Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35334
Docket No. MW-32944
01-3-96-3-326

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Louisville and Nashville
(Railroad Company / former Monon Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces to perform track work (tie replacement, switch straight lined and track tamped) at Mile Post Q244.2, 3rd Street, Bedford, Indiana on November 1 through 4, 1994 [System File 1-002-95/12 (95-0500) MNN].

(2) The Carrier further violated the Agreement when it failed to give the General Chairman fifteen (15) days' advance written notice of its intent to contract out said work as required by Rule 60.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman D. E. Baxter, Machine Operator R. P. Baelz and Trackmen D. M. Carpenter and A. J. Mathis shall each be allowed thirty-two (32) hours' pay at their respective straight time rates."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Carrier raised a jurisdictional issue as a threshold objection to the Board's authority to address the merits of this dispute. This objection was not made in the Carrier's Submission. Rather, it was raised for the first time at the Referee Hearing. The Organization countered that the objection was procedural and not jurisdictional. Being procedural, the Carrier waived it when it was not raised during the handling of the claim on the property.

It is well settled that jurisdictional objections may made at any time. Procedural objections, on the other hand, must normally be raised at the first opportunity to do so or they are deemed waived.

For the reasons to follow, the Carrier's objection here is found to be procedural. Thus, it was waived. In addition, however, it must also be rejected on its merits. According to the Carrier, its highest designated officer issued his denial of the claim on June 30, 1995. The Organization's Notice of Intent to file an ex-parte Submission with the Board was not dated until May 30, 1996, some 11 months later. Rule 20(c) of the parties' Agreement establishes a nine month time limit in which to perfect an appeal to the Board. However, this apparent surface appeal of the Carrier's objection is defeated by a January 23, 1995 Letter of Agreement. By this Agreement, the parties changed their usual and customary procedure for handling claims on the property. Their letter provided for a waiver of all appeal time limits for claims properly appealed from initial disallowance after September 14, 1994. The letter further tolled the running of the nine month time limit for appealing to the Board until after a conference was held on the property. If the claim was not resolved at the conference, then the Carrier would issue its decision within 60 days afterward. Only then would the nine-month appeal period begin running. Since the conference on the property was not held until August 31, 1995, the Organization's Notice of Intent was filed within the nine-month limit established by the Letter of Agreement.

During the Referee Hearing the Manager of Labor Relations pointed out that the January 23, 1995 Letter of Agreement was rescinded in January 1996, which rendered it ineffective after April 19, 1996. There is no dispute that the instant claim was

properly appealed after initial disallowance and, therefore, came under the scope of the Letter of Agreement while it was in effect. Indeed, before the Letter of Agreement was rescinded, the instant claim had already received the benefit of the extended time limit resulting from the August 31, 1995 conference date. To accept the Carrier's contention, it is necessary to retroactively throw the instant claim out from under the protection of that Agreement and remove the two month extension. But the parties said nothing about such retroactive application in their Letter of Agreement. Quite to the contrary, the letter notes that the parties "... agreed to cooperate with respect to any problems which may arise . . ." during transition. Accordingly, absent an explicit Agreement to the contrary, and there is none here, the Letter of Agreement continues to protect those claims that properly came within its scope while it was effective. Only those claims that were appealed from initial disallowance after the effective date of rescission fall within the coverage of the original procedure spelled out in Rule 20.

Turning to the merits of the claim, the salient facts are uncontested. Central Foundry, a General Motors facility, needed to align a portion of the Carrier's track to permit the Soo Line Railroad to deliver several large presses to its Bedford, Indiana, facility. The Carrier granted permission to GM to perform the work.

The Carrier's position is that while the disputed work was performed on the Carrier's property, it was property that was not used in the Carrier's operations. As a result, the work did not come under the Scope of the Agreement. On the property, the Carrier asserted several times that the trackage in question had been abandoned and service had been discontinued. Indeed, the Organization acknowledged that the Carrier held an exemption that permitted cessation of service on the trackage. According to the record, this situation existed for several years prior to the events in question.

In a variety of prior Awards, the Board has long held that work on abandoned or retired track that is not used for railroad operations and which is not at the Carrier's expense nor for its benefit does not fall within the Scope of the Agreement. See, for example, Third Division Awards 31438, 19994 and 19639. On this record, therefore, we find no violation.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of February, 2001.