NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1016

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

CONSOLIDATED RAIL CORPORATION

AWARD NO. 106

Docket Nos. MW-3849, MW-3950, MW-3897

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier failed and refused to properly compensate machine operators assigned to Gang TP-201 for work performed (handling and carrying tools) prior to and after their regularly assigned work period beginning March 22, 1995 and on a continuing daily basis thereafter.

2. The Agreement was violated when the Carrier failed and refused to properly compensate machine operators assigned to Gang TO-201 for work performed (handling and carrying tools) prior to and after their regularly assigned work period beginning April 19, 1995 and on a continuing daily basis thereafter.

3. The Agreement was violated when the Carrier failed and refused to properly compensate machine operators assigned to Gang SM-201 for work performed (handling and carrying tools) prior to and after their regularly assigned work period beginning April 19, 1995 and on a continuing daily basis thereafter.

4. As a consequence of the violation referred to in Part (1) above, C. E. Wilkinson, F. P. Lope, G. Urish, T. A. Webster, W.H. Hirsch and P. A. Radaker shall each be allowed one (1) hour's pay at their respective time and one-half rates for each workday they were required to perform the work in question beginning on March 22, 1995 and continuing until the violation ceases.

5. As a consequence of the violation referred to in Part (1) above, J. W. Sajko, C. L. Price, F. E. Nelson, J. L. Majetsky, S. E. Waite, T. D. Whiteman, G. C. Madie, G. E. Swales, S. I. Miller, J. A. Urbanek, R. A. Airhart, B. F. Gudleski, W. J. Eshelman, E. W. Holloway, J. J. Foltz, G. C. Eger, D. L. Vizza, R. N. Gentzyel, R. A. Crawford, R. L. Sedlak, J. J. McCabe, W. S. Mohr, B. V. Kulp, R. D. Battaglia and D. A. Hammaker shall each be allowed one (1) hour's pay at their respective time and one-half rates for each workday they were required to perform the work in question beginning on April 19, 1995 and continuing until the violation ceases.

6. As a consequence of the violation referred to in Part (1) above, J. G. Lanks, D. A. Laird, A. T. Smith, M. L. Crawford, H. A. Brown, R. J. Ickes, L. R. Shreckengast, R. A. Snyder and C. T. Robinson shall each be allowed one (1) hour's pay at their respective time and one-half rates for each workday they were required to perform the work in question beginning on April 19, 1995 and continuing until the violation ceases.

F I N D I N G S

This claim combines three separate but identical circumstances involving the interpretation of Rule 23(c), which reads as follows:

> (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.

In this instance, the Organization asserted the Claimants were "required to . . . handle tools to and from such vehicles" and thus should be "paid for time riding as time worked". During the claim-handling procedure, this Board issued Awards 91 and 98, sustaining the Organization's position in similar circumstances. Thereafter, settlement efforts were made for the claim here under review. According to the Carrier, the dispute was resolved and so recorded in Carrier letters to the General Chairman on October 5 and 30,

1995. This was documented in letters to the Vice Chairman from the Manager, Labor Relations, in November 1995 referring to "full, final and complete settlement" and stating in pertinent part as follows:

> [The Claimants] will be allowed up to .5 hours' pay before and after the regular work day from [March 22 or April 19, as appropriate] until July 31, 1995 when the Carrier provided the appropriate accommodations enabling the employees to store their tools at their work site location, depending upon the actual time consumed each day.

The Carrier's contends that, commencing August 1, 1995, secure storage areas were provided to the Claimants at the work site, thus making it unnecessary (although permitted) for the Claimants to "handle" tools while traveling to and from the work site and consequently terminating the requirement for payment under Rule 23(c).

Payments were made as described in the Carrier's November letters. According to the Carrier, the Organization did not move to place the cases before the Board until April 26, 1996. The Carrier urges the Board to dismiss the claim, based on the supposed "settlement" reached, the introduction of new argument, and the alleged delay in moving the matter to the Board.

The Board finds the Carrier's procedural argument without merit for the following reasons:

1. Whatever may have occurred during settlement discussions, there is no counter-signature by the Organization on the Carrier's letters as to terms of payment.

2. Contrary to the Carrier's reference to delay, the record shows that as early as December 8, 1995, the Organization wrote to the Carrier expressing its dissatisfaction with (a) the stated termination date of the payments, and (b) the arrangements for tool storage which were a condition of the settlement.

3. The Board find no "new" argument by the Organization in reference to tool storage; this subject was included in the so-called "settlement" letter.

As to the merits, the Board finds that the Carrier's payments satisfactorily sustained the claim up to July 31, 1995, and no further discussion thereof is required. Since there is no evidence that the Organization "signed off" on the proffered settlement, however, the Organization appropriately continued to progress its claim to this Board for remaining remedy, if any.

As shown in the record provided to the Board, there is disagreement between the parties as whether appropriate tool storage facilities were provided on and after August 1, 1995. Faced with these contradictory assertions, the Board is unable to resolve such dispute as to the facts. Given the Carrier's written assurance as to providing storage space, so that the Claimants are not "required" to carry their tools to and from the work site, a new claim by the Organization would be necessary to demonstrate to the contrary.

The claim covering all three instances is based on violation of Rule 23(c), under which pay is called for when employees are "required" to carry tools. As noted above, this Board found merit

in the Organization' interpretation of the Rule. Thus, the only question remaining is whether the change in circumstances on and after August 1, 1995 is sufficient to limit the remedy to such date. The Board finds such was sufficient, and the Carrier ceased being in violation of Rule 23(c) when the Claimants were no longer "required" to carry their tools. There is no basis to continue payment until the end of the work season once the Carrier cured its contractual violation.

