

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35431
Docket No. MW-33007
01-3-96-3-399**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (All State Blastet) to sandblast the bridge over Frankford Avenue, Frankford Yard, on November 6, 1994 (System Docket MW-3822).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by the Scope Rule.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Foreman W. W. Trexler and B&B Mechanics J. L. Royer, M. D. Tallarida, G. A. Golden, S. F. Tanghe, C. E. Miller and E. W. Volbrig shall each be ‘ . . . compensated for the 10 hours, for the time the contractor spent performing this work, at the current rate for a B&B Foreman and B&B Mechanic respectively, at the appropriate overtime rate of time and one-half.’ ”**

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.

As a threshold issue, we note that the claim was not dated until January 6, 1995, which was the 61st day after the date of the alleged violation of the Agreement. The Carrier, however, did not raise any timeliness objection until the October 2, 1995 response of its highest designated officer. The Carrier's first two responses on the property are silent on the issue. Accordingly, the Carrier's failure to raise this procedural objection at the first opportunity to do so is deemed a waiver of the objection. See Third Division Award 33153 and others cited therein. We so find.

The focus of this claim is the sandblasting of paint containing lead from the bridge in question. In reviewing the record, we have disregarded all information and argument that was not exchanged in the on-property record.

In the initial claim, the Organization noted the sandblasting performed by the contractor and asserted ". . . the claimants have performed thesevery same duties on the Philadelphia Seniority District in the past, and the Carrier currently has the needed equipment in its possession at the Ann St. headquarters." The Organization went on to quote from the Scope Rule language, which explicitly referenced ". . . maintenance of . . . bridges, . . ." The initial claim also noted the Carrier's failure to provide written notice of its intent to contract the work.

In its first response to the claim, the Carrier did not refute the Organization's assertions of past performance of sandblasting work or possession of equipment. Rather, it drew a distinction based on the assertion that the paint in question contained lead. The response did not refute the alleged notice violation. Nor did the Carrier take issue with the number of hours claimed or their overtime rate of pay. Indeed, the Carrier's second response noted that each of the Claimants had Saturday- Sunday rest days. The contractor forces performed the work on Sunday, November 6, 1994.

Subsequent correspondence on the property maintained these respective postures. At no time did the Carrier provide any evidence to support a past practice of contracting out the work of sandblasting lead-based paint. However, the Carrier's highest designated officer did address the notice aspect. He wrote, "Moreover, since the work is not covered under the Scope Rule, prior notice was not required."

Our review of the record convinces us that the Carrier is attempting to split hairs too finely by trying to distinguish the Scope coverage, for notice purposes, of sandblasting paint from sandblasting paint containing lead. Regardless of what the parties' respective rights may be on the actual contracting of the disputed work, scope coverage for notice purposes imposes a very low hurdle. All that is required is a showing that the employees have performed the kind of work in dispute at least once in the past. The Organization accomplished this with its unrefuted assertions of past performance of sandblasting work and the Carrier's possession of equipment. It is well settled that unrefuted assertions of material fact become established as facts sufficiently proven. We find, therefore, that the Carrier violated the Agreement when it failed to provide the requisite notice.

Given the lack of a dispute over the number of hours involved and the applicability of the overtime rate, we must sustain the claim as presented.

AWARD

Claim sustained.

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 26th day of April, 2001.