

SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NOS. 107, 109, 110, 112, 126, 128 and 129

CASE NOS. 107, 109, 110, 112, 126, 128 and 129

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Consolidated Rail Corporation

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claims denied in Cases 107, 109, 112, 126, 128 and 129.
Claim in Case 110 is sustained in accordance with the Findings.

DATE: May 15, 2000

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. [Case 107] The Agreement was violated when the Carrier failed and refused to properly compensate the affected machine operators assigned to Rail Gang 111 for work performed (handling and carrying tools) prior to and after their regularly assigned work period beginning October 3, 1995 and on a continuing daily basis thereafter (System Docket MW-4197).
2. [Case 109] The Agreement was violated when the Carrier failed and refused to properly compensate the affected members of Gangs TO/SM/Suppt. 601 and SJ-602 for work performed (handling and carrying tools) prior to and after their regularly assigned work period beginning August 14, 1995 through October 3, 1995 and on a continuing daily basis thereafter (System Docket MW-4162).
3. [Case 110] The Agreement was violated when:
 - (a) The Carrier failed and refused to properly compensate the affected members of Tie Gang TP-202 for work performed (handling and carrying tools) prior to and after their regularly assigned work period beginning June 12, 1995 and on a continuing daily basis thereafter (System Docket MW-4276).
 - (b) The claim as presented by Vice Chairman C. T. Burkindine to Division Engineer R. J. Rumsey by letter dated August 7, 1995 shall be allowed as presented because the claim was not disallowed by Division Engineer Rumsey in accordance with Rule 26(a).

4. [Case 112] The Agreement was violated when the Carrier failed and refused to properly compensate the affected members of Gangs TO/SM/Suppt. 601, TK/SE-602 and SI-603 for work performed (handling and carrying tools) prior to and after their regularly assigned work period beginning February 19, 1996 and on a continuing daily basis thereafter (System Docket MW-4285).
5. [Case 126] The Agreement was violated when the Carrier failed and refused to properly compensate Machine Operators J. R. Connor, T. C. Bowser and J. M. Pollack for work performed (handling and carrying tools) prior to and after their regularly assigned work period beginning November 7, 1995 and on a continuing daily basis thereafter (System Docket MW-4179).
6. [Case 128] The Agreement was violated when the Carrier failed and refused to properly compensate the affected members of Gang RD 320 for work performed (handling and carrying tools) prior to and after their regularly assigned work period beginning April 8, 1996 and on a continuing daily basis thereafter (System Docket MW-4553).
7. [Case 129] The Agreement was violated when the Carrier failed and refused to properly compensate the affected members of Gangs TO-432, SM-432, TA-96 and support for work performed (handling and carrying tools) prior to and after their regularly assigned work period beginning September 24, 1995 and on a continuing daily basis thereafter (System Docket MW-4561).
8. As a consequence of the violation referred to in Part (1) above, the affected machine operators, initially R. D. Briddel, T. R. Phillips, J. M. Federinko, W. A. Miller, J. M. Nollan, J. E. McCabe, J. S. Lazar, G. E. McKay, B. J. Bobolsky, S. H. McDermott, R. W. Hunt, F. A. Gaydos, Jr. and R. A. Simpson, assigned to Rail Gang 111 shall each be compensated for carrying and handling their tools outside of regularly assigned work hours in accordance with the terms of the Agreement.
9. As a consequence of the violation referred to in Part (2) above, the affected employees assigned to Gangs TO/SM/Suppt. 601 and SJ-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.'

10. As a consequence of the violations referred to in Parts (3a) and/or 3(b) above, the affected employes assigned to Tie Gang TP-202 shall each be allowed '... up to 1 hour per day, starting with June 12, 1995, and continuing in accordance with Rule 26(f) of the current Agreement, for every day which they violate the Agreement, or for the amount of time which they were ordered to report to duty for and were not compensated as outlined in Rule 23(c), at the applicable overtime rate for the Classifications so listed.'
11. As a consequence of the violation referred to in Part (4) above, the affected employes assigned to Gangs TO/SM/Suppt. 601, TK/SE-602 and SI-603 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.'
12. As a consequence of the violation referred to in Part (5) above, Claimants J. R. Connor, T. C. Bowser and J. M. Pollack shall each be '... compensated for one (1) hours at the appropriate Machine Operator's overtime rate for each day worked since November 7, 1995.'
13. As a consequence of the violation referred to in Part (6) above, the affected employes assigned to Gang RD 320 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.'
14. As a consequence of the violation referred to in Part (7) above, Claimant L. G. Ticconi, G. L. Kurtz, K. E. McCullough, R. J. Ickes, T. A. Novak, D. W. DeGrand, D. C. Rhodes, S. I. Miller, G. C. Eger, D. M. Baker, S. E. Waite, J. A. Urbanek, D. J. McDermott, R. R. McCullough, R. A. Olsick, A. H. Dibosky, E. B. Lecomte, R. F. James, T. R. Johnson, T. L. George, M. A. Jones, J. G. Lanks, J. W. Sajko, R. W. Schmitt, W. Baney, R. A. Crawford, D. A. Claar, F. E. Nelson, Jr., R. P. Smith, B. L. Balicki, G. L. Winder, Jr., R. E. Shaffer, R. Gutierrez, R. C. Gorchik, Jr., D. L. Metz and W. S. Mohr shall each be '... compensated for one-half (0.5) hour at the appropriate rate for each day worked by each Claimant since the first day of this claim, September 24, 1996.'

