PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

Award No. 82

Case No. 82

Referee Fred Blackwell

Labor Member: M. Schappaugh Carrier Member: J. H. Burton

Parties To Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

CONSOLIDATED RAIL CORPORATION

Statement Of Claim:

[As stated in the submission and not repeated herein.]

Findings:

Upon the whole record and all the evidence, and after hearing on April 24, 1992, 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.

OPINION

INTRODUCTION

This case is one of a group of twenty (20) Scope Rule cases that relate to

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claims about the performance of crossing repair work by outside contractors and that was held in abeyance, by the parties' stipulation, pending the decision of this Board on the crossing repair/Scope Rule dispute in Case No. 10 respecting claims arising in May 1985 (System Docket CR-1775 and CR-1776). This Board sustained the claims in Case No. 10 and awarded compensation to the Claimants in Award No. 10 issued on April 5, 1991; similar sustaining rulings were issued in succeeding Awards Nos. 11 and 12, also issued on April 5, 1991.

In June and July 1991, the parties held discussions about the group of cases held in abeyance in light of this Board's Award No. 10, and disposed of thirteen (13) of the twenty (20) cases held in abeyance. The Carrier determined that Award No. 10 was inapplicable to the remaining seven (7) cases (herein Case No. 82 and Cases Nos. 83, 84, 85, 86, 87, and 88)[1] and denied each case on various grounds by separate letters in June and July 1991. Upon receipt of the Carrier's letter denying the herein case, dated July 10, 1991, the Organization progressed said cases to this Board by letter dated July 22, 1991.

NATURE OF CASE

This case is comprised of seven (7) sets of claims filed on September 12, 985, on behalf of six (6) furloughed BMWE Employees who allege that the circumstances in

[1] Case No. 83 was denied in this Board's Award No. 83 (June 23, 1992) on the ground that the record did not show the performance of work by a contractor in the month cited in the claims.

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which the Carrier permitted crossing/repair work to be performed by an outside company on the Columbus Division on August 20, 22, 23, 30, September 4, 6, and 11, 1985, violated the Scope Rule provisions, of the Conrail-BMWE Agreement, on the subjects of work jurisdiction and the requirement for advance notice of a contracting-out transaction. Compensation is claimed for fifty-six (56) hours of straight time pay for each Claimant for the seven (7) claim dates.

ON-PROPERTY HANDLING

There is a threshold issue about the on-property contentions raised by the Carrier respecting the herein claims, that the Board must determine before considering the merit arguments of the parties in this matter. The predicate in the Board's determination of this procedural matter is that the parties' handling of these claims on the property ended when the parties agreed to hold this and other cases in abeyance pending the outcome of Case No. 10, which concluded with Award No. 10 of this Board.[2]

The Carrier's letter dated July 10, 1991, which advised the Organization of five (5) reasons for the Carrier's decision that Award No. 10 does not apply to the claims in herein Case No. 82, sets out these reasons as follows:

> *"1. Improper Claimants. Each claim is progressed for 6 employees (2 Vehicle Operators, 2 Machine Operators and 2 B&B Helpers); however, the following would not have stood for recall pursuant to Section 4 of Rule 3 because they do not possess seniority in the class in which they claim:*

[2] The parties' on-property handling of these claims is comprised of Carrier letters dated September 16, November 1, October 31, 1985, and February 12, 1986; and Organization letters dated October 4 and December 28, 1985.

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M. Keefe - *Has no Vehicle Operator seniority.*

R. L. Cassidy - *Has no seniority in any class except Trackman.*

J. L. McLaughlin - *Has no seniority in any class except Trackman.*

G. S. Cost - *Has no Class 2 Machine Operator seniority.*

L. A. Robinson - *Has no Machine Operator seniority.*

2. *The contractor performed no work on the dates cited in System Dockets CR-2012, 2013, 2016 and 2018.*

3. *Claims are excessive. Contractor used the following manpower:*

   System Docket CR-2012 - 4 men for 5 hours
   System Docket CR-2014 - 6 men for 5 hours
   System Docket CR-2015 - 6 men for 7 hours
   System Docket CR-2016 - 5 men for 5 hours
   System Docket CR-2017 - 4 men for 6 hours
   System Docket CR-2018 - 5 men for 6 hours

4. *Equipment used by contractor:*

   4 Dump Trucks
   1 843 Bobcat
   1 Roller

5. *J. Kellems worked on all of the claim dates cited except for August 23, 1985 (System Docket CR-2013) because he was absent from duty."*

The Organization's letter of July 22, 1991, in responding to the Carrier's letter about its denial decision, objected that the reasons set out in the Carrier's July 10 letter had not been raised on the property and thus are new subjects that cannot be considered by this Board.

