PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

Award No. 88

Case No. 88

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. 88 and Cases Nos. 82, 83, 84, 85, 86, and 87)[1] and denied 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 12, 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 May 21, 1986, on behalf of seven (7) furloughed Claimants who allege that the circumstances in which the Carrier permitted crossing/repair work to be performed by an outside company, Gra-Hill Construction, 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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various grade crossings on the Northcumberland and Williamsport Subdivisions on the Allegheny Division beginning on May 5, 1988, and continuing, violated the Scope Rule provisions, of the Conrail-BMWE Agreement, on the subjects of work jurisdiction and the requirement for advance notice 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. 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.[2]

The Carrier's letter dated June 12, 1991, which advised the Organization of three (3) reasons for the Carrier's decision that Award No. 10 does not apply to the claims in herein Case No. 88, sets out these reasons as follows:

> *"1. No crossing work was done on the Northcumberland or Williamsport Sub-divisions on May 5, 1986.*
>
> *2. J. Shabloski, Manager, Gra-Hill Construction advised they usually do 2 or 3 crossings per day and generally use a Truck Driver, Machine Operator and a laborer. Their research shows they billed Conrail for 4 crossings done on May 30, 1986 on the Williamsport Sub-division and 9 crossings completed on May 13, 1986 on the Northcumberland Sub-division.*

[2] The parties' handling of this dispute on the property is reflected in Carrier multiple-letters dated July 3 and August 26, 1986; and Organization multiple-letters dated May 21 and July 21, 1986 and June 24, 1987.

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3. *Improper claimants. Claims are progressed for 7 employees (2 Machine Operators and 5 Vehicle Operators); however, 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:*

D. P. Cantolina - Acquired Vehicle Operator seniority on May 16, 1989 which is after claim date.

M. I. Saggese - Has no Vehicle Operator seniority.

R. J. Ickes - Has no Vehicle Operator seniority.

H. A. Brown - Has no Vehicle Operator seniority.

R. L. Winner - Has no Vehicle Operator seniority.

D. Keller - Has only Class 3 Machine Operator seniority.

R. J. Beauseigner - Does not appear on Allegheny seniority district rosters, however, records show he was off sick-disabled from July 1, 1985 to June 16, 1986, which encompasses claim date."

The Organization's letter of July 1, 1991, in responding to the Carrier's letter about its denial decision, objected that the reasons set out in the Carrier's June 12 letter had not been raised on the property and thus are new subjects that cannot be considered by the 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 letter and that were not raised on the property, namely: incorrect dates (CS, page 11) and non-ownership of the necessary equipment to perform the disputed work (CS, page 15).

Board review of the record of the handling on the property confirms the validity of the Organization's objection that the three (3) contentions, set out in the Carrier's letter

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of June 12, 1991, were not raised on the property and thus such contentions will not be considered by the Board in the adjudication of the herein claims.

The Board also finds that the contentions in the Carrier's submission about non-ownership of the equipment needed to perform the disputed work, were not raised on the property and thus this contention will not be considered by the Board in the adjudication of the herein claims.

In view of the foregoing findings concerning the on-property handling in this matter, the Board notes that the contentions argued on the property and in the Carrier submission that are properly before this Board for consideration in the adjudication of the herein claims, are the following:

(1) Incorrect dates, CS page 11, and the Carrier's on property contention that the claims are vague and not specific and are in violation of Rule 26 as no dates or times are mentioned when the alleged violation occurred to enable the Company to verify if work was performed by a contractor as alleged.

(2) The disputed work does not accrue exclusively to the BMWE and was properly performed in accordance with the Scope Rule.

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

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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 argument about incorrect dates and that the claims are vague and not specific and violate Rule 26 is refuted by the information on the face of the initial claims. The initial claims (Employee's Exhibit E-1) states that the Scope Rule of the Conrail-BMWE Agreement was violated by the Carrier's action of permitting Gra-Hill contractor to perform crossing work from May 5, 1986, until contractor is removed from property. The claim identified (7) seven pieces of equipment used by the contractor and identified as well the location of the work by the contractor, the Northcumberland and Williamsport Subdivisions. This information was sufficient to enable the Carrier verify whether the claims' allegations were valid; indeed, the Carrier's letter of June 12, 1991, states with particularity that work was performed on the Northcumberland and Williams-port Subdivisions by the Gra-Hill Construction Company in May 1986. Accordingly, the Board concludes and finds that information in the claims is sufficient to indicate the time parameter of the claims and other essential specifics needed for the Carrier to respond to the claim; and that, therefore, the claims are in compliance with Rule 26.

The Board also rejects the Carrier's contention that the disputed work is not work

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that accrues to the BMWE. In precedent Award No. 10, this Board 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.

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.

In view of the foregoing, and based on the record as a whole and on precedent Awards Nos. 9, 10, 11, and 12, the Board finds that the herein claims are supported by the record (supra 6); therefore, the claims will be sustained and compensation will be awarded to the Claimants for work by the Gra-Hill Construction Company that is shown by a joint check of the pertinent records to have been performed at the locations cited in the claims during the month of May 1986.

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

May 1, 1995

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SBA No. 1016 / Award No. 88 - Case No. 88

AWARD

The record established that the Carrier violated the work jurisdiction and advance notice provisions of the Scope Rule of the Conrail-BMWE Agreement.

Accordingly, the claims are hereby sustained and the Carrier is directed to compensate the Claimants for work by the Gra-Hill Construction Company that is shown by a joint check of the pertinent records to have been performed at the locations cited in the claims during the month of May 1989.

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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1016-88

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

1016-88

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
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.