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

These cases comprise the final seven in a series of claims before this Board and the Third Division of the National Railroad Adjustment Board. The claims have all sought compensation pursuant to Rule 23(c) for time spent handling small tools, such as pliers, screw drivers and adjustable wrenches, while traveling between the daily reporting point and the work site. These seven have been consolidated because of the common issue on the merits. In addition, two of the cases (109 and 112) involve one kind of procedural issue that the parties have asked the Board to address regardless of the outcome on the merits. Case 110 raises yet a different procedural issue that also requires attention.

The details of this line of cases are thoroughly described in the prior Awards of this Board No. 37(Blackwell, 1990), 91/98(Fletcher, 1995), and 106(Marx, 1998) as well as Third Division Award No. 32615(Conway, 1998) and will not be restated here beyond a very brief, general overview.

The pertinent Agreement rule reads 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.

* * *

Award No. 37 determined that the hand tools, which Machine Operators are required to provide at their expense, were encompassed by Rule 23(c). The claims were, accordingly, sustained.

Award No. 91/98 apparently dealt with the second generation of claims to arise under Rule 23(c) in 1993. The Award followed Award No. 37 on the merits. In so doing, the Board found that Article VII and Side Letter 13, arising out of the parties' 1992 collective bargaining negotiations, did not alter the application of Rule 23(c) as construed by Award No. 37. Award No. 91/98 also rejected the Carrier's contention that the claims there were procedurally defective in that they failed to identify specific claimants by name. Instead, the claim referred to members of a specific gang by specific classifications during a specific timeframe. The Board found that the claim did provide sufficient information that the identities of the individual claimants were "... readily ascertainable ..." and, therefore, satisfied the requirements of the Rule 26 of the Agreement.

Third Division Award No. 32615 also dealt with a 1993 claim. Award No. 32615, however, made findings contrary to Award No. 91/98 of this Board. It appears the Third Division determined that Article VII and Side Letter 13 did alter the operation of Rule 23(c) and nullified any obligation to pay compensation for handling tools while traveling.

In Award No. 106, this Board dealt with a third generation of claims from early 1995. In that case, however, the Board noted that the Carrier began providing secure storage facilities on various track machines effective August 1, 1995. Beginning with that date, therefore, affected employees could securely store their small tools overnight and over the weekend at the worksite. As a result, the Board accepted the Carrier's contention that employees were no longer *required* to carry their tools to and from the work site. Given that the handling of tools was no longer *required* while traveling, the Board determined that there was no basis for continued compensation payments under Rule 23(c) after August 1, 1995. Accordingly, Award No. 106 denied the claim.

This brings us to Carrier's procedural objection in two of the instant claims, Cases 109 and 112. Carrier maintains in its submission that they are defective for failing to name the individual Claimants. In Award No. 91/98, this Board rejected the same argument. We concur for two reasons, each of which is sufficient to reject Carrier's objection. First, these two cases do not place in dispute any factors that are uniquely personal to specific Claimants. For example, factors such as availability and/or qualification to perform work, which are essential elements of

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introduced a copy of its denial letter to show that the claim was properly denied, a long line of prior awards between these parties have rejected the sufficiency of such an effort. See Third Division Awards 25309, 29891, 31759 and 32334. Since the final sentence of Rule 26(a) provides that the "... claim will be allowed." when Carrier fails to timely respond, we find that the Organization is entitled to a default award in this case.

Notwithstanding the foregoing, we decline to make any specific monetary award because of the unusual nature of the claim. The wording of the claim does not demand a specific amount of time or money for the alleged violations. Instead, it reads as follows:

The Organization will further require that the Carrier compensate the above stated claimants for up to 1 hour per day, starting June 12, 1995, and continuing in accordance with Rule 26(f) of the current Agreement, for every day which they violate the Agreement, or for the amount of time which they were ordered to report to duty for and were not compensated as outlined in Rule 23(c), at the applicable overtime rate for the Classifications so listed.

