

SPECIAL BOARD OF ADJUSTMENT NO. 1016

**AWARD NO. 158
CASE NO. 158**

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

vs.

Consolidated Rail Corporation

ARBITRATOR: **Gerald E. Wallin**

DECISION: **Claim sustained**

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 (Poole Paving) to perform paving and clean-up work on the Southwest Seniority District at Mile Post 198.63 at State Line Road No. 1 Track crossing on the Cleveland to Indianapolis Line on September 8, 1997 (System Docket MW-5172).**
- (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 the work described in Part (1) above as required by the Scope Rule.**
- (1) As a consequence of the violations referred to in Parts (1) and/or (2) above, two (2) senior furloughed vehicle operators, two (2) senior furloughed Class 2 Machine Operators, one (1) senior furloughed foreman and one (1) senior furloughed trackman from the Southwest Seniority District shall each be allowed ten (10) hours' pay at their respective 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.

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.

Carrier raised a second procedural objection in its October 7, 1998 response on the property. It took exception to the Organization's failure to identify specific claimants and demonstrate their qualifications to perform the work. Neither of the Carrier's first two responses on the property raised this objection.

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 objection must be rejected.

The record on the merits of this Claim is virtually identical to that reviewed in Award 150 of this Board (Parties' Docket MW-4559). Indeed, the record here references the same Carrier defenses given in Docket MW-4559. Moreover, the Organization's submission contains the same employee statements that were presented in Docket MW-4559. Therefore, for the reasons expressed in Award 150, we must sustain this Claim on the merits as well.

This Claim also alleges a notice violation. While Carrier maintained that proper notice was provided by its letter dated February 21, 1997, which contained a seven-page attachment listing crossings to be paved, our examination of the attachment does not reveal any listing for a crossing at Mile Post 198.63 on the Cleveland to Indianapolis main line. Accordingly, we must find that proper notice was not served for the work in dispute. This provides a secondary basis for sustaining the Claim.

No limitation on the requested remedy, as was directed in Award 150, is required by this record. Carrier took no exception to the number of contractor employees or their hours of work during the handling of the matter on the property.

AWARD:

The Claim is sustained.


Gerald E. Wallin, Chairman
and Neutral Member


R. C. Robinson,
Organization Member


D. L. Kerby,
Carrier Member