

SPECIAL BOARD OF ADJUSTMENT NO. 1016

**AWARD NO. 161
CASE NO. 161**

**PARTIES TO
THE DISPUTE:** Brotherhood of Maintenance of Way Employees

vs.

Consolidated Rail Corporation

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained

DATE: July 19, 2001

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Carman Construction) to perform Maintenance of Way work (installing facia, felt paper and roofing shingles) at NK Tower in Newark, New Jersey on October 26 and 27, 1998 (Carrier's File 1090500106).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out said work and discuss the matter in good faith as required by the Scope Rule.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. E. Faller, F. Hernandez, E. J. Ferrence, A. S. Fantasky and W. E. Buck shall now each "... receive a days pay for each day the Contractors employees performed work and be made whole for all other benefits and credits lost as a result of this violation. ..."

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.

It is conceded that no notice was provided to the Organization. However, Carrier contends that notice was not required because of emergency circumstances that existed when the deterioration of the NK Tower roof was discovered on October 25, 1997. Among other things, Carrier also noted that the Claimants were on duty and under pay on the Claim dates. In Carrier's view, they were not available to perform the work.

The Organization challenged the existence of emergency circumstances. It also asserted,

without refutation by the Carrier, that B&B employees, which Claimants were, have ladders, scaffolds, and planking and have previously performed the kind of work involved. In addition, they have all been training in fall protection.

Our review of the record compels us to reject the Carrier's contention of emergency. Generally speaking, emergencies do not arise out of the failure to detect what could have been discovered by diligent periodic inspections. Moreover, once Carrier's contention was refuted by the Organization, as it was, Carrier assumed the burden to prove the existence of the emergency. It relied on assertions only and failed to provide supporting evidence.

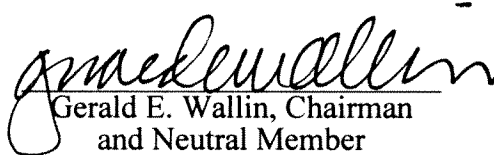
On this unique record, we find that the Organization has sufficiently demonstrated scope coverage of the work involved. Carrier, therefore, was in violation of the Agreement when it contracted out the work as it did and without notice to the Organization.

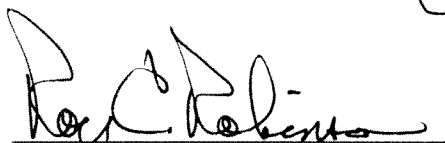
We also reject Carrier's full employment defense. This record does not establish why the work could not have been scheduled and performed by scope covered B&B employees. Thus, a loss of work opportunity has been demonstrated.

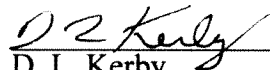
Given the foregoing discussion, this Claim must be sustained. The evidence supports the Organization's request for additional compensation for each Claimant equal to sixteen (16) straight time hours.

AWARD:

The Claim is sustained.


Gerald E. Wallin, Chairman
and Neutral Member


R. C. Robinson,
Organization Member


D. L. Kerby,
Carrier Member