

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35633
Docket No. MW-35148
01-3-98-3-903**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to properly compensate affected machine operators assigned to Rail Gangs 110, 121, 140 and 320 for work performed, (handling and carrying tools) prior to and after their regularly assigned work period beginning March 25, 1996 and on a continuing daily basis thereafter (System Docket MW-4850).**
- (2) The Agreement was violated when the Carrier failed and refused to properly compensate the affected members of Gangs TO/SM-601 and SI-603 Suppt. for work performed (handling and carrying tools) prior to and after their regularly assigned work period beginning March 10, 1997 and on a continuing daily basis thereafter (System Docket MW-4949).**
- (3) The Agreement was violated when the Carrier failed and refused to properly compensate the affected members of Gang SI-602 for work performed (handling and carrying tools) prior to and after their regularly assigned work period beginning April 28, 1997 and on a continuing daily basis thereafter (System Docket MW-4950).**
- (4) As a consequence of the violation referred to in Part (1) above, the affected machine operators assigned to Rail Gangs 110, 121, 140 and 320 shall each be compensated for carrying and handling their**

tools outside of regularly assigned work hours in accordance with the terms of the Agreement.

- (5) As a consequence of the violation referred to in part (2) above, the affected employees assigned to Gangs TO/SM-601 and SI-603 Suppt. shall each be allowed ' . . . the difference in pay between what they are being paid and what the Organization states they are entitled to. This means that the 30 minutes to and from should be paid at time and one-half and the Carrier is paying nothing now. After the 30 minutes the Carrier is paying straight time but should also be paying overtime for this also.'
- (6) As a consequence of the violation referred to in Part (3) above, the affected employees assigned to Gang SI-602 shall each be allowed ' . . . the difference in pay between what they are being paid and what the Organization states they are entitled to. This means that the 30 minutes to and from should be paid at time and one-half and the Carrier is paying nothing now. After the 30 minutes the Carrier is paying straight time but should also be paying overtime for this also.'"

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 three claims at issue here were consolidated for presentation to the Board. Each one seeks compensation under Rule 23(c) for time spent carrying small tools while

traveling between the daily headquarters and the work site before and after regularly assigned hours each day. The Organization contends that these were continuing violations throughout the duration of the gangs' work seasons.

The applicable Rule provides as follows:

"Rule 23 - WAITING OR TRAVELING BY DIRECTION OF COMPANY

c) Employees traveling on a motor car, trailer or highway vehicle, who are required to operate, supervise (Foreman), flag or move the car or trailer to or from the track, or handle tools to and from such vehicles, shall be paid for time riding as time worked."

The Organization contends that the Carrier requires its Machine Operators and other specified employees to provide personal hand tools for work each day. Under the terms of Rule 23(c), the Carrier is thus obligated to compensate employees for carrying those tools to and from the work site.

The Organization rejects the contention of the Carrier that secure storage is available for the employees' tools, thereby obviating the need to carry the tools back and forth to the work site. In the Organization's view, the Carrier admitted in a December 22, 1994 letter to employees that Conrail property is not a secure location and it would not be held liable for personal property that was stolen. As a result, the Organization argues that the employees have had no viable alternative but to carry their tools to and from work each day, and employees should therefore be compensated in accordance with Rule 23(c).

Additionally, the Organization argues that the Carrier should not be permitted to dictate where employees' personal tools are stored during off hours. Put another way, because the Carrier does not provide the tools, it has no right to restrict the employees' use of those tools during non-working time.

The Board will not trace the history of the application of Rule 23(c), as a thorough review has already been provided in prior Awards. Suffice it to say that since July 1995 the Carrier has denied claims on the basis that it has provided secure storage at the worksite and, since that time, no employee has been required to carry tools. That

position has been upheld in Third Division Award 32615 and Special Board of Adjustment No. 1016, Award 106. Most directly on point are the claims resolved on this property in Special Board of Adjustment No. 1016, Awards 107, 109, 110, 112, 126, 128, and 129 all of which were consolidated into a single Board ruling. In those cases, the Board addressed the same issues that are presented for determination here.

With regard to the merits of the dispute, the Board found that no affirmative evidence had been presented by the Organization to counter the Carrier's position that secure storage had been provided. Special Board of Adjustment No. 1016, Award 107 stated, "While the Organization takes exception to whether the provided storage is truly 'secure,' no proof of theft, damage or other loss has been established by evidence in the record."

Special Board of Adjustment No. 1016, Award 107 also determined that the Organization's remaining argument was unconvincing:

"After careful review, we find that Award No. 106 of this Board has already answered all of the Organization's lingering concerns. By providing secure storage for tools at the worksite, the Carrier is not dictating where the employees store their tools. It merely provides each employee an option. Each employee is completely free to store his tools at the worksite or carry them back and forth each day. By having the option, however, the employee is not required to transport them each day. Accordingly, pay under Rule 23(c) is not required. It follows, therefore, that Carrier is not in violation of the Agreement by refusing payment . . ."

It is well-established that an Award need not be followed if it is found to be palpably erroneous. No such finding is warranted here. The prior Award is soundly reasoned, and because it involves the same parties, the same issues, the same contract provision, and the same factual underpinnings, it is controlling. The concept of finality dictates that the instant claims be denied.

AWARD

Claim denied.

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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 28th day of August, 2001.