PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 66

Case No. 66

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 Agreement was violated when the Carrier assigned outside forces (Emery Contracting) to cut weeds and clean the right-of-way on the New Jersey Division in the Allentown/Bethlehem area beginning October 7, 1986 (System Docket CR-3090).

(2) The Agreement was further violated when the Carrier did not give the General Chairman 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, Track Foreman F. Fazio, Machine Operator - Class 2 B. Davis and Trackman S. Snisky shall:

(a) each be allowed eight (8) hours of pay at their respective pro rata rates for each of the following days: October 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31; November 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25 and 26; December 1, 2, 3 and 4, 1986 and

(b) they shall each be allowed pay at their respective time and one-half rates for each of the following days: October 11, 12, 18, 19, 25 and 26; November 1, 2, 8, 9, 15, 16, 22, 23, 29 and 30, 1986.

FRED BLACKWELL
ATTORNEY AT LAW

19129 ROMAN WAY
GAITHERSBURG,
MARYLAND 20879
(301) 977-5000

FINDINGS:

Upon the whole record and all the evidence, and after hearing on December 17, 1990, 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.

DECISION:

Claims sustained as hereinafter provided.

OPINION

This case arises from claims filed on December 4, 1986, in behalf of three (3) named Claimants, Track Foreman Fazio, Machine Operator (Class 2) Davis, and Trackman Snisky, on the basis of allegations that the Carrier violated the parties' Agreement by its action of improperly contracting with an outside Company, Emery Contracting, to cut weeds and clear the right-of-way on the New Jersey Division in the Allentown/Bethlehem area, beginning October 7, 1986. The Organization asserts that the subject work violated both the work jurisdiction provisions and the notice provisions of the Scope Rule of the Agreement.

The Claimants, who were on duty and under pay during the outsider's performance of the subject work, seek compensation at their respective straight rates for forty-one (41) days in October, November, and December 1986, and compensation at their respective time and one-half rates for sixteen (16) days in October and November 1986.

The Employees submit that beginning October 7, 1986, three (3) Employees of the

FRED BLACKWELL
ATTORNEY AT LAW

19129 ROMAN WAY
GAITHERSBURG,
MARYLAND 20879
(301) 977-5000

outside contractor commenced work cutting weeds and cleaning the right-of-way in the vicinity of Allentown and Bethlehem, Pennsylvania, and that work of this character has customarily, traditionally, and historically been performed by the Carrier's Maintenance of Way Track Department forces. Such work, the Organization asserts, has been performed on the Carrier's property from 1945 onward, as evidenced by letters written by Track Department Employees (Employee's Exhibit A-7); the disputed work is thus also encompassed by the provisions in paragraphs 1 and 5 of the Scope Rule concerning past practice. In addition, the Organization asserts that the Carrier violated paragraphs 2 and 3 of the Scope Rule by its failure to give the General Chairman advance, written notice of the Carrier's intent to contract brush cutting work to Emery Contracting.

The Carrier submits that its action in using an outside contractor to cut brush and remove debris, at the locations and on the dates specified in the claim, did not violate the Agreement, and that on that basis the claims should be denied. The Carrier more specifically asserts that:

1. Because the controlling Scope Rule is general in nature and the work of cutting brush and removing debris from the right-of-way is not mentioned in the rule, the Employees have the burden of showing that work of the same character has been performed exclusively by Maintenance of Way Employees, on a system-wide basis, which burden the Employees cannot meet because the subject work has been historically performed at the locations cited in the claim and at various other locations by outside contractors.

FRED BLACKWELL
ATTORNEY AT LAW

19129 ROMAN WAY
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2. Because the disputed work does not accrue exclusively to the Maintenance of Way Employees, and because the Employees have not shown of record that MW Employees have performed the subject work exclusively on a system-wide basis, the Carrier had no obligation under the notice provisions of the Scope Rule to give advance notice to the General Chairman of the Carrier's intent to contract the subject work to Emery Contracting.

3. Because the Employees have acquiesced to the correctness of the Carrier's use of contractors to perform the subject work for approximately the first three (3) years of the Agreement, 1982 to 1985, the Employees cannot now protest that to which the Employees' prior silence implies assent.