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Board review of the record of the handling on the property confirms the validity of the Organization's objection that the contentions described in items 1, 3, and 5 of the Carrier's denial letter dated July 10, 1991, were not raised on the property. Accordingly, the Board finds that these items are not properly before the Board in this proceeding and the Board will not consider these contentions in the adjudication of the claims in this case.

The Organization's objections that there was no on-property handling of the contentions raised in items 2 and 4 of the Carrier's letter dated July 10, 1991, are not supported by the record and accordingly, these contentions are properly before the Board and will be considered in the adjudication of the subject claims.

In view of the foregoing findings about the on-property handling in this matter, the Board notes that the contentions argued in the Carrier's submission that are properly before this Board, for consideration in the adjudication of the herein claims, are the following:

(1) The claims are vague and indefinite because among the classes claimed were "Laborer" and "Roller Operator" which classes do not exist under the agreement and which therefore constitutes a claim for hours at a non-existent rate.
(2) The contractor performed no work on dates cited in System Dockets etc.
(3) The Carrier did not possess the required equipment.
(4) The disputed work does not accrue exclusively to the BMWE.

MERIT DISCUSSION AND FINDINGS

From review of the whole record the Board concludes and finds that the claims

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have merit and are supported by the record.

Accordingly, in line with this Board's precedent Award No. 10, the Board finds that the paving and repair of crossings in dispute in this case is covered by the BMWE Scope Rule and that the Carrier provides no justifiable reason for contracting out said work. Therefore, the Board finds that the Carrier's actions in this matter violated the work jurisdiction provisions and the advance notice provisions of the Scope Rule in the Conrail-BMWE Agreement. A sustaining award is thus in order.

The Carrier's reasons for denying the herein claims, as indicated, are not persuasive.

The Board rejects as unpersuasive the Carrier's contention that the claims are procedurally defective, because the initial claims were submitted for non-existent classes and non-existent pay rates for the class of "Truck Driver", "Laborer", and "Roller Operator". The initial claims' use of incorrect nomenclature concerning the classifications of the respective Claimants was properly clarified on the property by the Organization's December 28, 1985 letter, which indicated that "Truck Driver", "Laborer", and "Roller Operator" referred, respectively, to the vehicle classifications of Vehicle Operator, B&B Helper, and Machine Operator-Class 2. On this evidence the Board finds that the incorrect nomenclature indicated in the initial claims, e.g., Truck Driver instead of Vehicle Operator, did not render the claim defective due to being vague and indefinite, particularly since the incorrect nomenclature had no reasonable likelihood of obscuring from the Carrier the agreement classes that were being claimed. The Organization's letter of

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December 28, 1985, was a permissible clarification of the classes being claimed and is not deemed by the Board to constitute an amendment to the instant claim that renders the claims procedurally defective.

The Board also finds that the claims are not negated by the Carrier's contention that the contractor performed no work on the dates cited in the claims. Although the Hendy Construction Company is the contractor cited in the claims, the Organization noted on the property that the work was performed by a subsidiary of the Hendy Construction Company, Casey Construction, and that the remuneration for the work accrued to Hendy. No rebuttal of this statement is reflected in the record. Moreover, the information concerning work performed by the contractor, submitted by the Carrier in support of its contention that the claims are excessive, shows that work by a contractor was performed within the time parameters of the initial claims.

The Carrier's argument that the contracting out was necessary due to a lack of Carrier-owned equipment is rejected for lack of record support. The Carrier violated the Scope Rule's requirement to give notice to the Organization of contracting out and thereby precluded a meeting by the parties to discuss the proposed contracting out transaction. The leasing of equipment,[3] and possibly other alternatives, could have been presented to the Carrier by the Organization at such a meeting, but, as noted, the Carrier failed to give the required notice and no meeting was held. In sum, by violating the notice

[3] The Organization advised the Carrier during handling on the property that it had discovered four (4) firms in the Columbus, Ohio, area that rented equipment without operators.

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requirement, the Carrier deprived the Organization of its opportunity to present alternate ideas and suggestions for performing the work in house; therefore, the Carrier's contention about the lack of equipment does not negate the subject claims.

