

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 83

Case No. 83

Referee Fred Blackwell

Carrier Member: J. H. Burton

Labor Member: M. Schappaugh

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 (Pool Paving, Inc.) to perform crossing repair work (removal of crossing timbers, paving work and related clean-up work), on the grade crossing at State Route 73 on the Franklin Branch on the Columbus Division, on July 24 and 25, 1985 (System Docket SD-1951).
2. The Carrier also violated the Agreement when it did not give the General Chairman advance written notice of its intention to contract out said work.
3. As a consequence of the violations in Parts (1) and/or (2) above, furloughed Maintenance of Way employes J. Kellems, M. Keefe, G. S. Cost and L. A. Robinson shall each be allowed sixteen (16) hours' pay at their applicable straight time rates.

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:

Claim Denied.

OPINION

This case is one of a group of twenty (20) Scope Rule cases that, by the parties' stipulation, was held in abeyance pending the decision of this Board on the Scope Rule dispute in Award No. 10 (04-05-91). That Award sustained the claim and issued a compensatory award. Similar rulings were made in succeeding Board Awards Nos. 11 and 12, also issued on April 5, 1991. The Carrier dissented to all three (3) Awards.

In June 1991 the parties held discussions and disposed of thirteen (13) of the twenty cases held in abeyance. In nine (9) of the cases, the Carrier paid compensation to the Claimants on the basis that such was required by the decision in Award No. 10. In four (4) of the cases, the Carrier did not pay compensation on the basis that such was warranted by the decision in Award No. 10.

The compensation sought in the remaining seven (7) cases was denied by the Carrier on various grounds that the Carrier contends remain open for consideration notwithstanding the sustaining decision in Award No. 10.

The Organization rejected the Carrier's denial of these seven (7) cases, and progressed all seven cases to the Board.

\* \* \* \* \*

The herein Scope claim and the record thereon presents the Issues of - -

(1) Whether the parties' agreement to hold the group of

twenty (20) Scope Rule cases in abeyance pending the decision of the scope dispute in Award No. 10, required the Carrier to apply the sustaining decision in Award No. 10 by making automatic payments of the compensation claimed in the said twenty cases; and

(2) Whether the claim in this case, Case No. 83, for compensation due to a Scope Rule violation, should be sustained on the basis of the precedential authority of Award No. 10.

In regard to issue (1) the Organization submits that the intent of the parties in holding the group of twenty Scope cases in abeyance pending the decision in Award No. 10, was that such cases should be settled in accord with the decision in that Award and that inasmuch as Award No. 10 ruled in favor of the Organization's position, the claims in said cases should be sustained in full.

The Carrier submits that the parties' agreement to hold the group of Scope cases in abeyance pending the decision in Award No. 10, was not intended to make the cases held in abeyance automatically payable by virtue of the sustaining ruling in Award No. 10; and that, instead, the agreement contemplated that the cases held in abeyance would be reviewed in light of the decision in Award No. 10 to determine the applicability of Award No. 10 to said cases.

The Board finds in respect to issue (1) that the record contains no evidence of an agreement whereby the parties' contemplated that payment or withdrawal of a Scope case held in abey-

ance would occur automatically based on this Board's decision in the Scope dispute in Award No. 10. So far as the instant record shows, the parties agreed that the twenty (20) Scope cases held in abeyance would be reviewed in light of the decision in Award No. 10, either favorable or unfavorable. Under such arrangement, if Award No. 10 had contained a denial decision, the Organization would not have been required to withdraw all twenty cases held in abeyance. Conversely, in the present circumstances, wherein the Award was favorable to the Organization, the sustaining decision in Award No. 10 does not make the cases held in abeyance automatically payable.

In sum, an agreement to hold a group of cases in abeyance pending the decision in a particular dispute, is a device commonly used in claims litigation for the purpose of achieving administrative efficiency. That appears to be the purpose of the parties' agreement in this case to hold twenty Scope cases in abeyance pending the decision on the Scope dispute in Award No. 10 and accordingly, the Carrier's position on issue (1) is found to be correct.

We come now to herein issue (2), respecting which, the Organization submits that because of the principle that Board review is confined to the record that was handled on the property in the usual manner, new arguments made in the Carrier's July 10, 1991 letter against paying the claimed compensation in herein Case No. 83 are barred from consideration by this Board in the

adjudication of the case.

The Carrier submits that notwithstanding the decision sustaining the Scope claim in Award No. 10, the Carrier's reasons for refusing payment in the remaining seven (7) Scope cases are not barred from Board consideration because of not having been heard on the property and that the grounds of the Carrier's denial of the instant claim, Case 83, in a July 10, 1991 letter are properly before this Board for its consideration and determination.

