SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 144
CASE NO. 144

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

VS.

Consolidated Rail Corporation

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained in accordance with the Findings.

DATE: July 26, 2001

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (G. M. McGrossin) to construct a stall (engine repair facility) in the Engine House. at the Conway Yard, Conway, Pennsylvania on November 16, 1995 and continuing (System Docket MW-4369).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman prior written notice of its intent to contract out said work as required by the Scope Rule.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Messrs. W. 0. Parker, J. M. Meehan, A. G. Six, L. E. Kawalski, A. M. Opsatnik, B. M. Putze, R. H. Stevens, J. F. Clark, D. Bentlejewski and G. N. Pachuta shall each be allowed pay at their respective straight time and/or time and one-half rate for an equal proportionate share of the total man-hours expended by the outside forces in the performance of the work in question beginning November 16, 1995 and continuing until the violation ceased and they shall each receive proper credit for vacation and benefit purposes."

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.

A procedural objection by the Carrier requires discussion at the outset. Carrier contends that this Board has no jurisdiction over the dispute because it was not handled in the usual manner on the property. Specifically, Carrier maintains that the Organization submitted new information and expanded previous arguments after the appeal was handled by the final appeal officer on the property.

The Carrier's objection must be rejected. Section 26(d) of the parties' Agreement establishes

a nine-month time limit in which a claim may be progressed to this Board following the decision of Carrier's highest designated officer. A primary purpose of this relatively lengthy time period is to permit the parties to reflect on the merits of their respective positions, do additional investigation and refine or augment their positions accordingly. Were it not for this capability, there would be little practical reason for the nine-month time limit. It is well settled, therefore, that the on-property record remains open for continued development until the time limit expires or a Notice of Intent to File an Ex-Parte Submission is served.

Turning to the merits, we find we must also comment on the scope of our review. Our reading of Carrier's submission reveals it to contain new information and argument that was not presented during the development of the on-property record. For example, the Carrier's submission contains references to the need for a crane which do not appear anywhere whatsoever in the on-property record. It is well settled that our review of the evidence is confined to the record developed by the parties during their handling of the matter on the property. Consequently, no new information or argument may be considered by us if it is presented for the first time to this Board. Accordingly, we have ignored, as we must, such new information.

The instant record contains a number of assertions and counter assertions. With no exceptions of significance, when the Carrier's assertions were challenged by the Organization, the Carrier did not provide probative evidence to support its position. On the contrary, however, assertions made by the Organization were, for the most part, unrefuted by the Carrier. To the limited extent that Carrier did challenge assertions made by the Organization, the Organization provided signed statements, other documents, and pictures to support its various contentions, Other significant Organization assertions stand unrefuted in the record. It is well settled that such unrefuted assertions of material fact become established fact for purposes of analysis of the Claim.

On this record, the Organization claimed excavation and concrete form work in connection with the demolition and reconstruction of Stall #19 at the Conway Engine House that was performed by an outside contractor. It also alleged that Carrier failed to provide proper advance notice of its intent to contract the work.

The Organization's unrefuted evidence also establishes that scope covered employees were performing essentially the same work on Stall #18 before the contractor forces began work on Stall #19, essentially the same work on Stalls #15 and # 16 while the contractor worked on Stall # 19, and essentially the same work on Stall #22 after the contractor finished its work on Stall # 19. All of this transpired in the same engine house.

The Carrier also did not refute the Organization's assertion that the work performed by the contractor was "... ordinarily and customarily performed by B&B forces." Nor did Carrier challenge the contention that B&B forces performed "... similar work on the newly renovated and re-built East Park Fueling Station, in 1993-94"

The Carrier also apparently ignored the Organization's request for a copy of the contract and

job specifications as well as its request for certain information pertaining to the notice issue. The Organization's February 20, 1997 letter noted the commitment of one of Carrier's Labor Relations Specialists to respond to several information requests made the Organization, namely the request for a copy of the contract and also the request for an answer to the question why the contractor began work on Stall #19 less than 15 days after Carrier allegedly provided notice of its intent to contract the work. The on-property record does not reflect any Carrier response whatsoever.

As the Statement of Claim indicates, the requirement of proper advance written notice is also in controversy. The Claim alleged the requisite notice had not been provided. In its first response on the property dated March 8, 1996, Carrier's official merely asserted that notice was provided in a letter dated November 11, 1995. It is undisputed that the contractor began work on Stall #19 on November 16, 1995 -only five days later. The Carrier's denial did not refuted any other contentions raised in the Claim.

After the Organization's appeal again alleged no notice, the Carrier's second response also asserted that proper notification was made by the November 11, 1995 letter.

It was not until Carrier's third response dated January 15, 1997, that Carrier altered its position and contended that notice was made by letter dated *July 25, 1995*. Indeed, its precise statement was, "*As stated in previous* levels *of handling* the Carrier served notice to you and General Chairman Geller by letter dated July 25, 1995, advising of its intent to contract this work." (Italics supplied)

According to the record, the Organization informed the Carrier that General Chairman Geller did not represent employees in the Pittsburg Seniority District. Although the Carrier's next correspondence, dated January 15, 1997, said a copy of the letter was attached, it apparently was not. The Organization wrote back on March 21, 1997 informing the Carrier that the letter had not been attached. Nothing in the record thereafter reflects that the missing copy was exchanged on the property. Although copies of virtually identical letters, one 'bearing the July 25, 1995 date and another with the November 11, 1995 date, which is quite interesting in itself, are included in the Carrier's submission, they may not be considered, as we said earlier, because the record does not show they were exchanged as part of the on-property record.

On this record, therefore, we are forced to conclude that Carrier did not provide the requisite written notice of its intent to contract out the disputed work. Given the fact that it is unrefuted in the record that B&B forces were actually performing essentially similar work before, during and after the work on Stall #19, that B&B forces ordinarily and customarily perform such work, and that such work falls within the scope of the Agreement, the lack of notice must be seen as a violation of the Agreement.

In defending its actions, the Carrier's primary contention was that the Stall #19 work did not have to be piecemealed to provide work for scope covered employees. The record, however, paints an entirely different picture. Given the fact that Carrier forces performed essentially the same work

on four other stalls at the engine house, it appears that piecemealing, if any, arose by virtue of contracting out the work on Stall #19.

The Carrier also raised certain other defenses. For example, it noted that all Claimants were on duty and under pay during the Claim period. In addition, several of the Claimants were on vacation or otherwise unavailable, in Carrier's view, during portions of the disputed work. Under the circumstances of the instant record, this contention is found to lack merit.

In contracting out situations where proper notice was not served and discussion meetings were not held, the Carrier effectively denies itself the benefit of the full employment defense. Had the parties engaged in the kind of good faith discussions contemplated by the Scope Rule, who knows what scheduling arrangements could have been developed to accommodate the people involved. In the absence of such discussions, the fact that employees may have been elsewhere during the Claim period is simply not persuasive.

Given the foregoing discussion, we are compelled to find, given the state of the instant record, that the Claimants suffered a lost work opportunity. Nonetheless, a word about the remedy is in order. Our review of the record shows that all contractor hours have been claimed. The Claim, however, specified only the "... digging and concrete forms for the re-built stall . .." For this reason, the dispute is remanded to the parties to determine the number of manhours expended on such work. When so determined, each Claimant shall be paid additional straight time compensation for a proportionate share of the hours.

AWARD:

The Claim is sustained in accordance with the Findings.

Gerald E. Wallin, Chairman
and Neutral Member

R. C. Robinson,
Organization Member

D. L. Kerby,
Carrier Member