PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 69

Case No. 69

Referee Fred Blackwell

Carrier Member: J. H. Burton Labor Member: S. V. Powers

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 (D. Millious Contractors) to unload ties on the Lehigh Valley Main Line and River Line from April 13 through June 1, 1987 (System Docket CR-3473).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. E. J. Hollock shall be allowed pay for:

"***eight (8) hours at the pro-rata class 2 machine operators rate for: April 13, 14, 15, 16, 20, 21, 22, 23, 24, 27, 28, 29, 30 May 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29 and June 1 1987 and continuing until the work is completed. Additionally, the Organization claims eight (8) hours at the time and one half class 2 machine operators rate for each of the following dates: April 17, 18, 19, 25, 26 May 2, 3, 9, 10, 16, 17, 23, 24, 30, 31 and continuing until the work is completed."

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

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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:

Claim sustained as hereinafter provided.

OPINION

This claim arises from a claim filed June 1, 1987, by Machine Operator E. J. Hollock on the basis of allegations that the Carrier violated the Scope Rule and Rule 1 of the current Agreement by contracting out the work of unloading ties on the Lehigh Valley Main Line (MP 50 to Port Reading Junction) and River Line (CP 33 to MP 69) on the New Jersey Division, between April 13 and June 1, 1987.

The subject work was performed with a modified backhoe mounted on a gondola; after the ties were offloaded from the gondola, the ties were used in track repair and maintenance of the roadbed.

During the claim period of April 13 through June 1, 1987, the Claimant was employed by the Carrier at times as a Mechanic in the Easton MW Repair Shops, and at times as a Trackman on the New Jersey Division.

By letter dated June 1, 1987, the Organization presented a claim for compensation at straight rate for each week day during the claim period, and for time and one-half pay for Holidays and weekends during the claim period. The claim presented to the Board shows a request for compensation in the claim period for thirty-five (35) dates and fifteen

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(15) dates at straight rate and at time and one-half rate, respectively.

The Carrier states in its submission that the contractor worked on only thirty-one (31) dates in the claim period and did not work on any of the dates for which time and one-half is claimed.

The Organization's position is that the claim should be sustained on the ground that the Carrier's action of contracting out the subject work violated both the work jurisdiction provisions of the Scope Rule and the notice provisions of the rule, that requires the Carrier to give fifteen days advance notice of the contracting to the General Chairman. The Organization also submits that the Carrier's contention that the Claimant was not qualified for the offloading position is not valid because the Carrier did not bulletin the position before the contracting of the work.

The Carrier's position is that the grievance should be denied on the grounds that Claimant was not qualified to operate the modified backhoe machines that are mounted on top of gondola rail cars in order to offload ties, that the Claimant was on duty and under pay while the work was performed, and that the Carrier's limited supply of modified backhoes were in use and not available for this project.

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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

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provisions and the notice provisions of the confronting Scope Rule.[1]

The Board, after careful study of the Carrier's contentions, finds Carrier's contentions unpersuasive and not supported by the record. Therefore, the Board finds that the claim has merit and that a compensatory remedy is in order.

With regard to remedy, the record shows that the facts and contentions in this case are similar to those in Awards Nos. 43 and 66 of this Board, which Awards, the Board notes, did not involve Claimants who, like the herein Claimant, were not qualified to perform the disputed work during the claim period.[2] The Board observes, however, that the Carrier did not bulletin the position in question before the contracting of the offloading work: the Board cannot determine, retroactively, whether the contracting would have been canceled or modified by the Carrier if there had been advance notice and discussion about the intended contracting. Therefore, in the Board's judgment, the differing fact concerning the Claimant's lack of qualifications does not evidence such a substantial difference between the claims in Awards Nos. 43 and 66 and the herein claim as to preclude a compensatory remedy in this case.

Accordingly, adhering to the rationale set out in this Boards' Awards Nos. 43 and 66, the claim will be sustained to the extent that the Claimant will be awarded

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[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.

[2] The Carrier's submission states that the Claimant successfully invoked Rule 3, Section 2, subsequent to the filing of the instant claim, and became qualified to unload equipment from gondola cars with the use of a modified backhoe mounted on a gondola.

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compensation at the Claimant's wage rate for one-half of the hours worked by the outside backhoe operator on the dates enumerated in the claim during the period of April 13 through June 1, 1987, subject to a maximum of twenty (20) work days. The dates enumerated in the claim must be confirmed by a joint check of the pertinent records.

In view of the foregoing, and based on the whole record, the Board finds that the Carrier violated both the work jurisdiction provisions and the notice provisions of the Scope Rule of the BMWE Agreement and that on that basis, a sustaining award is in order.

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

July 20, 1994

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AWARD

The Agreement was violated.

The claim is hereby sustained to the extent that the Claimant is awarded compensation at the Claimant's wage rate for one-half of the hours worked by the outside backhoe operator on the dates enumerated in the claim during the period of April 13-June 1, 1987, subject to a maximum of twenty (20) work days; said dates enumerated in the claim must be confirmed by a joint check of the pertinent 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 on or before September 19, 1994.

BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016.

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

S. V. Powers, Labor Member

J. H. Burton, Carrier Member

Executed on 3/27, 1995

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