* * * * * * * * * * *

From full review and assessment of the record as a whole, the Board finds and concludes that the protested contracting out by the Carrier violated the work jurisdiction and the notice provisions of the confronting Scope Rule.[1] Therefore, the Board finds that the claims have merit and that the Carrier's opposition to the claims is not supported by the record. Accordingly, a compensatory remedy will be awarded as hereinafter provided.

More specifically, the Board finds that the subject work is within the purview of the work jurisdiction provisions of the BMWE Scope Rule that makes specific reference to *"work generally recognized as maintenance of way work, such as,...maintenance*

[1] 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.

FRED BLACKWELL
ATTORNEY AT LAW

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GAITHERSBURG,
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of...tracks." Rule 1 of the Scope Rule also makes reference to the operation of a *"Brushcutter"* machine by Class 3 Machine Operators. In addition, paragraph 5 of the Scope Rule provides that work which was being performed by Maintenance of Way Employees on the effective date of the Agreement (February 1, 1982) is within the scope of the Agreement. The letters by Track Department Employees, contained in Employees' Exhibit A-7, show that the Maintenance of Way forces have performed work of the same character as the disputed work for many years before and on the date of the execution of the current contract in February 1982.

There is thus no question that the subject work involved in this dispute is encompassed within the text of the BMWE Scope Rule. The Board therefore finds, as previously noted, that the Carrier's contracting of the disputed work violated the work jurisdiction provisions of the BMWE rule.[2] Third Division Awards Nos. 26545 (09-30-87), 27012 (04-25-88), 27014 (04-25-88), 27185 (06-23-88), and 27333 (08-30-88).

The Board has considered and rejects the Carrier's position that these Awards and similar rulings should be overturned by this Board, because, in the disputes in those Awards, the Carrier failed to document its contentions that the subject work does not historically accrue to BMW Employees, but the Carrier has documented such contention in this dispute. However, as indicated, the Board finds that analysis of those awards, in the context of this dispute, reveals no persuasive reason for this Board to reverse the

[2] All of the prior authorities submitted of record have been studied and analyzed in arriving at this Finding and Decision.

FRED BLACKWELL
ATTORNEY AT LAW

19129 ROMAN WAY
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ruling in the prior authorities concerning coverage of particular work by the BMWE Scope Rule on the grounds suggested by the Carrier.

The Board has also considered the Carrier argument that since these authorities cited by the Employees (Third Division Awards Nos. 26545, 27012, 27014, and 27185) post-date the date of the violation in this case, October-December 1986, the findings in those Awards that contracting brush cutting violated the BMWE Scope Rule did not give the Carrier notice that such contracting required the Carrier to comply with the notice requirement in paragraph 2 of the Scope Rule.[3] This facts underlying this contention are accurate, but the contention must be considered in the context that the Organization did not accept and continued to protest the Carrier's policy concerning contracting out. Thus, this lack of notice contention, plus the fact that the cited Awards were issued over a period of several years, does not negate the Carrier's liability to remedy a Scope violation by payment of compensation; however, such considerations, in the facts of this case, will be weighed as mitigating considerations in determining the quantum of the compensatory remedy.

As regards the scheduling of the work for in-house performance, the record persuades that even though the Track Department Employees were working on their regular assignments during the contract for the brush cutting work, the brush cutting work could have been performed by the Carrier's Track Department Employees on daily or

[3] This characterization also applies to the cited Awards; all of the Awards post-date the dates of the violations treated in the Awards.

FRED BLACKWELL
ATTORNEY AT LAW

19129 ROMAN WAY
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week-end overtime. The Board cannot determine retroactively how the scheduling issue would have been resolved if the parties had met and discussed the contracting out as contemplated by paragraphs 2 and 3 of the Scope Rule. The Board, on the record as it now stands, can only conclude that the Carrier had opportunity to discuss with the Employees its reasons for not using its Track Department Employees, but that the Carrier forfeited such opportunity, as noted immediately below, by its failure to give the General Chairman notice of contracting the subject work.

The Carrier also violated the paragraph 2 provisions in the Scope Rule that required the Carrier to give the General Chairman notice of the Carrier's intent to contract the subject work and to discuss same, if requested, with the General Chairman. The Carrier's contention that exclusivity applies to this dispute, and hence notice to the General Chairman was not required, has been considered and rejected in prior Third Division Awards No. 27012 (04-25-88) and No. 27014 (04-25-88). The Board will give these Awards precedential authority and hence the Carrier's contention that exclusivity exempts the Carrier from the notice requirement is rejected in this dispute also.

