Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35335
Docket No. MW-32947
01-3-96-3-324

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 Agreement was violated when the Carrier assigned outside forces to use a cutting torch to remove and haul away scrap material from a sand tower in Lafayette, Indiana beginning August 24 through September 9, 1994 [System File 10195.B&B/12 (95-0063) 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, B&B Foreman R. E. White, Carpenter Truck Driver L. L. Phillips, Carpenters J. Miller, H. W. Williams and Carpenter Helper W. G. Smith shall each be allowed one hundred four (104) hours' pay at their respective straight time rates and sixty-six (66) hours' pay at their respective time and one-half 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 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 March 13, 1995. The Organization's Notice of Intent to file an ex-parte Submission with the Board was not dated until May 30, 1996, some 14 and one-half 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 four and one-half 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.

The Carrier also asserted that the Organization's Notice of Intent to file an ex-parte Submission with the Board expressed a different or amended claim from that handled on the property. It is noted that the Carrier's ex-parte Submission contains a verbatim quote of the Statement of Claim from the Organization's Notice of Intent yet no such contention was raised in the Carrier's Submission. Indeed, during the Referee Hearing the Manager of Labor Relations conceded that the objection was being raised for the first time at the Hearing. Given that posture, it is well settled that we do not consider new matters. But the Carrier's objection is misplaced on its merits as well.

The original claim alleged that three contractor employees worked seven days per week at ten hours per day for 17 days from Wednesday, August 24 through Friday, September 9, 1994. This totaled 510 hours. The original claim sought to divide this total among the five Claimants comprising B&B Gang 6K76 for 102 hours each ". . . and that all the time that could have been overtime be paid at the time and one/half rate of pay." The Organization advanced this damage request at each step of the on-property handling. At no time did the Carrier dispute the days, number of days, daily hours and total hours alleged. Moreover, the substance of the claim never deviated from covering only the work associated with dismantling and hauling away the scrap from the sand tower at Lafayette Yard. Therefore, the substance of the claim as well as the number of work hours involved are well established in the on-property record and have never

changed. It appears that the Organization, in filing its Notice of Intent, attempted, albeit mistakenly, to precisely quantify the number of straight time and overtime hours to be allocated to each Claimant. This does not render the claim invalid. It is still the same claim the parties handled on the property.

Turning to the merits, the Carrier maintains that it did give proper notice of its intent to contract the work, that the contracting was proper due to the lack of sufficient manpower and equipment, and that the Claimants were fully employed throughout and were not deprived of any earnings.

As noted in the Statement of Claim, the Organization maintains that the Carrier failed to provide proper advance notice of its intent to contract the disputed work. In addition, the Organization alleged that such work had customarily and traditionally been performed by B&B forces.

Careful review of the on-property record reveals that the Organization bolstered its assertions of customary and traditional past performance of the disputed work with evidence in the form of signed employee statements. The Carrier provided no similar evidence to support its assertion to the contrary. Given that such past performance of the work by B&B forces is thus established as fact by this record, the work is covered by the Scope Rule for the purpose of requiring the Carrier to provide advance written notice of its intent to contract the work to outsiders per Rule 60.

On this record, the Carrier concedes that it failed to provide proper notice to the General Chairman initially. While it maintains that an exemption was later granted by the General Chairman on September 22, 1994, this is directly refuted by evidence provided by the General Chairman. According to the General Chairman, the exemption he extended on that date pertained to different work consisting of the movement of ties with a backhoe and bobcat by the same contractor in a different area of the Lafayette Yard on different days. The General Chairman's account must be credited because the sand tower removal work had already been completed for nearly two weeks before the alleged exemption was granted on September 22, 1994.

A line of recent Third Division Awards involving these same parties has sustained claims where there has been a failure to provide the requisite notice of intent to contract out work where the Carrier's employees had at least a colorable claim to the work. See,

for example, Third Division Awards 30977, 31597 and 31777. We see no reason to depart from that line of precedent.

For the remedy, the Claimants are entitled to be compensated for the lost work opportunity resulting from the improper contracting of the disputed work. According to the original claim, the Claimants comprised B&B Gang 6K76. They worked four ten-hour days with rest days on Friday, Saturday and Sunday. Of the 510 hours worked by the contractor forces, 210 were worked on the Gang's rest days, which would have been overtime hours. Dividing the 300 straight time hours and the 210 overtime hours equally between the five Claimants results in each Claimant being entitled to 60 hours of straight time compensation and 42 hours of overtime compensation at their respective rates 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.