The Carrier's contention concerning exclusivity has been rejected in this Board's prior Awards Nos. 9 (April 5, 1991) and 10, on the rationale that because the BMWE Scope Rule covers work performed by BMWE on the effective date of the Conrail-BMWE Agreement, February 1, 1982, the Organization does not have the burden in a Scope Rule claim to show exclusive, system-wide, performance of work in order to bring work under the confronting Scope Rule. The following extract from Award No. 10, is pertinent to this case:

> *"The herein facts and issues are similar to the dispute involved in this Board's sustaining decision in Award No. 9, Case No. 9, wherein the Board commented as follows:*
>
> > *'The parties' submissions present comprehensive historical analysis of Board treatment of problems arising under the Maintenance of Way Scope Rule, along with a large body of prior authorities which have ruled on these problems with mixed results. Notwithstanding these mixed results, the awards submitted of record indicate the existence of a growing consensus favoring the proposition that the Carrier will usually be held accountable if the Carrier has violated the notice requirements in the Scope Rule of the MofWE Agreement, in circumstances where the disputed work has been performed, albeit not exclusively, by Maintenance of Way Employees. One of the apparent justifications for this proposition is that the Agreement text, first paragraph of the Scope Rule, brings under the Scope Rule'...work which, as of the effective date of this Agreement, was being performed by these Employees...' This provision of the Scope Rule effectively negates the Carrier's contention that the exclusivity test, on a system-wide basis, must be met to bring work*

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under the confronting Scope Rule.'

So, here too, as in this Board's Award No. 9, Case No. 9, the Board finds that showing exclusive system-wide performance of the disputed work is not part of the Organization's burden; and that, as previously stated, the Board is persuaded by the record that the herein disputed work is within the purview of the Scope Rule of the confronting Schedule Agreement."

The rulings in precedent Awards Nos. 9 and 10, of this Board will be adhered to in this dispute and therefore, the Carrier's argument concerning exclusivity is rejected.

In view of the foregoing, and based on the record as a whole and this Board's prior Awards Nos. 9, 10, 11, and 12, the Board finds that the herein claims are supported by the record and, therefore, the claims will be sustained and compensation will be awarded to the Claimants as hereinafter provided.

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

May 1, 1995

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AWARD

The record established that the Carrier violated the work jurisdiction and advance notice provisions of the Scope Rule of the Schedule Agreement.

Accordingly the claims are hereby sustained and the Carrier is directed to compensate the Claimants on the basis of a joint check of the Carrier's records to confirm the dates and amount of crossing paving/repair work performed by the contractor within the time parameters of the dates in the initial claims.

BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016

Fred Blackwell

Fred Blackwell, Neutral Member

M. Schappaugh, Labor Member

J. H. Burton, Carrier Member

Executed on _____, 1995

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1016-82

CARRIER MEMEBER'S DISSENT

The holding in Awards 82 and 84-88 is not surprising; the windfall granted to numerous employees is unwarranted. These cases are virtually identical with that reviewed by this Board in Award No. 10. In each of these crossing paving contracting cases, the Carrier relied on its long standing practice and used a contractor to perform the work. In none of these cases did the Carrier provide notice to the General Chairman of its intent to contract, and provide an opportunity for the Organization to discuss the contracting transaction. Since issuance of Award No. 10, the Carrier has complied with the requirements of the Scope Rule in all paving transactions.

While dismissing the Carrier's valid arguments on improper claimants, this Award provides absolutely no rationale for distinguishing this case from that in Award No. 83, which found that similar paving cases held in abeyance were still "on property". The majorities' insistance on paying all Claimants, even when they were not available for service due to their working other positions, being in a furloughed status or even where they did not possess the appropriate seniority, is their means of applying punitive damages where no such right exists under the contract. A number of Awards, typified by Third Division Awards 30844, 30756, 28923, Public Law Board No. 4615, Award No. 3 and Public Law Board No. 3775, Award No. 39, on this property, have properly denied payments in such instances.

For all of these reasons,

I DISSENT

J. H. Burton
Carrier Member

1016-82

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBER'S DISSENT
TO
AWARD NOS. 82 AND 84-88 OF SPECIAL BOARD OF ADJUSTMENT NO. 1016
(Referee Blackwell)

One school of thought among railroad industry arbitration practitioners is that dissents are, for the most part, not worth the paper they are printed on because they rarely consist of more than a sour grapes repeat of arguments that were considered and did not prevail in the case. While the Labor Member does not necessarily adhere to this school of though, it is foursquare on point with respect to the dissent on these cases. In a transparent attempt to assail the unassailable reasoning of the Majority, the Carrier Member's dissent misstates the facts, mischaracterizes the effect of the award and then cites anomalous awards as if they represent the dominant precedent on damages, which they do not.