A W A R D

Claim denied.

HERBERT L. MARX, Jr., Chairman and Neutral Member

MARK J. SCHAPPAUGH, Employee Member 3/27/98 written dissent to follow

J. H. BURTON, Carrier Member

NEW YORK, NY

DATED: 4/7/98

1016-106

EMPLOYE MEMBER DISSENT TO AWARD 106
SPECIAL BOARD OF ADJUSTMENT NO. 1016
(Referee H. L. Marx, Jr.)

This Award requires dissent because the Arbitrator incorrectly reached the determination that the Carrier did not violate Rule 23(c) in these instances. This dispute involved a combination of three (3) claims. Each of the claims was initiated under circumstances similar to disputes that had previously been considered by this Board. Awards 37 (Blackwell), 91 and 98 (Fletcher) of this Board involved disputes wherein the Carrier violated Rule 23(c) when it failed to properly compensate employes for work they performed carrying personal tools to and from the work site each work day. In those disputes, as in the instant claims, the employes were required to provide and possess such tools as a part of their bulletined assignments. Awards 37, 91 and 98 were sustained in favor of the Organization.

In these instances after approximately three (3) months of not compensating the Claimants as required by Rule 23(c), the Carrier concocted a scheme to avoid paying employes who had historically carried personal tools to and from work each work day. The Carrier alleged that beginning on August 1, 1995 the affected employes were no longer "required" to carry personal tools to and from work every day because "secured and locked storage facilities" (Carrier Submission Pages 3&4) were provided for such tools. The Claimants were paid for carrying their tools from the dates the gangs began work until July 31, 1995. Thereafter the Carrier maintained that none of the Claimants were entitled to payments under Rule 23(c).

In reaching its decision in this dispute the Board held that, "...the Carrier ceased being in violation of Rule 23(c) when the Claimants were no longer 'required' to carry their tools." The main problem here is that the Carrier did not establish that it provided adequate storage compartments for the Claimants on or after August 1, 1995. In fact, during the handling of these disputes on the property the Organization presented nine (9) written statements from various Claimants evidencing that many of them did not have any tool or storage boxes provided at all on their assigned machines or that if boxes were available, they were either filled with spare parts leaving no room for additional personal tools or were not provided with locks. On the other hand, all that was provided by the Carrier were <u>assertions</u> that accommodations were provided for the Claimants to store their personal tools at the job site. Based upon the record the Board should have recognized that the Carrier never established that it provided proper "accommodations" for the Claimants' personal tools at any time after August 1, 1995 and a sustaining award should have been issued. Instead the Board held that, "Faced with these contradictory assertions, the Board is unable to resolve such dispute as to the facts." Obviously there was no such conflict. It is a hornbook principle that written evidence, refuted only by bare assertions, does not serve to create a conflict in facts. In

any event, even assuming that there was a conflict in facts regarding whether the Carrier provided "accommodations" after July 31, 1995, one would have believed that the Board would have rendered a dismissal award without further discussion of the merits. In fact, that is precisely what the Board should have done if it found that there was a conflict in facts. It was plain and simply wrong for the Board to determine that there was a conflict in facts and then proceed to deny the claim on the merits. Awards 18871, 20408 and 21423.

In addition to the above, this award requires dissent because the Board completely failed to address the issue of the Claimants personal property rights as they related to these claims. We submit that even assuming that the Carrier provided on-site storage facilities (which we do not concede occurred here), that, in and of itself, would not serve to eliminate the Carrier's obligation under Rule 23(c) to compensate the Claimants for carrying their personal tools to and from the work site each work day. This is true because the type of tools involved in these claims were the personal property of each individual. Each of the Claimants involved here was required by bulletin to provide personal hand tools in connection with his assignment. The tools were not provided by the Carrier. As was pointed out during the handling of these disputes on the property the Carrier could not and would not ensure the safety of the Claimants' personal tools even if they were stored on-site. In fact, a memo from Division Engineer R. A. Hunt, dated less than four (4) months prior to the dates these disputes arose, specifically stipulated that the Carrier would not be liable for personal property stolen from company vehicles. His memo, in pertinent part, reads:

> "Please be advised that Conrail will not be held liable for personal property stolen from company vehicles beginning January 1, 1995. It will be the employees responsibility to remove all personal tools and other valuable personal property from Conrail vehicles and properly secure same on his own property or his motel room." (Carrier Exhibit "7(a)", Page 2)

Faced with the specific edict from the Carrier that it would not pay for the loss of personal tools left on Carrier equipment the Claimants were left with no other option but to continue to carry their tools to and from work each work day. Either they could leave their personal tools on-site and risk an uncovered loss or they could continue their historical practice of carrying their tools to and from work and ensure their readiness for work each

1016-106

day. This leads us to yet another issue that was not addressed in this Award, namely, whether the Carrier could validly restrict the Claimants use of their personal tools during off hours. The Organization continues to maintain that the Carrier simply does not have the right to dictate what the employee must do with his tools during off hours. As such, by virtue of the fact that each Claimant was required by bulletin to provide personal hand tools each work day, he had every right to carry his personal tools to and from work each work day in order that such tools could be available for personal use during off hours. In fact, as discussed above, such action was required by the Carrier.

The Carrier may have succeeded in pulling the wool over this arbitrator's eyes by creating the illusion that the Claimants were not "required" to carry their personal tools to and from the work site each work day, however, when consideration is given to the full facts and circumstances surrounding the matter there can be no question but that this Award falls short of settling the issue. Hence, for the reasons discussed above, this Award is erroneous and must bear no precedential value regarding the application of Rule 23(c).

Respectfully submitted,

Mark J. Schappaugh

Mark J. Schappaugh
Employe Member-SBA 1016