Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35337
Docket No. MW-32955
01-3-96-3-327

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 Maintenance of Way work (installation of a tunnel liner culvert) at Mile Post Q40.2 on the Monon Seniority District, Chicago Division, Cedar Lake, Indiana beginning November 8 through December 21, 1994 [System File 1-005-95/12 (95-0499) MNN].

(2) As a consequence of the aforesaid violation, Foreman R. E. White, Truck Driver/Carpenter L. L. Phillips, Carpenters J. Miller, H. W. Williams, Carpenter Helper W. G. Smith and Crane Operator F. J. Shirley shall each be compensated at their respective straight time and overtime rates of pay for all hours expended by the outside forces in the performance of the work in question."

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 neither made in the Carrier's final May 21, 1996 correspondence on the property nor in its 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 29, 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.

On the merits of the claim, it is undisputed that the Carrier served written notice of its intent to contract out the installation of a 72" by 8 GA tunnel liner culvert by letter dated September 20, 1994. The stated reason for the contracting was that the Carrier did not have ". . . equipment laid up and forces laid off, sufficient both in number and skill with which the work might be done." The Carrier went ahead with its plan despite a protest by the General Chairman asserting that the Carrier did have sufficient skilled forces who had done the type of work in the past. The General Chairman also asserted that equipment was available on the property and, if not, may be rented.

According to the record, the work was done by a contractor on eighteen of the 43 days comprising the period from November 8 until December 21, 1994. The record also established that there were no employees furloughed during the claim period.

On January 13, 1995, the General Chairman filed the instant claim alleging, among other things, that the type of work was to be done by bridge forces on the Monon Subdivision. He also cited Rules 1 (Scope) and 54 (Classification of Work) in support. The claim again asserted that the Carrier ". . . did have the manpower and the equipment to this type of work [sic]." The Carrier's reply of March 5, 1995 denying the claim stated only that proper notice had been furnished. The reply provided no additional information, nor did it refute any of the assertions about manpower, equipment availability, or Scope coverage.

The reply of the Carrier's highest designated officer, dated June 29, 1995, concurred with its earlier denial but provided no additional factual information. Moreover, it did not refute any of the assertions from the original claim or the Organization's appeal.

The Carrier's final correspondence on the property, dated May 21, 1996, did assert lack of equipment and skilled forces, but provided no probative evidence to support these contentions. It went on to state that ". . . the nature of the work dictated timely completion so as not to impact on train operations." Lastly, the reply asserted the Claimants were fully employed during the claim period and suffered no wage loss. No information, however, was provided to establish which days the contractor worked or which days the Claimants worked. Nor did the Carrier refute the application of the December 11, 1981 Letter of Agreement to the instant dispute as asserted in the Organization's letter dated April 5, 1996.

The Organization's April 5, 1996 letter also attached a signed statement by the Claimants attesting to the fact that B&B forces had always performed the kind of disputed work in the past. The statement also said they could have done so in this case but for the lack of equipment and the Carrier denying them the opportunity to do so. Several specific examples were cited. The Carrier never countered this evidence or the related assertions.

In its Submission to the Board, the Carrier relied entirely upon the text of Rule 60 to justify the use of contractor forces to perform the disputed work. The Carrier's Submission does not address the application of the December 11, 1981 Letter of Agreement whatsoever.

Rule 60 is the parties' codification of Article IV of the 1968 National Agreement. According to the Carrier, the Rule imposes only two conditions upon its ability to contract scope covered work: (1) it must notify the Organization of its intent to contract the work in question; (2) it must meet with the General Chairman in an attempt to reach an understanding concerning the contemplated contracting. The Carrier maintains that both conditions were met.

Absent negotiated provisions or well established precedent providing to the contrary, and none has been cited on this record, Rule 60 is not so limited in its application as the Carrier maintains. While it is true that the 1968 National Agreement

imposed the notice and meeting requirements upon participating parties, it was careful to point out that it did not affect existing rights of either party in connection with contracting out. Generally speaking, work that falls within the Scope of a Labor Agreement is reserved to the employees covered thereby. Whether Scope coverage exists or not depends upon the language of the Scope Rule and related provisions. If there is explicit reservation language that is usually determinative of the question. If the Scope Rule is general, however, as it appears to be here, then Scope coverage becomes an evidentiary problem. The question is whether the work has been historically, customarily and traditionally contracted out or performed by Carrier forces.

On this record, the only evidence of past performance comes from the Organization. Its employee statements maintain that the work had always been done by the employees. The Carrier neither countered this assertion, nor provided any evidence that such work had ever been performed by outsiders under any circumstances. We must conclude, therefore, that the disputed work is reserved to the employees. As such, it may not be contracted out except in accordance with existing rights following due notice. But here again, the Carrier has not established either the source or nature of any such existing rights. Article IV of the 1968 National Agreement did not create such rights. Rather, it merely acknowledged them if they already existed.

Where, as here, the Organization demonstrates Scope coverage, the burden of proof shifts to the Carrier to establish the source and nature of any existing rights to contract out work. This record contains no such evidence.

Even if, for the sake of discussion, the Carrier had existing rights, it failed to take into account the impact of the December 11, 1981 Letter of Agreement. While reaffirming the intent of Article IV of the 1968 National Agreement, the letter provided, in pertinent part, as follows:

> "The carriers assure [the Organization] that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."

The December 11, 1981 Letter of Agreement refined Article IV and created new Carrier commitments that limited existing rights, if any, to contract out Scope covered work. See, for example, Third Division Awards 26072 and 29158. Read together with Article IV, the Letter of Agreement requires the undertaking of good-faith efforts to use Carrier forces and equipment, or rent such equipment, before resorting to previously existing rights to contract out Scope covered work. The lack of such good-faith efforts, therefore, undermines the validity of an otherwise permissible contracting arrangement. As with existing rights, the burden of proof shifts to the Carrier to demonstrate that it has undertaken such good-faith efforts.

On this record, not only did the Carrier fail to prove that it undertook any good-faith efforts to use its forces or obtain rental equipment, it did not even assert that it did.

Given the lack of existing rights to permit the contracting in dispute and the lack of any good-faith efforts to avoid the contracting situation, we are compelled to conclude that the Carrier violated the Agreement and denied the Claimants the opportunity to perform the work.

For the remedy, it is undisputed that the work was performed on only 18 days of a 43 day span of time. This suggests that good-faith scheduling efforts could have used the Claimants to perform the work in addition to their other assignments with some use of overtime compensation. The record, however, does not permit the Board to conclude how much, if any, overtime would have been necessary without forcing us to indulge in an impermissible degree of speculation. Because the Organization had the burden of proof to demonstrate this facet of the claim, we must deny granting any overtime compensation.

The record does establish, however, that the contractor used six employees for a total of 180 hours each. Accordingly, the claim is sustained to the same extent. Each of the six Claimants shall receive 180 hours of additional compensation for the lost work opportunity at his respective straight time rate of pay.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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