PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 9

Case No. 9

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 Agreement was violated when outside forces were used to dismantle and remove the depot at Greenville, Ohio on March 28 and 29, 1985 (System Docket CR-1670).

(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) Because of the aforesaid violations, Machine Operators J. Williams, C. C. Russell and T. Metz shall each be allowed sixteen (16) hours of pay at their respective straight time rates.

FINDINGS:

Upon the whole record and all the evidence, and after hearing on December 5, 1988, 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.

OPINION

This is a contracting out dispute under the Scope Rule of the Conrail-MofWE Schedule Agreement, effective February 1, 1982.

This dispute arises from claims by three (3) furloughed

Employees in the classification of Machine Operator on the Carrier's Columbus Division, who allege that the Carrier violated the applicable Agreement when it engaged an outside contractor to dismantle and remove the depot at Greenville, Ohio, on March 28 and 29, 1985. The Claimants further allege that the Agreement was also violated when the Carrier did not give the General Chairman prior written notice of its plan to assign the subject work to outside forces.

The requested remedy is for the Claimants to be made whole for the work performed by the outside contractor and for a an award which directs the Carrier to pay each Claimant sixteen (16) hours at the straight time rate, to compensate them for the work performed by the outside contractor.

The Organization contends that the claims are valid in that the disputed work is within the purview of the Scope Rule of the Maintenance of Way Agreement and that the Carrier did not notify the General Chairman of its intention to contract out the disputed work as required by the provisions of paragraphs 2 and 3 of the Scope Rule.

The position of the Carrier is that the herein claims lack merit in that the confronting Scope Rule is general in nature and does not grant the Maintenance of Way Employees the exclusive right to perform the disputed work; that in order to bring the work in question within the purview of the Scope Rule, the Organization must demonstrate that Maintenance of Way Employees have

performed the work exclusively on a system wide basis, which fact is not established by the record; and that the disputed demolition work has historically been performed by outside contractors at various locations on the Carrier's property.

* * * * * * * *

The Agreement text which is pertinent to this dispute is found in the first three (3) paragraphs of the Scope Rule of the Maintenance of Way Agreement, reading as follows:

> "These rules shall be the agreement between Consolidated Rail Corporation (excluding Altoona Shops) and its employees of the classifications herein set forth represented by the Brotherhood of Maintenance of Way Employes, engaged in work generally recognized as Maintenance of Way work, such as, inspection, construction, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences and roadbed, and work which, as of the effective date of this Agreement, was being performed by these employees, and shall govern the rates of pay, rules and working conditions of such employees.
>
> In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. "Emergencies" applies to fires, floods, heavy snow and like circumstances.
>
> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Company may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith. "

* * * * * * * *

After due study of the foregoing and of the whole record, inclusive of the submissions[1] presented by the parties in support of their respective positions in the case, the Board concludes and finds that the record as a whole persuades that the disputed work falls within the purview of the Scope Rule of the confronting Maintenance of Way Agreement and further that there is no question that the Carrier failed to give the MofWE General Chairman notice of the contracting out as required by the second and third paragraphs of the Scope Rule. In these circumstances the Board finds that the manner in which the Carrier effected the disputed contracting out of the dismantling of the Front Street Depot at Greenville, Ohio, was violative of the confronting Agreement and that the claims should therefore be sustained.

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

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[1] The prior authorities submitted by the parties have been carefully studied and analyzed in making the ultimate conclusions and findings in this case.

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 under the confronting Scope Rule.

Beyond this it suffices to say that the facts of this case are analogous to the facts in the sustaining decision in Third Division Award 27012 (04-25-88); that such Award is therefore found to be a persuasive precedent in the facts of this case; and that the herein claims will be sustained on that basis.

In view of the foregoing, and based on the record as a whole, the claims will be sustained.

AWARD:

Claims sustained.

BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016

Fred Blackwell

Fred Blackwell, Neutral Member

Steven V. Powers

S. V. Powers, Labor Member

Dissent attached

J. H. Burton, Carrier Member

Executed on APR 05 1991, 1991

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ADDENDUM BY REFEREE BLACKWELL

There was extensive discussion of foregoing proposed Award 9, Case 9, in the Executive Session conducted by the Board in Carrier's offices, Philadelphia, Pennsylvania, on August 22, 1990; and although that discussion does not provide a basis for changing any of the findings in the proposed Award, the comments that follow are appropriate.

1. Proposed Award No. 9 is based on an evidentiary finding that the disputed demolition work is within the M&W Scope Rule because the Organization's evidence established that said work was performed by BMWE Employees as of the effective date of the applicable Agreement, February 1, 1982, and hence was effectively encompassed within the said Scope Rule at the time of the alleged violation; the Carrier evidence concerning contracting out does not alter this finding.

In contrast, the denial of BMWE claims concerning demolition work, in Third Division Awards No. 27604, No. 27626, and No. 27629, was based on failure of the Organization's evidence to show that the disputed work was within the Scope Rule.

2. The partisan Board Members both stated the viewpoint that when the work in dispute is not explicitly mentioned in the text of the Scope Rule, the Organization, in order to prevail in said dispute, has the burden to show that the work was "customarily and traditionally" performed by MW Employees. In view of these agreeing viewpoints it is appropriate to treat the proposed Award as meeting that standard, although a change in the Award is considered unnecessary; also, the parties can reliably regard said standard as applicable in their future submissions on contracting out disputes of the kind presented here.

Fred Blackwell

Frederick R. Blackwell, Chairman/Neutral
Special Board of Adjustment No. 1016

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CARRIER'S DISSENT TO AWARD NO. 9:

The Board fails to provide a convincing rationale for rejecting three prior awards involving the same contested work, especially as the only "evidence" presented by the Organization was a 1984 letter from the General Chairman containing undocumented assertions of demolition work performed. In contrast, Carrier identified 38 demolition projects just within the relevant division performed by outside contractors in the 1981-1983 period. In Carrier's view, one sustaining award out of four, does not show that demolition work has been "customarily and traditionally" performed by Carrier's MW forces. I therefore DISSENT.

J. H. Burton
Carrier Member