

SPECIAL BOARD OF ADJUSTMENT NO. 1016

**AWARD NO. 142
CASE NO. 142**

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

vs.

Consolidated Rail Corporation

ARBITRATOR: Gerald E. Wallin

DECISION: Claim denied

DATE: July 24, 2001

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned an outside concern (Amtrac Railroad Contractors) to perform track maintenance work on the Eaglebrook track off Number Two track of the Chicago Main Line at Mile Post 173.1 on November 1, 2, 6, 7, 8, 9, 13, 14, and 15, 1995 and continuing (System Docket MW-4321).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out the work as required by the Scope Rule.
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Foremen M. Hepburn and C. Younger, Vehicle Operators J. L. Antonello and B. M. Cruxton, Class 2 Operators S. Coleman, Jr. And Casual Driver J. Morgan shall each receive ninety (90) hours of pay at their respective straight time rates."

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.

Certain procedural objections by the Carrier require discussion at the outset. First, 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.

Secondly, Carrier raised several other procedural objections in its November 19, 1996 response on the property. It took exception to the continuing nature of the Claim and the composition of the work force asserted in the Claim as well as the number of man-hours claimed to have been worked by the contractor. None of these objections was made in Carrier's earlier responses.

Arbitral thought on this second point is also well settled. Non-jurisdictional procedural objections must be made at the first opportunity to do so or they are deemed to be waived. Consequently, Carrier's procedural objections must be rejected.

On the merits, what might seem like a complex set of transactions on the surface appears to be rather straightforward upon closer examination of the evidence, which includes a Property Lease effective November 6, 1995 and a Side Track Agreement effective December 29, 1995. It is important to note that the Organization did not take issue with any of the terms of the Property Lease on the property. Other than noting the effective date of it, the same is true of the Side Track Agreement.

In 1995, a third-party industry, Eaglebrook, Inc., sought to improve its transloading operations on property it owned adjacent to Carrier's main line. Eaglebrook's property contained two side track stubs that connected to track on Carrier's property that ultimately connected to Carrier's main line.

Improving the use of its property apparently required that Eaglebrook relocate one of the track stubs on its property so that it would comply with Carrier's required minimum set back distance of 50 feet from the centerline of its nearest main line track. This appears to have required some relocation of the existing connecting track that ran over Carrier's property. Finally, it appears that Carrier was not interested in expending any of its resources for the benefit of Eaglebrook. If the track work was to be done, therefore, it would have to be at Eaglebrook's sole expense. To that end, Carrier entered into the Property Lease with Eaglebrook. The lease essentially permitted Eaglebrook to rehabilitate what had been out-of-service connecting track on Carrier's property.

On December 29, 1995, Carrier and Eaglebrook entered into a Side Track Agreement. It is unrefuted in the record that the Property Lease is the controlling document in this dispute. The Side Track Agreement is only required when Carrier equipment is to operate on track not owned by Carrier to place cars.

On this record, the mosaic that emerges from the evidence is one of a legitimate arms-length transaction between independent private parties. The Organization did not claim otherwise on the property. In its submission, however, the Organization contended, as a new argument, that the lease was a subterfuge. It went on to assert parallels with Third Division Award No. 27576. In that case, the Third Division found that the so-called third party lessee was, indeed, a wholly owned subsidiary of the carrier. Moreover, in that case, the carrier's directors comprised the board of directors of the subsidiary, thus producing overlapping control. No such evidence has been produced in the record for the instant dispute.

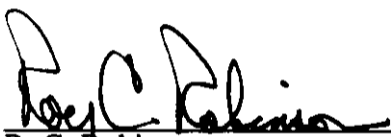
The Organization also noted, without objection by the Carrier, that slightly more than two months after the disputed work was completed, Carrier forces were used to perform certain repairs and to perform periodic inspections. Such work, however, is not inconsistent with Eaglebrook's responsibilities under the usage agreements. It hired Carrier as its maintenance provider and paid for it accordingly. The evidence does not show otherwise. Standing by itself, therefore, it does not show the Property Lease to be a subterfuge.

It is well settled that work undertaken by and performed for the benefit of an independent third party lessee at its expense does not fall within the scope of the effective Agreement between the parties. It was the Organization's burden of proof to show otherwise. On this record, it has failed to do so.

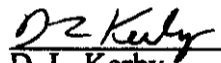
Having thus found the disputed work to be outside the scope of the Agreement, it follows that Carrier was not required to provide any notice of the work performed by the contractor for Eaglebrook.

AWARD:

The Claim is denied.


R. C. Robinson,
Organization Member


Gerald E. Wallin, Chairman
and Neutral Member


D. L. Kerby,
Carrier Member