

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 43

Case No. 43

Referee Fred Blackwell

Labor Member: S. V. Powers

Carrier Member: J. H. Burton

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 cut brush, clear brush and pick up ties on the right-of-way on the Richmond Branch of the Philadelphia Division beginning August 4, 1986 (System Docket CR-2944).
- (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 violations referred to in Parts (1) and/or (2) above, each employe holding seniority rights on the Philadelphia Seniority District Vehicle Operator and Trackman rosters shall be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by the outside forces performing the work referred to in Part (1) above.

FINDINGS:

Upon the whole record and all the evidence, and after hearing on August 17, 1989, 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.

**FRED BLACKWELL
ATTORNEY AT LAW**

**19129 ROMAN WAY
GAITHERSBURG,
MARYLAND 20879
(301) 977-5000**

DECISION:

Claims sustained as hereinafter provided.

OPINION

This case arises from claims filed on behalf of each Employee holding seniority rights on the Philadelphia Seniority District Vehicle Operator and Trackman Rosters, on the basis of allegations that the Carrier violated the BMW Scope Rule by improperly contracting with an outside contractor to cut brush, clear brush, and pick up ties on the right-of-way on the Richmond Branch of the Philadelphia Division, beginning August 4, 1986, and by failing to comply with the requirement that the Carrier give the General Chairman advance, written notice of its intention to contract the brush cutting work. The Organization alleges that beginning on August 4, 1986, the outside concern (JMG Excavating Co.), used three (3) high rail dump truck drivers and six (6) laborers to cut brush and clear the right-of-way on the Richmond branch.

The Organization submits that the disputed work is encompassed within the express, explicit text of the scope of the Agreement; that the disputed work of brush cutting is also brought within the scope of the Agreement by the Agreement provisions in paragraphs 1 and 5 concerning past practice; and that the Carrier failed to comply with the Scope Rule requirements to give the General Chairman advance notice of its intention to contract out the disputed work.

The Carrier submits that its action in contracting out the brush cutting work did not

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violate the Agreement, and that on that basis the claims should be denied. The Carrier more specifically asserts that - -

1. The subject Scope Rule is general in nature and the work at issue in this case is not mentioned therein. In consequence, the Employees have the burden to show that the disputed work has been exclusively performed, by Maintenance of Way Employees, by past practice on a system-wide basis. This burden has not been met by the Employees, and it cannot be met, because brush cutting is work that has historically been performed by outside contractors at the involved location and at various locations across the Carrier's property.

2. Inasmuch as the disputed work does not accrue exclusively to the Maintenance of Way Employees, the Carrier had no obligation under the notice provisions of the Scope Rule to give advance notice to the General Chairman of the Carrier's intent to contract the brush cutting work to JMG Excavating.

* * * * *

From full review and assessment of the whole record, the Board finds and concludes that the Carrier action of contracting the subject work violated the work jurisdiction and the notice provisions of the confronting Scope Rule.¹ Therefore, the Board finds that the claims have merit and that the Carrier's opposition to the claims is not supported by the record.

¹ The Hopkins-Berge Letter of Agreement dated December 11, 1981, has been omitted from the considerations of this dispute. Said letter was held not applicable on Conrail in this Board's Award No. 66-A executed on January 18, 1993.

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More specifically, the Board finds that the subject work is within the purview of the work jurisdiction provisions of the BMW Scope Rule that make specific reference to *"work generally recognized as Maintenance of Way work, such as,...maintenance of... tracks...and roadbed."* The Scope Rule also makes reference to Machine Operators, Class 3 and Class 2, operating Brush Cutter machines and Brush Cutter (on track) machines, and rail-highway vehicles. In addition, paragraph 5 of the Scope Rule provides that work which was being performed by Maintenance of Way Employees on the effective date of the Agreement (February 1, 1982) is within the Scope of the Agreement. Employees statements included in Employees' Exhibit A show that the Maintenance of Way forces have performed brush cutting work on the Carrier's right of way for many years before the execution of the current contract in February 1982.

There is thus no question that the subject work involved in this case is encompassed within the text of the BMW Scope Rule.

Accordingly, as noted previously, the Board finds that the Carrier action of contracting the disputed work violated the work jurisdiction provisions of the BMW Scope Rule. Therefore, consistent with this finding, the precedential authority of Third Division Award No. 27333 (08-30-88), Third Division Award No. 27185 (06-30-88), and the doctrine of Stare Decisis, the Carrier will be held accountable for this violation as hereinafter provided.

The Carrier also violated the paragraph 2 provisions in the Scope Rule that required the Carrier to give the General Chairman notice of the Carrier's intent to contract the

brush cutting work.

