

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 97

Case No. 97

Referee: Michael Fischetti

Carrier Member: J.H. Burton Labor Member: M.J. 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 Agreement was violated when the Carrier assigned outside forces (Baldassari Construction) to install a chain link fence in B Yard at Frankford Junction and along Wheatsleaf Street in Philadelphia, Pennsylvania on December 21, 22 23, 26, 28, 29, 30 and 31, 1992. and January 4, 5, 6, 7, 8, 9, 11 and 12 1993 (System Docket MW-3072).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out the work described in Part (1) above, as required by the Scope Rule.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants C.L. Daub, G.A. Golden, J.L. Royer and M.D. Tallarida shall each be allowed eight (8) hours' pay at the applicable straight time rate for each day the contractor forces performed fence construction work on December 21, 22, 23, 26, 28, 29, 30 and 31, 1992 and January 4, 5, 6, 7, 8, 9, 11 and 12, 1993. Claimant J.H. Love shall be allowed eight (8) hours' pay at the applicable straight time rate for each day the contractor forces performed fence construction work of January 4, 5, 6, 7, 8, 9, 11 and 12, 1993.

Findings:

Upon the whole record and all the evidence and hearing in the Carrier's Office in Philadelphia, PA, 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

The Claimants contend that the fencing work at issue herein is clearly and unambiguously reserved to BMW forces in accordance with clear rules, i.e., the Scope Rule and the April 24, 1989 Letter of Agreement, and established past practice, i.e., as recognized by Third Division Award 29204.

The Claimants further contend that the Carrier failed to give advance written notice of its plans to contract out the fencing work, and that failure to give advanced notice was clearly a violation of the Agreement.

The Claimants also contend that the Carrier's assertion that the work involved herein occurred on "abandoned" property is totally unsupported by any probative evidence, and that the Organization has presented evidence refuting the Carrier's assertion.

Finally, the Claimants contend that there is overwhelming precedent on this property for a monetary award because of the Carrier's violation of the Agreement. They cite Awards 9, 10, 34, 41 and 82, among others, that the Board recognized that a sustaining award with an attendant monetary remedy was required in order to ensure the integrity of the Agreement.

The Carrier contends that the work at issue was performed on abandoned, non-revenue producing property, which was not being used for anything in connection with the operation of the railroad.

The Carrier also contends that it is well-settled that work on property that is not being used for railroad operations is not covered under the BMW Scope Rule, regardless of whether or not the Carrier owns the property.

Finally, the Carrier contends that the Claimants were all on duty and under pay at the time of the disputed contracting activity, and therefore, none of the Claimants would be entitled to any monetary penalty in connection with this claim.

The Board notes that the Carrier has violated the Scope Rule by subcontracting work that is generally recognized as BMW work. The Board also notes that in the event of an emergency the Carrier may subcontract the work at issue, but the Carrier has not contended that any emergency existed. In addition, the Carrier failed to notify the General Chairman, which is a further violation of the Scope Rule. The Carrier's position is that the property in question, although owned by the Carrier, had been abandoned pursuant to NERSA and was no longer considered as an operating property. The Carrier, however, has not offered any probative evidence that the property at issue was a "non-operating" property. Further, the Carrier had not provided appropriate information related to NERSA and its applicable

provisions. Moreover, the Carrier concedes that the fence was erected to protect operating property, but maintains that the crucial question rests with use rather than ownership. The Board, however, notes the purpose of the fence, and its proximity to other operating property.

Because of the lack of documentation to show that the property at issue was abandoned the Board must infer that the said fence was within the scope of work as defined by the Agreement and the claim is sustained.

AWARD

Claim sustained.

BY ORDER OF SPECIAL BOARD OF ADJUSTMENT OF NO. 1016

Michael Fischetti

Michael Fischetti, Neutral Member

Mark J. Schappaugh

M.J. Schappaugh, Labor Member

J.H. Burton

J.H. Burton, Carrier Member

Dissent attached.

Executed on

1/17/97

Conrail/BMWE/SBA 1016/97

CARRIERS DISSENT TO AWARD NO. 97

This award is wrong in that it ignores a long line of precedent showing that abandoned property is not covered by the Carrier's collective bargaining agreement, including its scope. Those awards (such as Third Division Awards No. 12918, 21993, and 19994) remain viable and are implicitly followed by the majority. In fact there was substantial evidence in the record showing that the property was not being used for railroad operations. The carrier does not have the burden of disproving the claim; the Organization is the moving party and must establish the necessary facts.

Given that the majority accepts the underlying premise that no scope obligations attach to abandoned property this award is limited to the facts of this case. None the less,

I DISSENT.



J. H. Burton