The first problem with the dissent is that it relies upon the false premise that the Carrier had a long-standing practice of contracting out the work in question. This is a misstatement of the facts. As the record shows, BMWE-represented employes were performing crossing work as of the effective date of the Agreement and continued to consistently perform it thereafter. When the Carrier did contract out crossing work, the union filed claims, literally dozens of them. It should go without saying that contracting out which is consistently challenged by the union does not establish a "practice".

After misstating the facts, the Carrier Member asserts that since the issuance of Award No. 10, the Carrier has served notice to the General Chairman when it intended to contract out crossing work, as if to imply that Award Nos. 10, 82 and 84-88 somehow mean that if the carrier provides advance notice it may contract out crossing work. Of course, this is not what these awards say and the Carrier Member's implication to the contrary is in conflict with the plain language of the awards, the Scope Rule and the controlling practice. The fact that Conrail may notify the General Chairmen of its desire to contract out crossing work does not give it the right to do so under the Scope Rule.

Finally, the Carrier Member assails the remedy by stating that it was improper to allow compensation for employes that were working elsewhere or for employes that were furloughed. In other words, the Carrier Member seems to think that the Carrier should be able to violate the Agreement with impunity because there are no circumstances under which a monetary remedy is appropriate. One would have thought that the day had long since passed when such an argument would even be raised. It has long been settled by the courts that the Board had the authority to order the remedy that it did in these cases. See the decision of the U.S. District Court, Eastern District of Texas in BRAC v. St. Louis Southwestern Ry. Co. (126 LRRM 2643),[1] which upheld an arbitrator's award above the type

[1] The cited case was affirmed by the U.S. Court of Appeals for the Fifth Circuit, and the U.S. Supreme Court denied cert. on October 13, 1987.

of common law arguments the Carrier made in the instant cases. Moreover, since the very inception of the NRAB and Public Law Boards, arbitrators in this industry have been awarding monetary damages in contracting out cases and similar cases, not only to make claimants whole for wage loss suffered,but, more importantly, to enforce the integrity of the Agreements. Typical of the thousands of awards holding to such an effect are Third Division Awards 685, 2277, 10033, 11701, 19937, 12374, 13349, 14004, 14982, 15689, 16009, 16430, 16946, 19268, 19324, 19814, 19846, 19924, 21678, 21751, 27485, 27614, 28185, 28241, 28513, 28851, 29036, 29531, 29783, 29939, 30827, 30910, 30912 and 30944. These awards clearly demonstrate that from the early days of the Adjustment Board right through to the present (i.e., Award 30944 is dated June 29, 1995) arbitrators have been awarding monetary remedies similar to the remedy in the instant cases, not only to make employes whole for lost work opportunities, but to enforce the integrity of the Agreements.

In addition to the overwhelming precedent cited above, the fact is that another of the arbitrators on the rotating panel of arbitrators assigned to Special Board of Adjustment No. 1016, has issued a finding on monetary remedies that is entirely consistent with the instant cases. See Award No. 34 of Special Board of Adjustment No. 1016 wherein Arbitrator Westin held:

> "We regard any improper siphoning off of work from a collective bargaining agreement as an extremely serious contract violation, one that can deprive the agreement of

"much of its meaning and undermine its provisions. In order to preserve the integrity of the agreement and enforce its provisions, the present claim will be sustained in its entirety. Contrary to Carrier's contentions, we do not find that the absence of a penalty provision or the fact that claimants were employed full time on the five dates in question deprives the Board of jurisdiction to award damages in this situation."

Moreover, the findings of Special Board of Adjustment No. 1016 concerning the payment of monetary remedies to enforce the Agreement have consistently been cited with favor by the NRAB in cases involving this Carrier. For example, see Third Division Awards 29381 (Referee Fletcher) and 30181 (Referee Marx) which cite Award No. 41 of Special Board of Adjustment No. 1016 with favor concerning a monetary remedy for fully employed claimants.[2]

Award Nos. 82 and 84-88 are well-reasoned awards that draw their essence from the plain language of the Agreement and set forth a remedy consistent with literally thousands of awards and dominant legal precedent. For all of these reasons, the Carrier Member's dissent falls short just as its initial cases fell short and should be given the same amount of credence, which is to say none.

Mark J. Schappaugh
Labor Member

[2] It is worth noting that the former Carrier Member of Special Board of Adjustment No. 1016 did not file a dissent to Award No. 34 and the present Carrier Member of Special Board of Adjustment No. 1016 did not file a dissent to Award No. 41. Moreover, the Carrier Members of the NRAB did not file a dissent to Third Divisions Awards 29381 or 30181.