

SPECIAL BOARD OF ADJUSTMENT 1110

Award No. 89  
Case No. 89

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

CSX Transportation, Inc. (former Louisville and  
Nashville Railroad Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces (Midway Construction) to drive piling at Mile Post T-75.3 on the Short Line on May 20, 1996 and continuing [System File 37(5)(96)/12(96-1320) LNR].
2. The Agreement was further violated when the Carrier assigned outside forces (Midway Construction) to cut rail to be used for driving piling at Mile Post T-75.3 on the Short Line on May 21, 1996 and continuing [System File 8(62)(96)/12(96-1319)].
3. The Agreement was further violated when the Carrier failed to timely notify the General Chairman of its intent to contract out said work in accordance with Article IV of the May 17, 1968 National Agreement and failed to act in good faith in accordance with the December 11, 1981 Letter of Agreement.
4. As a consequence of the violations referred to in Parts (1) and/or (3) above, System Pile Driving Gang 6C74 Engineer E. D. Helton shall now ' . . . be allowed ten (10) hours straight time and all overtime for each day beginning May 20, 1996 and continuous until violation is corrected at their respective straight time and overtime rates of pay. The claimants also should be allowed

the 2 cents a mile and 2 minutes a mile from Mile Post C-300.5 on KD Subdivision to Mile Post T-75.3 on Short Line.'

5. As a consequence of the violations referred to in Parts (2) and/or (3) above, System Pile Driving Gang 6C74 Welder James K. White, Jr., shall be allowed overtime at the welder's overtime rate of pay for all hours worked by the Midway Construction employees on May 21, 1996 and continuing until the violation ceases.

#### FINDINGS:

This Board, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and the Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act, as amended; and
2. That the Board has jurisdiction over this dispute.

#### OPINION OF THE BOARD:

A careful review of the record indicates that an emergency existed in the referenced location because heavy and excessive rains caused certain damage in which the embankment could no longer support repetitive train movements in a safe manner. As a result, the conditions caused the Carrier to impose a main line slow order on or about May 11, 1996 at the referenced location.

Although the disputed work constituted work customarily and historically performed by members of the bargaining unit, the Carrier asserted that the emergency condition precluded the assignment of the Claimants. The Carrier explained that the Claimants were fully employed at the time on other necessary projects and that the Carrier did not have the necessary equipment available at the time to perform the disputed work. The Carrier further clarified that no employees remained on furlough at the time.

The Organization maintained that the Carrier knew about the soft spot in the referenced location since approximately 1991 and had failed to act in a timely manner to address the potential problem by assigning members of the bargaining unit to perform the disputed work before an emergency had developed. The Organization reasons that the Carrier always had the option to expand the size of the workforce to address such needs before an emergency materialized.

The record further indicates that the Organization attacked the Carrier for failing to provide effective advance written notice to the Organization of the Carrier's intent to use outside forces to perform the disputed work. Although the record reflects that the Carrier did provide advance written notice to the Organization, the Organization argues that the timing of such notice, which the Carrier controlled, precluded the parties from meeting before the outside forces had begun to perform the disputed work. The Organization underscores that the meeting concerning the disputed work therefore became meaningless because the Carrier already had implemented the decision to use outside forces.

Third Division Award No. 32273 (Meyers, Ref.) addressed the appropriate approach in an emergency situation:

This Board has reviewed the record in this case and we find that the work that was the subject of the contracting out dispute related to the Carrier's attempt to deal with heavy rains and flooding that had washed out track at various locations. At the time, the trains were all subject to slow orders in the affected area. The Carrier has shown that an emergency did exist. We find that it is not necessary that the line be completely shut down in order for an emergency situation to exist. We also find that the fact that there was no notice served does not require a sustaining award because in this situation the emergency conditions required immediate action.

The record substantiates that the Carrier did provide an advance notice. Although a very small chance existed that the parties could realistically resolve the matter because of the timing pressures that existed, the attempt by the Carrier to provide such advance notice constitutes important evidence that the Carrier sought to act in good faith under the conditions set forth in the record.

The record proves that an emergency situation existed. The Carrier therefore did not violate the Agreement by using the outside forces to perform the disputed work. The record also indicates, without refutation, that the Carrier did not have the necessary equipment to perform the disputed work and did not have any members of the bargaining unit remaining on furlough at the relevant times.

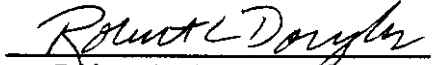
With respect to the argument by the Organization that the Carrier knew of a potential problem in the area since 1991 and had failed to arrange to have the necessary work performed, the record fails

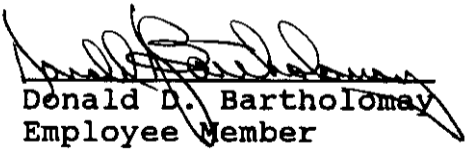
to provide sufficient evidence about the precise potential danger in a more recent context to the present case. The fact that such a substantial period of time had passed since the members of the bargaining unit had performed certain work around mile post T-75.3 fails to prove that the Carrier should have arranged to have the actual disputed work performed either in 1991 or thereafter. The passage of a number of years between the alleged knowledge to the Carrier in 1991 and the emergency in the present case in 1996 suggests that the situation in 1991 did not provide sufficient knowledge to the Carrier of an imminent likelihood of a potential emergency. Instead, the record suggests that the heavy and excessive rains that occurred in May 1996 constituted an intervening and superseding occurrence that substantially changed the physical conditions and caused the emergency to occur.


Under all of the special circumstances of the present dispute that involved an authentic and documented emergency, the preponderance of the evidence fails to substantiate the Claims of the Organization.

AWARD:

The Claim is denied.

  
Robert L. Douglas  
Chairman and Neutral Member

  
Donald D. Bartholomay  
Employee Member

  
Mark D. Selbert  
Carrier Member

Dated: 5/14/01