

# Get The Best Results In Claim Resolution Through The Smart Use Of CPM Scheduling

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*Major construction projects generate major construction litigation. Management of either is perilous. Morse/Diesel, Inc. v. Trinity Industries, Inc.*, 67 F.3rd 435, 437 (2nd Cir. 1995).

Consider what many of us have faced when digging into or preparing a complex construction claim: piles of schedules with hundreds or thousands of activities; stacks of diaries and daily reports covering months or even years; hundreds of serial letters among the owner, contractor, designer, subcontractors and suppliers; radically conflicting opinions on relative fault; cost records showing an unprofitable job; and massive change order files.

We all know that imposing a workable analytical framework or narrative line on the day-to-day activities of a construction project is necessary to bring sense and order to what at times appears chaotic. Achieving the best possible results in resolution of construction claims requires being able to explain (and understand) the claim and its equities in a simple, understandable form. It's not enough to simply pile the project documentation in a neat stack and hope for the best; a structure and a narrative is crucial.

The question, always, is how?

Fortunately, a basic framework for the analysis of complicated construction claims exists: set out the original plan and show that it was (or was not) reasonable, compare that original plan to what actually happened on the project, identify the differences between the two, assign cause for the differences, and then demonstrate the impact and cost to the project. The classic statement of that framework, which involves CPM scheduling, comes from Messrs. Wickwire, Driscoll and Hurlbut in CONSTRUCTION SCHEDULING: PREPARATION, LIABILITY AND CLAIMS, § 9.1 at 202:

The basic technique used in evaluating contract claims with CPM is to compare the as-planned CPM schedule with the as-built CPM schedule. The technique can be summarized in the following five questions:

1. How was it planned that the project would be constructed?
2. How did construction actually occur?
3. What are the variances, or differences, between the plan for performance and the actual performance with respect to activities,

sequences, durations, manpower and other resources?

4. What are the causes of the differences or variances between the plan and actual performance?

5. What are the effects of the variances in sequence, duration, manpower and so on as they relate to the cost experience both by the contractor and the owner for the project?

A recent 10th Circuit case demonstrates just how important it is to use CPM methodology. In Morrison Knudsen Corp. v. Fireman's Fund Insurance Co., 175 F.3d 1221 (10th Cir. 1999), the Tenth Circuit ruled that in order to be excusable, any delay complained of must extend the project's overall completion; that is, the delay must be on the critical path. In that case the Tenth Circuit stated:

A critical delay is one which may delay not just a particular activity at issue, but the overall completion date of the Work. Many activities may be performed on a project at any time without any effect on the completion of the project. A delay in such non-critical activities will not delay the project overall and cannot constitute an excusable delay. Only delays to activities on the critical path - activities with no leeway in the schedule - may give rise to excusable delay.

The Tenth Circuit then went on to state:

Courts often use CPM scheduling to resolve disputes over excusable delay claims. CPM provides a useful, well-developed nomenclature and analytical framework for expert testimony. While CPM has generated technical terminology, the legal requirement that is used to analyze is general and commonsensical: contractor must prove that a delay affected not just an isolated part of the project, but its overall completion. Courts often do not use formal CPM terminology, but simply an informal, CPM-like analysis to determine whether a contractor has met its burden of proof on that general requirement.

The Tenth Circuit expressly required the subcontractor to examine each specific delay claim, determine whether the contractor caused each delay in a manner authorized by the contract, and then determine whether each delay caused the subcontractor to incur reasonable costs which were properly allocable to the contract. The lesson from that case is that a critical path analysis is often essential to a clear, effective claims presentation and also, oftentimes, can be an absolute legal requirement.

While this may appear to be obvious and fundamental, two points are worth noting. First, the case law shows clearly that not just juries, but courts, boards and other fact finders, want to hear from those lawyers and witnesses who are objective and base their opinions on (and also understand) what actually happened day to day on the project. See ABA Section of Litigation, Jury Comprehension in Complex Cases 41 (1990); Neal & Company, Inc. v. U.S., 36 Cl. Ct. 600 (1996); Williams Enterprises, Inc. v. Straight Manufacturing & Welding, Inc., 728 F. Supp. 12 (D.C. Cir. 1990). Next, one of the best, if not the best, method of doing so can be through the use of the CPM technique described above.

Negotiation is easier and more fruitful, mediation has a better chance of success

and litigation can be kept to a minimum and turns out better when the CPM analysis referred to above is used. One of the reasons, of course, is because that analysis lets those involved with the claim see and understand what was happening, day to day, on the project.

In that regard, no matter what the measure of damages, no matter what the style of the lawyers; whether the playing field is mediation, arbitration, negotiation, bench trial, board hearing, summary proceeding or jury trial, the same factors which ultimately persuade fact finders are stated repeatedly. Courts and mediators want to hear in the simplest possible terms what actually happened day to day on the project (in the form set out above) from objective, credible persons who have first-hand knowledge of the project or the project documentation, who back their testimony with relevant project data, facts and records. Again, one of the best ways of doing so can be a CPM analysis.

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