Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30540
Docket No. MW-30707
94-3-92-3-496

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside concern (A. Campo General Contracting) to perform grade crossing paving work on the crossings located on the Vineland Subdivision at Mileposts M.P. 3, M.P. 5.6 and M.P. 5.8, on the Penns Grove Subdivision at Mileposts M.P. 19.8, M.P. 20.0, M.P. 20.8, M.P. 21.7, M.P. 23, M.P. 28 and on the Beesley's Point Subdivision at Mileposts M.P. 2.3, M.P. 2.5 and M.P. 15.7 on June 4, 6, 7, 26, 27, July 4, 5, 9, 10, 11, 12 and 13, 1990 (System Docket MW-1896).

(2) The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with advance written notice of its intention to contract out said work as required by the Scope Rule.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operators D. Cerveny, J. Castaldi and N. J. Parris shall each be allowed ninety-six (96) hours' pay at their respective pro rata straight time rates of pay."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This dispute is one of a series concerning the Carrier's action in contracting to outside firms the work of repair of public crossing over the Carrier's tracks. As will be discussed further below, the Carrier emphasizes that the work involved the application of hot asphalt, rather than cold patching of crossings.

There is, preliminarily, one major procedural matter to be resolved. After the answer of the Carrier's highest level of authority, the Carrier undertook to send this dispute to the Board for resolution. The Organization brought this same dispute to the Board at a later time, but within the required nine-month period following the Carrier's last reply in the claim handling procedure.

The Carrier argues that the Organization has thus "pyramided" the dispute by bringing its case to the Board. On this basis, the Carrier seeks a dismissal award. The Board finds the Carrier's objection without merit. Pyramiding is objectionable where one party seeks to have a single dispute resolved by the processing of more than one claim.

In this instance, the Claim was initiated on the property by the Organization. The Carrier, for whatever reason, brought the Organization's Claim to the Board. While the Carrier had the right to do so, this clearly cannot be found to prohibit the Organization from bringing its own dispute to the Board.

Under these circumstances, the Board finds it appropriate to resolve the matter on the basis of the Organization's filing with the Board. (The claim as submitted by the Carrier will be separately resolved on a procedural basis. See Third Division Award 30532.)

The record shows that the Carrier provided advance notice of its intention to contract for work at a number of grade crossings. The Organization argues that such notice is insufficient, based on the lack of detailed information concerning each instance of proposed work. The Board finds, however, that the notice and subsequent meeting fulfilled the contractual requirements of the Scope Rule, which reads in pertinent part as follows:

"In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. 'Emergencies' applies to fires, floods, heavy snow and like circumstances.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Company may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith."

As a further preliminary matter, the Organization relies to some degree on the additional responsibilities placed on carriers under the so-called Berge-Hopkins letter of December 11, 1981. The issue of whether the Berge-Hopkins is applicable has now been resolved in an Award which is confined solely to this question. Public Law Board No. 1016, Award 66-A, issued on January 18, 1993, found that the Berge-Hopkins letter is not applicable on this Carrier's property.

The Board has been provided with numerous Awards, on this property and elsewhere, concerning work performed on grade crossings as well as other types of contracted work. The Organization bears the burden of demonstrating that the work is covered by the Scope Rule and/or that the work has regularly been performed by Maintenance of Way employees. As a part of its proof in this regard, the Organization points to Special Board of Adjustment No. 1016, Award 10 (and, to similar effect, Awards 11 and 12) involving the same parties. Award 10 states in pertinent part as follows:

"...the Board concludes and finds that the record as a whole persuades 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; and further, that there is no question that

> the Carrier failed to give the MofW General Chairman notice of the contracting out as required by the second and third paragraphs of the Scope Rule. In these circumstances the Board finds that the manner in which the Carrier effected the disputed contracting out of the paving and clean-up work at the two grade crossings in question, was violative of the confronting Agreement and that the claims should therefor be sustained."

These sustaining Awards obviously support the Organization's claim to "paving (blacktop) and related clean-up." Special Board of Adjustment No. 1016, Award 10 also takes note of the Carrier's failure to provide the required advance notice (contrary to the situation here under review). More significantly, Award 10 does not offer a precise description of the type of crossing work which was involved.

Here, the Carrier emphasized in the on-property claim handling and in its Submission that what is involved here is "hot asphalt" highway crossing work, which it distinguishes from routine cold-patching. The Carrier asserts that this "hot asphalt" work has regularly been contracted and has not been performed by Maintenance of Way forces. The Organization has demonstrated that black top work generally is covered under the Scope Rule (as found by the above-cited Special Board of Adjustment No. 1016 Award). There is no support, however, for the view that Maintenance of Way forces have been used for "hot asphalt" with any frequency or regularity. This was a point stressed in the on-property handling of this dispute. As one example, the Carrier's letter of June 28, 1990 stated:

> "...our employees, in virtually all areas of Conrail, have not been involved in the installation of hot asphalt highway crossings at the time of or since the effective date of our agreement."

The voluminous record provided by the parties does not offer persuasive evidence in contradiction to this statement.

As stated in Third Division Award 27629 involving the same parties, but involving a different type of work:

> "This Board's review of the facts and circumstances in the instant case fails to support the Organization's position. A search of the record finds that the work is not specifically covered by the language of the Scope

Rule. When not explicitly granted by Agreement, the Organization must show proof that the work was customarily and traditionally performed by the employees."

