PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

Award No. 85

Case No. 85

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. 85 and Cases Nos. 82, 83, 84, 86, 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 Carrier permitted crossing/repair work to be performed by an outside company, Hilltop Paving, on the Haysville and Leetsdale Grade Crossing on

[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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the Pittsburgh Division on August 9 and 10, 1988, in circumstances that 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.[2] 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.

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. 85, sets out these reasons as follows:

> *"1. Claim was progressed for August 9 and 10, 1988, however, the contractor did not work on August 10, 1988.*
>
> *2. Hilltop Paving Company advised no laborers (Trackmen) were utilized; they used 5 men operating a backhoe, roller and 3 trucks; thus, there would not have been any need for claimants (Trackmen) M. Ryan and J. Federinko.*
>
> *3. Improper claimants. Claim is progressed for 5 furloughed employees (1 Foreman, 1 Vehicle Operator, 1 Machine*

[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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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.

B. Putze - Has no Vehicle Operator seniority.
R. Ribet - Has no Machine Operator seniority.

4. *G. Williams (Foreman) was on duty and under pay and worked overtime on August 9, 1988."*

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 two (2) contentions that were not mentioned in the Carrier's June 12, 1991 letter and that were not raised on the property, namely, incorrect dates (CS, page 10), and non-ownership of the necessary equipment with which to perform the disputed work (CS, page 14).

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 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 incorrect dates and non-ownership of the equipment needed to perform the disputed

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work, were not raised on the property and thus these contentions 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 on 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 work of paving crossings is not work which accrues to the BMWE Employees and such work has consistently been contracted out without advance notice to the General Chairman of the contracting out transaction (CS, pages 5 and 8).

2. 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 8).

3. Even if a scope violation is found in this case, the Carrier should not be required to compensate the Claimants because the scope violation was only made evident by this Board's issuance of Award No. 10 (CS, page 18).

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MERIT DISCUSSION AND FINDINGS

From review of the whole record the Board concludes and finds that the claims have merit and are supported by the record.

Accordingly, in line with this Board's precedent Award No. 10, 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 Carrier's contention that the disputed work is not work that accrues to the BMWE is rejected on the basis of this Board's precedent Award No. 10, which 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.

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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 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, the Board will issue a compensatory award to Claimants on furlough. Awards Nos. 9, 10, 11, and 12 of this Board. 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. 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.

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The Board also rejects the Carrier's contention that compensation is not appropriate in this matter because the scope violation was only made evident by this Board's issuance of Award No. 10. In this regard the Board notes that the Carrier had knowledge, prior to letting the contract to Hilltop Paving, that the Organization opposed contracting out such work and claimed that the crossing work belonged to BMWE. In these circumstances the Carrier went ahead with the contract to Hilltop Paving at its own risk: the fact that the controversy about the work was not determined until the issuance of Award No. 10 is no basis for denying compensation to the herein Claimants.

Therefore, as previously indicated (supra 8), the Board will sustain the claims on the basis 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.

As to the quantum of compensation, the Board has determined that the Board cannot consider the Carrier's argument about incorrect dates because such argument was not raised on the property (supra 4). The Board also notes that the record contains no evidence in support of the Carrier's statement that no contractor work was performed on August 10, 1988. Accordingly, the Board will sustain the claims for compensation, on the basis of a joint check of the pertinent records, for work performed by the Hilltop Paving Company on the subject crossing, up to a maximum of two (2) days, within the time parameters of the initial claims.

In view of the foregoing, and based on the record as a whole and this Board's

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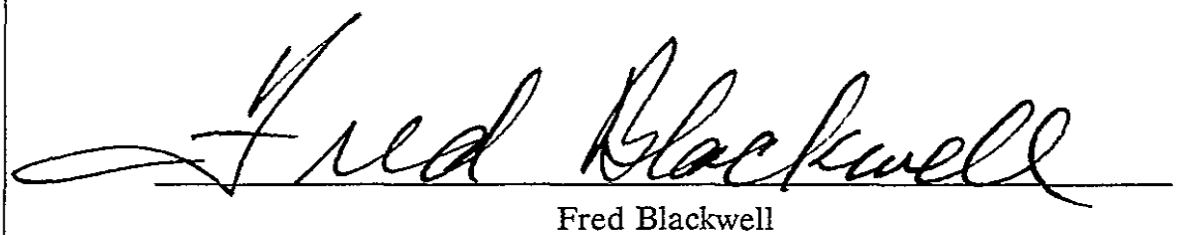
prior Awards Nos. 9, 10, 11, and 12, the Board finds that the herein claims are supported by the record and that the Carrier violated the work jurisdiction provisions and the advance notice provisions of the confronting Scope Rule. Therefore, the claims will be sustained and compensation will be awarded to the Claimants as hereinafter provided.



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 Schedule Agreement.

Accordingly the claims are hereby sustained and the Carrier is directed to compensate the Claimants for the performance by the Hilltop Paving Company of BMWE work, on the basis of a joint check of the Carrier's records to confirm the dates and amount of crossing paving/repair work performed by said company on the subject crossing, up to a maximum of two (2) days, within the time parameters of the initial claims.

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

1016-85

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
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.