After careful study and analysis of these arguments, the Board finds and concludes that the seven remaining Scope cases before the Board, including this case, Case 83, do not require the Board to reconsider the merit issue(s) determined in the Organization's favor in Award No. 10. The issue(s) presented to the Board in this case is confined solely to the question of whether, in light of the principle established by Award No. 10, a compensatory award should be issued in this case. The Board further notes that the herein claim, Case 83, was on the property, and had not been submitted to this Board, when the Carrier's Acting Senior Director-Labor Relations sent his July 10, 1991 letter to the BMWE General Chairman, Mr. Jed Dodd.

Accordingly, the Carrier's objections to paying compensation to the Claimants in the herein case are properly before the Board for consideration and determination.

The Board notes in this regard that the Carrier denied

compensation in this case on several grounds, including the ground that no paving work was performed at State Route 73 by the outside contractor (Pool Paving, Inc.) on the dates cited in the claim, July 24 and 25, 1985. The Carrier acknowledges that work was performed by Pool Paving Inc. at State Route 73 on August 7 and 8, 1985, but Carrier asserts that these dates are not cited in the claim and thus do not validate the claim.

The Organization asserts that the Carrier did not challenge the accuracy of the July 24 and 25, 1985 dates during the handling on the property, and that the new information to the effect that no paving work was performed by Pool Paving Inc. on those dates is not supported by any evidence of record. The Organization submits, therefore, that the Board should reject the Carrier's objection to paying the claim based on no work being performed on the dates cited in the claim.

In the circumstances at hand the Carrier has advanced a persuasive basis for its denial of the herein claims. If the case had been progressed to the Board before the Carrier stated that no paving work was performed by Pool Paving Inc. at State Route 73 by the outside contractor (Pool Paving, Inc.) on the dates cited in the claim, July 24 and 25, 1985, such information would be precluded from Board consideration. As previously noted, however, the herein claim, Case 83, was on the property, and had not been submitted to this Board, when the Carrier mentioned the fact of no paving work having been performed on July 24 and

25 in the July 10, 1991 letter of the Acting Senior Director-Labor Relations. In this posture of the handling on the property, the Organization had opportunity to submit rebuttal evidence to show that paving work was in fact performed on the cited dates of July 24 and 25. Such evidence was not forthcoming and consequently, on the record as it now stands, it cannot be found that work covered by the subject Scope Rule was performed as alleged by an outside contractor on the cited dates of July 24 and 25, 1985. Accordingly, there is no basis for finding that compensation should be paid to the Claimants on the ground that they were deprived of work covered by their Scope Rule.

In view of the foregoing, and based on the record as a whole, the claim for compensation will be denied.<sup>1</sup>

AWARD:

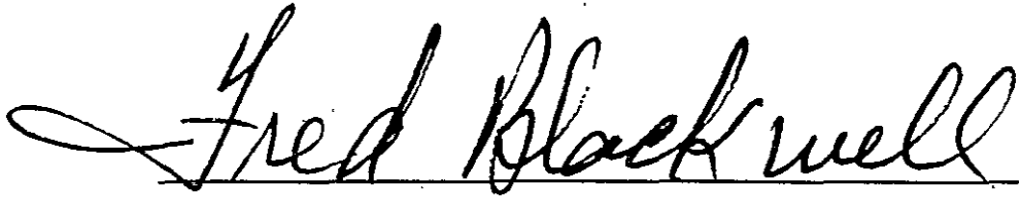
The record does not establish that work covered by the subject Scope Rule was performed as alleged at State Route 73 by the outside contractor (Pool Paving, Inc.) on the dates cited in the claim, July 24 and 25, 1985.

Claim denied.

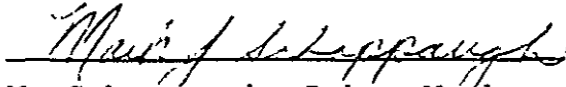
BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016

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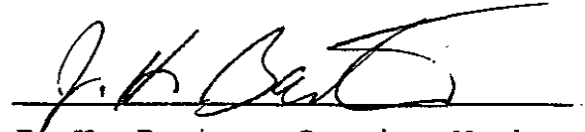
<sup>1</sup> The other reasons for the Carrier's denial of the herein claim are not reached by this ruling. In addition, this decision does not constitute a ruling on the applicability of the December 11, 1991 Hopkins/Berge Letter to the BMW/Conrail Agreement.



Fred Blackwell, Neutral Member



M. Schappaugh, Labor Member



J. H. Burton, Carrier Member

Executed on 6/23, 1992

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