PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

Award No. 84

Case No. 84

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 claims

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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. 84 and Cases Nos. 82, 83, 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 claims, dated June 12, 1991, the Organization progressed said claims to this Board by letter dated July 22, 1991.

NATURE OF CASE

This case is comprised of claims filed on June 18, 1988, on behalf of five (5) furloughed BMWE Employees, who allege that the circumstances in which the Carrier

[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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permitted crossing/repair work to be performed by an outside company, Hilltop Paving, on the grade crossing at Route 385 at Dravosburg, Pennsylvania, on the Pittsburgh Division, beginning on June 9, 1988, and continuing, 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 eight (8) hours straight rate pay for each Claimant for each day of the performance of the referenced work by the outside contractor.

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.

The Carrier's letter dated June 12, 1991, which advised the Organization of four (4) reasons for the Carrier's decision that Award No. 10 does not apply to the herein claims, sets out these reasons as follows:

> *"1. Claim was progressed as a continuing claim beginning June 9, 1988, however this is not a continuous claim as Hilltop Paving Company did not work on June 9, 1988, at Dravosburg, PA, the location cited in the initial claim. Further Hilltop Paving advised they worked 3 days at the crossings cited during the period June 10 to July 19, 1988. (Carrier submission (CS) pages 5, 6, & 7.)*

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2. *Hilltop Paving Company advised no laborers (Trackmen) were utilized, they used 5 men operating a Backhoe, Paver, Roller and 2 Trucks, thus there would not have been any need for claimants (Trackmen) M. K. Ryan and J. M. Federinko.*

3. *Improper claimants. Claim is progressed for 5 furloughed employees (1 Foreman, 1 Vehicle Operator, 1 Machine Operator and 2 Trackmen) however, in addition to those cited in item 2 above, 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:*

   T. Surlass - Acquired Foreman seniority on September 26, 1988, which was after the claim date.

   G. D. Samudosky - Acquired Vehicle Operator seniority on October 10, 1988 which was after the claim date.

   J. Nevels - Has only Class 3 Machine Operator rights. (CS pages 9, 10, & 11.)

4. *Claimant G. Samudosky was not furloughed, he was working on the date cited."*

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 June 12 letter had not been raised on the property and thus are new subjects that cannot be considered by the Board.

The Organization further objects that the Carrier's submission (CS) advances two (2) contentions that were not mentioned in the Carrier's June 12 letter and that were not raised on the property, namely incorrect dates, (CS, page 11) and non-ownership of the necessary equipment to perform the disputed work (CS, page 15).

Board review of the record of the handling on the property confirms the validity of the Organization's objection that the four (4) contentions, set out in the Carrier's letter

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of June 12, 1991, were not raised on the property and thus such contentions will not be considered by the Board in the adjudication of the herein claims.[2]

The Board also finds that the contentions in the Carrier's submission about incorrect dates and non-ownership of the equipment needed to perform the disputed work, were not raised on the property and thus these contentions will not be considered by the Board in the adjudication of the herein claims.

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

1. The work of paving and repairing crossings is not work that accrues to the BMWE and, historically, such work has consistently been contracted out without advance notice to the General Chairman of the contracting out transaction.

2. Even if a scope violation is found in this case, the Carrier should not be required to compensate the Claimants because the scope violation was only made evident by this Board's issuance of Award No. 10.

[2] The parties' handling of this dispute on the property is reflected in Carrier letters dated July 19, 1988, September 26, 1988, and December 27, 1988; and Organization letters dated July 20, 1988 and October 18, 1988.

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MERIT DISCUSSION AND FINDINGS

From review of the whole record the Board concludes and finds that the claims 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 Carrier's contention that the disputed work is not work that accrues to the BMWE is rejected on the basis of this Board's precedent Award No. 10, which expressly found that - -

> *"...the disputed work of paving (blacktop) and related clean-up at grade crossings at the Cincinnati-Dayton Road and at Kemper Road on the Columbus to Cincinnati Mainline, falls within the purview of the Scope Rule of the confronting Maintenance of Way Agreement;"*

The Board notes in addition that the herein disputed work is covered by the Scope Rule's specific terms and by the Scope Rule's provision that the Scope Rule covers work which was being performed by BMWE on the date of the Conrail-BMWE Agreement, i.e. February 1, 1982.

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In view of this finding, it follows that the Carrier was subject to the Scope Rule's requirement to give the General Chairman fifteen (15) days advance notice of a contracting out transaction.

The Board also rejects the Carrier's contention that compensation is not appropriate in this matter because the scope violation was only made evident by this Board's issuance of Award No. 10. In this regard the Board notes that the Carrier had knowledge, prior to letting the contract to Hilltop Paving, that the Organization opposed contracting out such work and claimed that the crossing work belonged to BMWE. In these circumstances the Carrier went ahead with the contract to Hilltop Paving at its own risk: the fact that the controversy about the work was not determined until the issuance of Award No. 10 is no basis for denying compensation to the herein Claimants.

Accordingly, as found in this Board's precedent Awards Nos. 9, 10, 11, and 12, the paving and repair of crossings is covered by the BMWE Scope Rule and the Carrier provides no justifiable reason for contracting out such work in this case. Therefore, as previously indicated (supra 6), the Board will sustain the claims on the basis 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.

As to the quantum of compensation, the Board notes that although the claim period in the initial claim starts on June 9, 1988, and is open ended thereafter, the Carrier's correspondence to the Organization dated December 27, 1988, and June 12, 1991, provide a means for settling and limiting the compensation to be awarded on the

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basis of the confronting record. The Carrier's letter of December 27, 1988, states that --

> *"Our records reflect Hilltop Paving was utilized to pave the subject crossing for a period of seven days commencing June 9, 1988."*

The Carrier's letter of June 12, 1991 states in part that --

> *"Further Hilltop Paving advised they worked 3 days at the crossings cited during the period June 10 to July 19, 1988."*

On the basis of the evidence contained in the two (2) cited Carrier letters, the Board finds that the Hilltop Paving Company was used to perform the disputed crossing repair work for up to seven (7) days commencing June 9, 1988. Accordingly a compensatory remedy to this effect will be awarded.

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

May 1, 1995

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AWARD

The Carrier violated the work jurisdiction provisions and the advance notice provisions of the Scope Rule of the Conrail-BMWE Agreement.

Accordingly part 3 of the claim is sustained as stated, up to maximum of seven (7) days, subject to the confirmation of the performance of the work by the contractor by a joint check of the pertinent records.

BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016

Fred Blackwell

Fred Blackwell, Neutral Member

Mark J. Schappaugh

M. Schappaugh, Labor Member

J. H. Burton

J. H. Burton, Carrier Member

Dissent Attached

Executed on 6/2, 1995

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