(underscoring supplied)

It is well settled that when the Board decides a claim on its merits, the Board also has broad authority to fashion a remedy appropriate to the circumstances. The instant claim, however, does not allow us to reach the merits. It is controlled by Rule 26, which states simply that the "... claim will be allowed." That statement is normally construed to mean that the claim must be allowed *as presented*. The explicit wording of Rule 26 does not explicitly provide the Board any separate authority to fashion its own remedy. Nor does the rule authorize the Board to remand the claim to the parties to research their own records to ascertain the amounts in controversy. The absence of such remedial authority provisions in Rule 26 strongly suggests that the claim must stand or fall *as presented*. The awards cited by the Organization to not provide us any precedent to the contrary. They all involve significantly different facts or rule provisions.

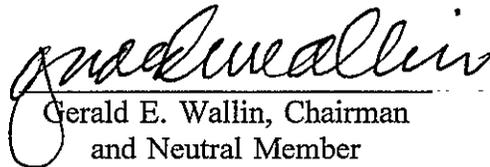
Given the nature of the claim, each individual claimant had the ability to track his own time day by day. This is not a case where the employees lacked access to the information necessary to perfect their claims. However, the record of claim handling on the property does not supply the requisite information to ascertain how much time was claimed, either in aggregate

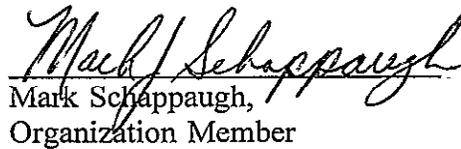
or by individual claimant. Consequently, we are left without an amount certain to award by default. In our view, we are confined to sustaining the claim in principle but without compensation.

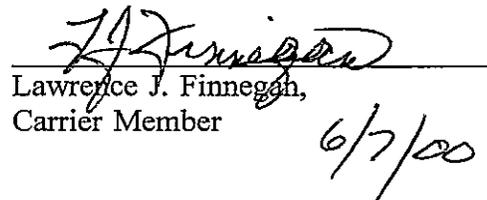
AWARD:

The Claims are denied in Cases 107, 109, 112, 126, 128 and 129.

The Claim in Case 110 is sustained in accordance with the Findings.


Gerald E. Wallin, Chairman
and Neutral Member


Mark Schappaugh,
Organization Member


Lawrence J. Finnegan,
Carrier Member
6/7/00

Organization Member Concurrence and Dissent to Award Nos. 107-129 Special Board of Adjustment No. 1016 (Referee Wallin)

This Board's findings in Award 107-129 require concurrence and dissent. On the procedural issues the Board correctly determined that the Carrier's procedural objections in Case Nos. 109 and 112 relative to alleged unnamed claimants were baseless. In addition, in Case 110 the Carrier correctly determined that the Carrier was guilty of failing to comply with Rule 26 when it did not timely respond to the initial claim in that case. On those findings we concur.

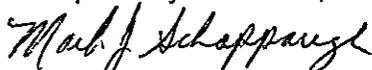
The Award, however, requires dissent on two (2) points. First, on the merits the Board held that:

"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 and *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."

Suffice it to say that the Organization does not agree that the Carrier has ever provided "secure" storage facilities for personal tools at the job site. Moreover, the Carrier concocted its "tool box" scheme simply to avoid Rule 23C payments after it lost three (3) disputes before this Board. In these cases each affected employee was faced with the fact that the security of his personal tools could not and would not be guaranteed by the Carrier if left on Carrier property. Hence, each employee had no viable alternative but to carry his tools to and from work each day in order to ensure that said tools would be readily available for use at work. Clearly each employee was required to carry his tools to and from work each work day and was entitled to be compensated as stipulated in Rule 23C.

Secondly, the Board's decision in Case No. 110 not to "...make any specific monetary award..." despite the fact that the Carrier committed a time limit violation requires dissent. As was pointed out on the property, in written brief and in oral argument, Rule 26 has its own clear remedy in the event of a Carrier default, i.e., "the claim will be allowed". Hence, the Board should have simply issued an award that declared that a default occurred and that the rule required that the claim "be allowed". The 13 on-property awards presented to the Board involving default claims provided overwhelming support for such a finding. Had any question arose thereafter regarding the remedy then the Board could have addressed the issue at that time, if requested by the Organization. As it is the Board placed the cart before the horse.

Respectfully submitted,



Mark J. Schappaugh
Organization Member