PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

Award No. 86

Case No. 86

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. 86 and Cases Nos. 82, 83, 84, 85, 87, and 88)[1] and denied the claims in 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 11, 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 August 15, 1988, on behalf of five (5) Claimants who allege that the circumstances in which the Carrier permitted crossing/ repair work to be performed by an outside company, Hilltop Paving, on various grade

[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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crossings on the Bay and Secondary between East Liverpool, Ohio, and Rochester, Pennsylvania, on the Pittsburgh Division from July 1 to August 21, 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 to the General Chairman of a contracting-out transaction.

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 June 11, 1991, which advised the Organization of four (4) reasons for the Carrier's decision that Award No. 10 does not apply to the claims in herein Case No. 86, sets out these reasons as follows:

> *"1. Claim was progressed for the period July 1 through August 21, 1988, and continuing, however, this is not a continuing claim as the contractor only worked 7 days within the aforementioned period.*
>
> *2. Hilltop Paving Company advised no laborers (Trackmen) were utilized; they used 5 men operating a backhoe, roller and 3*

[2] The parties' on-property handling of these claims is comprised of Carrier letters dated October 14, November 18, 1988, and March 2, 1989; and Organization letters dated October 8 and December 13, 1988.

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trucks; thus, there would not have been any need for claimants (Trackmen) K. Snider and J. Brown. Mr. Brown acquired Vehicle Operator and Machine Operator seniority after claim period.

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.*

   C. Clutter - Has no Foreman seniority nor any Vehicle Operator or Machine Operator seniority.

   W. Harris - Has no Vehicle Operator seniority and he acquired Machine Operator seniority on August 29, 1988 which is after the claim period.

   J. Reed - Has only Trackman seniority.

4. *Claimants were not furloughed, they were fully employed and some worked overtime on some of the 7 dates that the contractor worked."*

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

The Organization further objects that the Carrier's submission (CS) advances a contention that was not mentioned in the Carrier's June 12 letter and that was not raised on the property, namely, non-ownership of the necessary equipment to perform the disputed work (CS, page 17).

Board review of the record of the handling on the property confirms the validity of the Organization's objection that the reasons stated in items 1 and 2 of the Carrier's

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denial letter dated June 11, 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 Board also finds that the contentions in the Carrier's submission about non-ownership of the equipment needed to perform the disputed work, was not raised on the property and thus this contention will not be considered by the Board in the adjudication of the herein claims.

The Organization's objections that there was no on-property handling of the contentions raised in items 3 and 4 of the Carrier's letter dated June 11, 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 concerning 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 Claimants are improper Claimants because the Claimants would not have been used for the disputed work because they were unavailable due to furlough, full employment, or lack of seniority in the appropriate class (CS, page 10).

2. The claims are vague in that no dates or times are provided when the subject work was performed.

3. The work of paving and repairing crossings is not work that accrues to crafts

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represented by the BMWE (CS, page 17).

(4) The Carrier did not possess the required equipment (CS, page 17).

MERIT DISCUSSION AND FINDINGS

From full review and assessment of the foregoing and of the whole record,[3] the Board concludes and finds that the claims have merit and are supported by the record.

Accordingly, in line with this Board's precedent Awards Nos. 9, 10, 11, and 12, 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 finds no merit in the Carrier's contention that the Claimants were improper Claimants because they were unavailable due to furlough, full employment, or lack of seniority in the appropriate class.

Prior authorities have ruled that Employees being on furlough does not make them improper Claimants and that, in proper circumstances, Claimants on furlough may receive compensation under a Board award. Awards Nos. 9, 10, 11, and 12 of this Board.

[3] All prior authorities submitted for the record have been considered and analyzed in arriving at this decision.

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Employees under pay also have standing as Claimants and may be awarded compensation where the purpose of the remedy is to enforce the integrity of the contract, which is in part the case in the instant dispute. Likewise the fact that the Claimants did not possess seniority in the class which they claimed on the claim dates is not fatal to their claim. The Claimants hold seniority within the Maintenance of Way Department and accordingly, they are each entitled to bid for and hold positions within various classes in accordance with the terms of the BMWE Agreement. It is well settled that one of a group of Employees entitled to perform disputed work may progress a claim requesting compensation concerning the work even if other Employees have a preference to the work targeted by the claim. Third Division Awards Nos. 18557 and 25860. The fact that another Employee may have a better right to make the claim is of no concern to the Carrier and does not obviate or dispel the fact of the Carrier's violation of the agreement. The Board therefore finds that the herein Claimants are proper Claimants.[4]

The Board rejects as unpersuasive the Carrier's argument that the claims as presented are vague in that no times or dates are provided when the subject work was performed.

A scanning of the face of the initial claims refutes this argument. The initial claims (Employee's Exhibit E-1) states that the Scope Rule of the Conrail-BMWE Agreement was violated by the Carrier's action of permitting Hilltop Paving Company to perform paving

[4] Had the Carrier complied with the advance notice requirement of the Scope Rule and held a conference with the Organization, the details that make up the Carrier's improper Claimant argument could have been discussed and possibly resolved.

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crossing repair work "on July 1 through August 21, 1988, and continuing" for eight (8) hours per day. The quoted data in the initial claims, which is specific as to date of month and year, gave ample information for the Carrier to know how to research and respond to the claim. Therefore, the claims are not defective because of vagueness and the Board so finds.

The Board also rejects the Carrier's contention that the disputed work is not work that accrues to the BMWE. In precedent Award No. 10, this Board 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.

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 Carrier's argument that the contracting out was necessary due to a lack of Carrier-owned equipment is rejected as unpersuasive. 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.

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The leasing of equipment, 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 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.

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 as previously stated (supra 6) that a sustaining award is warranted by the record.

With regard to remedy, although the Carrier asserts in its submission that Hilltop Paving Company worked only seven (7) days within the claim period of July 1 through August 21, 1988, and continuing, the record contains no evidence by which the Board, at this juncture of the proceeding, could determine the validity of this assertion. Accordingly, the claim will be sustained and compensation awarded to the Claimants on the basis that the Carrier shall compensate Claimants for the days on which a joint check of the records confirms that Hilltop Paving Company performed crossing paving work during the parameters of the claim period, July 1 through August 21, 1988.

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 Conrail-BMWE Agreement.

Accordingly, the claims are hereby sustained and the Carrier is directed to compensate the Claimants for the days on which a joint check of the Carrier's records confirms that Hilltop Paving Company performed crossing paving/repair work at the locations cited in the claims during the period July 1, through August 21, 1988.

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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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

1016-86

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
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.