The Carrier's contention that exclusivity applies to this dispute, and hence notice to the General Chairman was not required, has been considered and rejected in prior Third Division Award No. 27012 (04-25-88) on a dispute between these parties. The following extract from that Award is apropos to this dispute:

"The Board finds that the Carrier's insistence on an exclusivity test is not well founded. Such may be the critical point in other disputes, such as determining which class or craft of the Carrier's employees may be entitled to perform certain work. Here, however, a different test is applied. The Carrier is obliged to make notification where work to be contracted out is 'within the scope' of the Organization's Agreement. There is no serious contention that brush cutting work is not properly performed by Maintenance of Way employees, even if not at all locations or to the exclusion of other employees. As emphasized by the Organization, the Carrier failed to make any notification to any Organization." (Emphasis added in original)

For a ruling that treated Award No. 27012 as controlling precedent, see Third Division Award No. 27014 (04-25-88).

Inasmuch as the facts and issues in Third Division Award No. 27012 are analogous to the facts and issues in the confronting dispute, the Carrier contention in this dispute concerning exclusivity is rejected on the basis of the precedential authority of Third Division Award No. 27012.

In view of the Carrier's violations of the work jurisdiction and the notice provisions of the Scope Rule, a remedy is in order. As to the form of the remedy, the Board

recognizes that no Maintenance of Way Employee was on furlough on the Philadelphia Division during the period of the brush cutting contract; the Board is also aware that Boards generally exercise restraint in awarding compensation to Employees who are on duty and under pay during the time of the performance of Agreement work by an outside contractor, even where, as here, the award is not only for lost work opportunities, but also has the purpose of enforcing and preserving the integrity of the Agreement. The Board also notes that, so far as the record shows, the claims are open-ended without a closing date on the alleged liability of the Carrier to compensate the Claimants.

In balancing these factors with one another, the Board concludes that a compensatory award is an appropriate remedy in this case but that the compensation should be subject to a ceiling. Therefore, based on the record as a whole, the Claimants will be awarded compensation at their respective rates for an equal proportionate share of the total number of man-hours expended by the contractor's work force in the performance of the protested brush cutting work covered by the BMWWE Scope. The said compensation will be based on the number of actual days worked by the contractor's work force subject to a ceiling of a maximum of twenty (20) work days. This finding concerning the quantum of the compensation to be awarded shall not be a precedent in any future dispute except where the facts and issues are analogous to the facts and issues of this dispute.

ACCORDINGLY, based on the whole record, the claims will be sustained as hereinafter provided.

FRED BLACKWELL
ATTORNEY AT LAW

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A handwritten signature in cursive script that reads "Fred Blackwell". The signature is written in dark ink and is positioned above a horizontal line.

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

April 12, 1994.

FRED BLACKWELL
ATTORNEY AT LAW

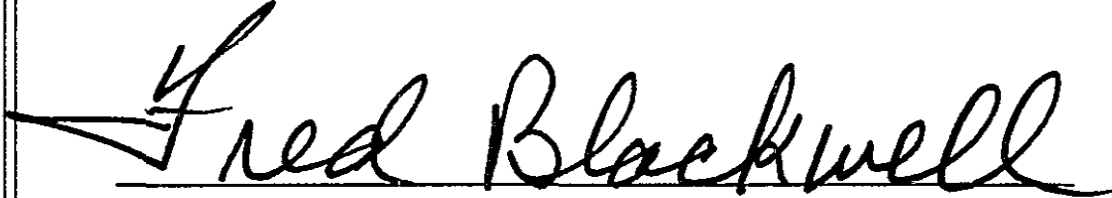
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AWARD

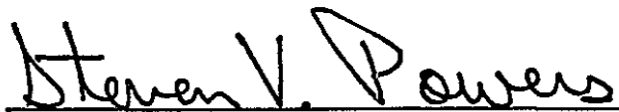
The Carrier violated the work jurisdiction provisions and the notice provisions of the confronting Scope Rule. Accordingly, the claims are hereby sustained and the Carrier is directed to pay the Claimants compensation at their respective rates for an equal proportionate share of the total number of man-hours expended by the contractor's work force in the performance of the protested brush cutting work covered by the BMW Scope. The said compensation will be based on the number of actual days worked by the contractor's work force subject to a ceiling of a maximum of twenty (20) work days.

Jurisdiction is retained for the Board to consider questions concerning the implementation of this Award, which are submitted in writing and received in the office of the undersigned within sixty (60) days from the date hereof.

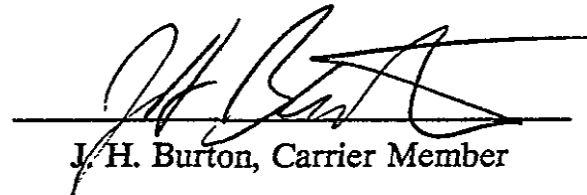
BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016



Fred Blackwell, Neutral Member



S. V. Powers, Labor Member



J. H. Burton, Carrier Member

Executed on 5/3, 1994

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