

SPECIAL BOARD OF ADJUSTMENT NO. 1016

**AWARD NO. 155
CASE NO. 155**

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

vs.

Consolidated Rail Corporation

ARBITRATOR: Gerald E. Wallin

DECISION: Claim denied.

DATE: July 30, 2001

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (New Technology Construction, Inc.) to perform road crossing removal and paving work at State Route 795, Mile Post 77.50 on the Carruthers Branch, from Walbridge to Woodville, Ohio on October 19, 1996 (System Docket MW-5003).
- (2) The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with advance written notice of its intent to contract out the work described in Part (1) above as required by the Scope Rule.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. E. Canas, J. Bressler, E. Berg, M. J. Daly and A. L. Herrera shall each be allowed five and one-half (5.5) hours' pay at their respective time and one-half rates of pay."

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.

The basic facts are not in dispute. Prior to the Claim date, Carrier's Carruthers Branch line from Walbridge to Woodville, Ohio contained dual track. At some point the second track was no longer used. Carrier forces were used to retire the second track by removing the rail, ties, and OTM at all points on the branch except the crossing where State Route 795 intersected the line. A copy of the contract in the record establishes that the track materials at the crossing were sold to the contractor as is where is. The contractor removed the materials on October 19, 1996 and paved over the location of the former second track. The surviving single track remained in operation.

The development of the on-property record is disturbing to us. Not only did the size of the Claim collapse down from 28 Claimants to 5, but the nature of the work claimed also changed significantly. The Organization's submission places great emphasis on claiming the paving work. On the property, however, the paving work was never claimed in any of the Organization's correspondence preceding the decision of the Carrier's highest designated officer. Indeed, paving work was not mentioned at all in the initial Claim dated December 11, 1996, the Organization's first appeal dated February 17, 1997 or the Organization's second appeal dated February 9, 1998. Instead, the Claim consisted only of the dismantling of the crossing and the hauling away of the materials.

In disputes of this kind, the threshold issue is that of scope coverage of the work. The explicit terms of the Scope Rule limit coverage to inspection, construction, maintenance and repair of track. By its terms, therefore, the rule does not appear to extend to track retirement. Moreover, on this record, the Organization has not provided sufficient evidence to substantiate that the employees it represents have historically, customarily or traditionally performed track retirement work. The statements provided on the property deal with crossing tear-out and replacement, which was not involved in this case. In addition, the statements do not establish that scope covered employees performed such work as of the effective date of the Agreement, which was February 1, 1982.

On this record, therefore, we do not find the evidence to properly establish scope coverage of the removal work. It follows, then, that the Carrier was not remiss in not providing advance notice of the contracting arrangement to the General Chairman.

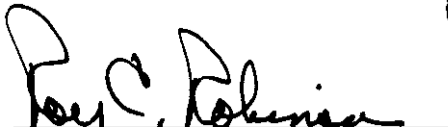
Finally, it is well settled that the Organization bears the sole burden of proof to establish all of the requisite elements of a claim. Even if the purported paving component of the Claim was entertained, the Organization has not apportioned any of the total time worked by the contractor

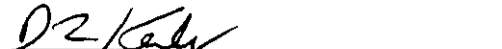
forces to the paving. Thus, we would have no proper basis for awarding a remedy for the paving portion of the work in any event.

AWARD:

The Claim is denied.


Gerald E. Wallin, Chairman
and Neutral Member


R. C. Robinson,
Organization Member


D. L. Kerby,
Carrier Member