In view of the Carrier's violations of the work jurisdiction and the notice provisions of the Scope Rule, a remedy is in order. As to the quantum of the remedy, the Board notes that the Claimants were on duty and under pay during the contractor's performance of the disputed work; hence, the considerations regarding the remedy differ from the considerations regarding Claimants who are on furlough when a contractor improperly performs BMWE work. Prior authorities have awarded compensation to furloughed

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ATTORNEY AT LAW

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Claimants for the contracted work on a make-whole basis. In contrast, Claimants under pay, in some prior authorities, have been awarded compensation for all of the contracted work, or for a portion of the contracted work. Other authorities have made findings of contract violations but have declined to award compensation. The parties have submitted prior awards that are representative of these viewpoints.

For the case at hand, the Board finds that with respect to disputes in which there is a Board finding of an Agreement violation, the authorities that award a remedy that provides compensation to Claimants under pay have a more rational basis than the authorities that make findings of a violation(s) but deny compensation to Claimants under pay. Therefore, a compensatory remedy is deemed appropriate for this case, on the rationale that although the instant Claimants were on duty and under pay during the period of the outsider's performance of work encompassed by the BMWE Scope Rule, the Board should, when appropriate, provide a meaningful compensatory remedy for an Agreement violation not only because work opportunities were lost, but also for the purpose of enforcing and ensuring the integrity of the Agreement and discouraging future violations of the kind presented in this case. Award No. 34, SBA 1016 (07-28-89), Referee Harold Weston.

In balancing the considerations applicable to the fashioning of a remedy, the Board finds it appropriate to award the Claimants compensation for one-half of the total amount of the wages claimed in paragraph (3) (a) and (b) of the claim, said amount to be computed on the basis that the forty-one (41) straight time and sixteen (16) time and one-

FRED BLACKWELL
ATTORNEY AT LAW

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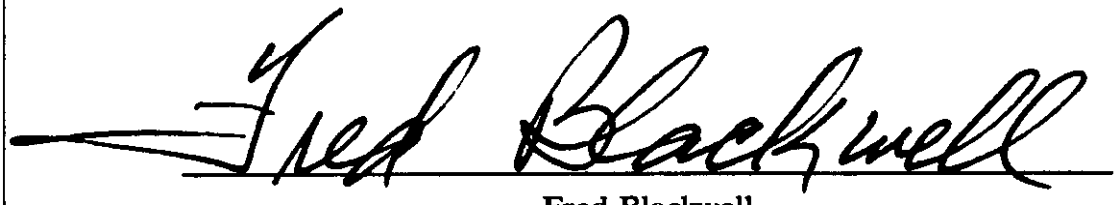
half claim dates enumerated in said paragraph (3) (a) and (b) shall be confirmed by a joint check of the Carrier's records.

ACCORDINGLY, based on the record as a whole, the Board finds that the Carrier violated the Agreement and that a sustaining award is in order as hereinafter provided.



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

April 14, 1994

FRED BLACKWELL
ATTORNEY AT LAW

19129 ROMAN WAY
GAITHERSBURG,
MARYLAND 20879
(301) 977-5000

AWARD

The Agreement was violated.

Claims sustained to the extent that the Carrier is directed to compensate the Claimants for one-half of the total amount of the wages claimed in paragraph (3) (a) and (b) of the claim, said amount to be computed on the basis that the forty-one (41) straight time and sixteen (16) time and one-half claim dates enumerated in said paragraph (3) (a) and (b) shall be confirmed by a joint check of the Carrier's records.

Jurisdiction is retained for the consideration of written requests for Board consideration of questions concerning the implementation of this Award, which requests are received in the office of the undersigned within sixty (60) days from the date hereof.

BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016.

Fred Blackwell

Fred Blackwell, Neutral Member

Steven V. Powers

S. V. Powers, Labor Member

J. H. Burton, Carrier Member

Executed on 5/3, 1994

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FRED BLACKWELL
ATTORNEY AT LAW

19129 ROMAN WAY
GAITHERSBURG,
MARYLAND 20879
(301) 977-5000