PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 10

Case No. 10

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 to perform paving (blacktop) work on grade crossings and related clean-up work at Cincinnati-Dayton Road on May 5 and 6, 1985 and at Kemper Road on May 8, 1985 (System Dockets CR-1775 and CR-1776).

(2) The Carrier also violated the Agreement when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations, furloughed Machine Operators M. Keefe, K. A. Bollinger, D. R. Stewart and D. A. Bennett and furloughed Trackmen W. J. Stevens and G. V. Fish shall each be allowed twenty-four (24) 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.

The dispute arises from claims by six (6) furloughed Employees, four (4) Machine Operators and two (2) Trackmen, who hold seniority in the Track Department on the Columbus Division, and who allege that the Carrier violated the applicable Agreement when it engaged an outside contractor (Hendy Inc.) to perform paving and related clean-up work on grade crossings at the Cincinnati-Dayton Road on the Columbus to Cincinnati Mainline on May 5 and 6, 1985, and at the Kemper Road grade crossing on the Columbus to Cincinnati Mainline on May 5, 6, and 8, 1985. The Claimants further allege that the notice requirement in paragraphs 2 and 3 of the Scope of the Agreement was also violated in that the Carrier did not give the General Chairman prior written notice of its plan to assign the subject work to outside forces.

The Employees request twenty-four (24) hours straight rate for each of the six Claimants for work improperly performed by the outsider, on the basis that each of the contractor's six (6) employees worked eight (8) hours on each of the claim dates for a total of twenty-four (24) hours.

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 Scope Rule is general in nature and does not grant the Maintenance of Way Employees the exclusive right to perform the work in dispute; that in order to bring the disputed work within the purview of the Scope Rule of the Conrail-Maintenance of Way Agreement, 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 work has historically been performed by outside contractors on the Carrier's property. The Carrier says further that inasmuch as the Organization alleges a violation of Public Law 93-226, Title VII, Section 707[1], exclusive jurisdiction of this dispute lies with Special Board of Adjustment No. 978, and that the herein claims in consequence should be dismissed as not within the jurisdiction of this Board.

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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,

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[1] Popularly known as the Northeastern Regional Rail Reorganization Act of 1973 (NERSA).

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. "

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After due study of the foregoing and of the whole record, inclusive of the submissions[2] presented by the parties in support of their respective positions in this case, the Board concludes and finds that the record as a whole persuades 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; and further, that there is no question that the Carrier failed to give the MofWE

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

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 paving and clean-up work at the two grade crossings in question, was violative of the confronting Agreement and that the claims should therefore be sustained.

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 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.

Further, the Board finds unpersuasive the Carrier contention that the Organization's reference to Title VII of NERSA renders this dispute within the exclusive jurisdiction of Special Board of Adjustment No. 978. The Organization's remarks concerning Title VII of NERSA are marginally related, at best, to the basics of this dispute and hence the contention concerning exclusive jurisdiction of SBA No. 978 is without merit. Accordingly, in line with the Finding in Award No. 9, Case No. 9, Third Division Award 27012 (04-25-88) is found to be a persuasive precedent in the facts of this case and on that basis, the Carrier's complained of actions are found to be violative of the Scope Rule of the confronting Agreement and the herein claims for compensation will therefore be sustained.

With regard to remedy, the Board has considered and rejects the Carrier's argument that should a Carrier violation of the Agreement be found by the Board, no compensation would be due the Claimants because they were furloughed Employees on the claim dates and thus were not available for service, and because the Agreement does not mandate the recall of furloughed Employees to temporary vacancies.

The Board specifically finds that the compensation requested by the Claimants in this case is not related to the filling of temporary vacancies by furloughees. The Board further

finds that the compensation herein awarded the six (6) Claimant furloughees is awarded for the purpose of enforcing and ensuring the integrity of the parties' Agreement by compensating Maintenance of Way Employees for work lost to the Maintenance of Way craft by the contracting out to Hendy, Inc.

In view of the foregoing, and based on the record as a whole, the herein 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

J. H. Burton, Carrier Member

Executed on APR 05 '91, 1991

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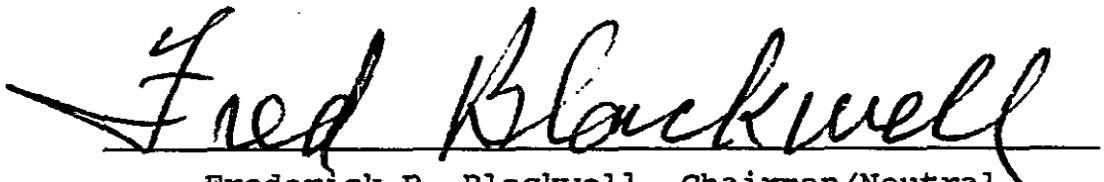
ADDENDUM BY REFEREE BLACKWELL

After careful consideration of the extensive discussion of foregoing proposed Award No. 10, Case 10, in the Executive Session conducted by the Board in Carrier's offices, Philadelphia, Pennsylvania, on August 22, 1990, it is concluded that such discussion does not provide a basis for changing any of the findings in the proposed Award.

(The discussions in the August 22 Executive Session also covered Awards sustaining similar claims in proposed Award No. 11, Case 11, and Award No. 12, Case 12.)

The Carrier comments on proposed Award No. 10, which sustained BMWE claims arising from the Carrier actions of contracting out paving work at grade crossings, were addressed primarily to the weakness and lack of specificity of the evidence submitted to support the claims. In this regard the Board observes that the preponderating evidence in the record as a whole has been assessed as establishing that the disputed work comes within the BMWE Scope Rule's coverage of work generally recognized as Maintenance of Way work, such as "...construction, repair and maintenance of... tracks". It is further noted that several items in the Organization evidence reflect that said paving work at grade crossings was being performed by MW Employees on February 1, 1982, that is, as of the effective date of the BMWE Agreement.



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

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