

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 40

Case No. 40

Referee Fred Blackwell

Labor Member: S. V. Powers

Carrier Member: J. H. Burton

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (Iberia Construction Company) to haul stone, grade the right-of-way and install culverts between Mile Post 83.7 and Mile Post 95.5 in the vicinity of Marion, Ohio beginning October 20, 1986 (System Docket CR-2895).
- (2) The Agreement was further violated when the Carrier did not give General Chairman Dodd prior written notification of its plan to assign said work to outside forces.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the two (2) senior track foremen, four (4) senior trackmen, four (4) senior machine operators and nine (9) senior vehicle operators on the Columbus Division Seniority Rosters, who were furloughed during the claim period, shall each be allowed one hundred twenty (120) hours of pay at their respective straight time rates.

FINDINGS:

*Upon the whole record and all the evidence, and after hearing on August 17, 1989, in the Carrier's Office, Philadelphia, Pennsylvania, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.*

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**DECISION:**

Claims sustained.

**OPINION**

This case arises from claims filed on behalf of nineteen (19) furloughed Maintenance of Way Employees on the basis of allegations that the Carrier violated the BMWE Scope Rule by improperly contracting with an outside contractor to haul stone, grade the right-of-way, and install culverts between MP 83.7 and MP 95.5 in the vicinity of Marion, Ohio, Columbus Division. The work, it is alleged, occurred on fifteen (15) claim dates in October and November 1986, with each of nineteen employees of the contractor performing eight (8) hours of work on each claim date for a total of 120 man-hours each. The contractor's work force was comprised of two (2) foremen, four (4) laborers, four machine operators, and nine (9) vehicle operators; the foremen supervised the work; the laborers performed laborer's work; the machine operators operated a backhoe, a Gradall, a bulldozer, and a roller; the vehicle operators operated eight dump trucks and one flat bed truck.

The Claimants are nineteen senior unnamed Employees in the job classifications that were allegedly used by the outside contractor to perform the work, namely: two foremen, four laborers, four machine operators, and nine vehicle operators.

The Organization contends that the claims are valid because the Carrier violated the Employees' Scope Rule in two respects: 1) the Carrier contracted out work secured

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to the Employees by the text of their Scope Rule, and 2) the Carrier did not comply with the Scope Rule notice provisions that obligated the Carrier to give General Chairman Jed Dodd prior written notification of the project.

The Carrier submits that the protested contracting out did not violate the Agreement, and that the claims should be denied on that basis. The specific grounds for the Carrier's denial of the claims, reflected in the Carrier's submission, are as follows.

1. The claims are procedurally defective, because the claims lack data that would enable the Carrier to identify the unnamed Claimants.

2. On August 14, 1986, the Carrier notified General Chairman J. B. Cassese, who heads the Consolidated Rail System Federation, of its plan to contract out grading and drainage work preparatory to the track construction phase of the Galion to Ridgeway, Ohio, TCS project. Mr. Cassese took no exception to the contracting of the subject work, and no claims for the work were submitted on behalf of Employees represented by his General Committee. This notice complied with the notice requirements of the Scope Rule and the Carrier was not required to give notice also to General Chairman Jed Dodd, who heads the Pennsylvania Federation.

3. The work in question was unusual and the required skills and equipment, and Employees who were qualified to perform the work, were not available to the Carrier. Also, the work project involved a considerable number of man hours.

4. The work of grading and hauling stone does not accrue to the Claimants by Agreement or past practice.

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5. Approving the claims for compensation would constitute the Board's assessment of a penalty against the Carrier, which the Board has no authority to do in the absence of an Agreement provision so providing.

\* \* \* \* \*

From full review and assessment of the foregoing, in the context of the whole record, the Board finds and concludes that the confronting claims have merit and that the Carrier's position is not supported by the record.

More particularly, the subject work is within the purview of the text of the BMW Scope Rule that makes specific reference to *"work generally recognized as Maintenance of Way work, such as,...construction, repair and maintenance of...culverts...tracks...and roadbeds."*

The Board finds that in view of this express coverage of the subject work by the confronting Scope Rule, the Carrier's action in contracting the subject work violated the Scope Rule. The Board further notes that the Organization stated at the hearing on this case that the request for compensation is limited to Claimants represented by the Pennsylvania Federation; therefore, subject to this limitation, the claims are deemed meritorious and compensation will be awarded as hereinafter provided on the basis of the Carrier's violation of the Scope Rule. It is also noted that the Hopkins-Berge Letter of Agreement dated December 11, 1981, has been omitted from the considerations of this dispute. *Said letter was held not applicable on Conrail in this Board's Award No. 66-A executed on January 18, 1993.*

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ACCORDINGLY, based on the whole record, the claims will be sustained. This Finding disposes of the claim; therefore, the Board finds it unnecessary to discuss or rule on the Organization's allegations that the Carrier violated the notice provisions of the Scope Rule.

A handwritten signature in cursive script, reading "Fred Blackwell", written over a horizontal line.

Fred Blackwell  
Chairman/Neutral Member  
Special Board of Adjustment No. 1016

January 9, 1995

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AWARD

The Carrier violated the Scope Rule.

The claims are hereby sustained on the basis that the Carrier is directed to compensate the herein Claimants represented by the Pennsylvania Federation in accord with the compensation requested in said claims.

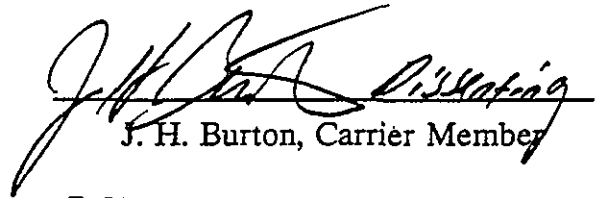
BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016



Fred Blackwell, Neutral Member



S. V. Powers, Labor Member



J. H. Burton, Carrier Member

Executed on 2/27, 1995

I dissent because this Award is erroneous in light of Award 29 of SBA 1016 involving the same kind of work and Third Division Award 29187 involving notice to the involved General Chairman.

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