Second Division Award 5223).

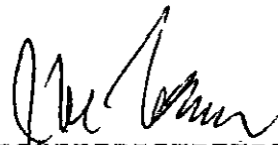
With respect to the timeliness that is questioned, Carrier indicates that it started the procedure of filling the Bridge Tender position on an as-needed basis in September of 1981. However, the Organization's claim was not filed until some 11 months later, clearly beyond the 60 days required by the Agreement. Furthermore, Carrier maintains that the argument raised by the Organization that the claim was a continuing one simply has no merit. Carrier argues that the claim was based on a single event, which was the failure of Carrier to rebulletin the Bridge Tender position when it was vacated on September 23, 1981. Carrier indicates that there have been many awards holding that such a continuing claim based upon a single event is incorrect (e.g., Third Division Award No. 12984). On the merits, Carrier points out that Appendix L was arrived at and written into the Agreement for one purpose only, that is to provide a means of accumulating rest days for the Bridge Tenders. Carrier insists that that Agreement and that language does not, in any sense, mandate the continuation of the positions beyond the time when they were needed. In short, there was no guarantee in Appendix L that the positions must be maintained indefinitely.

After examining the record carefully, the Board concludes that the claim was not timely filed on its face. However, even assuming arguendo that Petitioner is correct and the claim was not filed untimely, since it was a continuing one, on the merits, the claim does not have any validity. It is apparent that Appendix L does

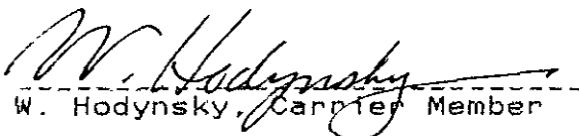
not guarantee that the Drawbridge Tender position would be filled forever. That position is no different than another position which is no longer justified by Carrier when the work decreases to a de minimus basis. In fact, Appendix L contemplates the possibility of the positions not being filled in the second paragraph when it states: "...continuing as long as it is necessary to fill those positions seven days per week." Carrier is not estopped from abolishing a position when the work disappears or diminishes to the point where it is not required. There is nothing in Appendix L or the Agreement which requires that the position be maintained indefinitely. For that reason alone, the claim must be denied.

AWARD

Claim denied.



I. M. Lieberman, Neutral-Chairman



W. Hodynsky, Carrier Member



F. H. Funk, Employee Member

9/20/88

St. Paul, Minnesota
August , 1988