Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35336
Docket No. MW-32954
01-3-96-3-323

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 failed to allow Backhoe Operator R. M. Coberly to displace a junior employe operating a backhoe at Wansford Yard near Evansville, Indiana beginning November 9 through 18, 1994 [System File 040195.ATC/12 (95-0319) MNN].

(2) As a consequence of the aforesaid violation, Mr. R. M. Coberly shall be allowed sixty-four (64) hours' pay at the backhoe operator's straight time rate."

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 be 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 5, 1995. The Organization's Notice of Intent to file an ex-parte Submission with the Board was not dated until May 30, 1996, more than eleven 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 almost three 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.

On the merits, the record is clear the Claimant's position was abolished in early November 1994. He attempted to bump onto a Backhoe Operator's position at Vincennes, Indiana. Because this position required a commercial driver's license (CDL), which the Claimant had not yet obtained, he was not allowed to displace. The Claimant does not dispute this denial. He next attempted to bump onto the position in dispute at Wansford Yards north of Evansville, Indiana. Based on a preliminary inquiry, the Claimant understood this position to be a fixed backhoe that did not require a CDL. When he reported for work on November 9, 1994, however, the Claimant was informed that a truck and trailer was assigned to the position in case the backhoe needed to be moved. The Carrier insisted, therefore, that a CDL was required to bump onto the position. Consequently, the Claimant was not allowed to displace.

The claim challenges the Carrier's last minute requirement for a CDL on the Wansford Yards position. Yet it appears from the on-property record as well as the Organization's Submission, that the CDL requirement was part of an on-going Carrier program to comply with the Commercial Motor Vehicle Safety Act of 1986. The Carrier asserted that all of its Backhoe Operator positions required a CDL. Moreover, no provision of the Agreement was cited that regulated the timing of when the CDL requirement could be imposed on specific positions. Nothing in the Agreement, therefore, restricted the Carrier from requiring a CDL as it did when it did.

The Organization and the Claimant also alleged that the junior operator whom the Claimant sought to bump was allowed to continue working without a CDL. The Carrier refuted this assertion, and the Organization did not provide any probative evidence to support its contention.

It further appears from the record that the Claimant had been advised several months earlier to obtain a CDL. At the time the claim arose, he still had not completed all of the CDL requirements.

On the record before us, no violation of the Agreement has been demonstrated.

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.