The Carrier points to the special equipment (rollers, etc.) required for this type of work, as well as the skills required to operate such equipment. The parties are in dispute as to whether equipment could be leased in order to have Carrier forces perform the work. Given the extent of the hot asphalt paving program at the time, it is unreasonable to assume that leased equipment could be made available for this paving project encompassing many different locations.

In sum, timely notice was given to the Organization concerning the projected work. There is convincing evidence that the "hot asphalt" work has not been regularly performed by Carrier forces and is not contractually reserved to them. This finding is not intended to contradict the Special Board of Adjustment No. 1016 Awards, but it is based on the particular aspect of crossing work which is involved here.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 9th day of November 1994.

LABOR MEMBER'S DISSENT
TO
AWARD 30540, DOCKET MW-30707
(Referee Marx)

The Majority committed several serious errors reaching its decision in the instant dispute. Moreover, this award conflicts with established precedent on this property concerning an identical situation. An award based on erroneous reasoning is of no value as precedent and dissent is therefore required. This dissent will focus on the fundamental errors of reasoning and will not address those errors which do not appear to have had a significant impact on the Majority's ultimate disposition of this case. Failure to address those additional errors should not be taken as acquiescence thereto.

This Board has recognized in innumerable awards the value of well-reasoned precedent, not only in settling the immediate cases brought before it, but also to fulfill the purposes of the Railway Labor Act to effect the prompt and orderly settlement of disputes by settling issues between the parties with some degree of finality. In this connection, attention is invited to Awards 14489 and 14508 of this Division:

AWARD 14489:

> "The principle of stare decisis is a most commendable one. It puts an end to controversy where a provision of an Agreement permits more than one interpretation and ends the parade of disputes seeking to upset the established view. In following stare decisis we do not say that we would necessarily have held the same way if we were presented the issue as a matter of first impression.

"We merely hold that unless the precedent view is palpably wrong we must not upset it. Award 12240."

AWARD 14508:

"*** Although we retain the authority to reverse prior awards of this Board. We find no justification for doing so in this case. Our reasoning is the same as that expressed by Refree (sic) Dorsey in Award No. 11788:

> 'We have no hesitation or compunction in reversing prior Awards when we are convinced they are palpably wrong. But, we cannot and do not lightly regard precedent Awards; for, if we did so, it would not engender the prompt and orderly settlement of disputes on the property within the contemplation of Section 2 (4) and (5) of The Railway Labor Act, herein called the Act * * * Only if in law and in fact a prior Award finds no support should we reverse it. Certainly, where a provision of an Agreement permits more than one interpretation, we must presume that the Division, in its deliberations, considered all of them before making its selective determination. We should not at a later date, with a different referee participating, substitute our judgment for that in a precedent Award unless we are unequivocally convinced and can find that the prior judgment is without support. To apply any other test would be to foster uncertainty in the Employe-Carrier relationships in derogation of the objectives of the Act.'"

The subject of the instant claim was the work of renewing grade crossings and, specifically, the asphalt paving associated therewith. In the instance involved here, Carrier Maintenance of Way forces renewed the track structure through certain grade crossings. Thereafter, instead of assigning Maintenance of Way forces to perform the final step of grade crossing renewal, paving of the crossings with blacktop (asphalt) and cleanup of the sites, the

Carrier assigned an outside contractor to perform this work in violation of the Agreement.

This is not the first time that the issues involved here have arisen between these two parties. In fact, the issues involved in this dispute were addressed by Special Board of Adjustment No. 1016 in Awards 10, 11 and 12, which found that asphalt paving is reserved to Maintenance of Way employes under the Scope of the Agreement between the parties hereto. Based on the findings of Special Board of Adjustment No. 1016, and absent a finding that said awards were palpably wrong, the Board should have applied the principle of stare decisis and sustained the claim.

In light of the foregoing, it is significant that the Majority did not find Awards 10, 11 and 12 of Special Board of Adjustment No. 1016 to be palpably wrong but, rather, specifically stated that "this finding is not intended to contradict the SBA 1016 Awards." However, instead of applying stare decisis and sustaining the claims, the Majority here erroneously found there to be a distinction between the work involved here and that involved in the disputes leading to Awards 10, 11 and 12 of Special Board of Adjustment No. 1016.

In the dispute settled by Award 10 of Special Board of Adjustment No. 1016, which involved the paving of crossings using hot as-

phalt, the Carrier argued that there was a distinction between the work of patching asphalt crossings and the work of paving asphalt crossings and urged that Maintenance of Way employes only performed patching work. However, Special Board of Adjustment No. 1016 did not find a distinction, but found the "... paving (blacktop) and related clean-up at grade crossings ***" involved in that dispute to be scope covered work.

In the instant case, the Carrier came to this Board with the same argument, that there was some fundamental difference between the work of patching and paving asphalt crossings. Here the Carrier attempted to base this argument on the fact that asphalt patching is often performed using cold asphalt and paving of entire crossings is generally done using hot asphalt. It should be recognized that the cold asphalt used for patching material is simply hot mix asphalt which has been allowed to cool and is usually surplus asphalt which is left over from a previous (hot) paving job. Hot asphalt is much more easily spread, compacted and smoothed and adheres much more readily to existing paving than cold asphalt. For those reasons, although it is the exact same material and exactly the same skills and equipment are used for cold patching and hot paving with asphalt, hot asphalt is strongly preferred for paving work, including patching. The reason that cold asphalt is often used for patching is simply because it is impractical to keep hot asphalt readily available for use in small quantities.

Asphalt is asphalt and the Majority here should have refused to draw the erroneous distinction urged by the Carrier.

After citing Awards 10, 11 and 12 of Special Board of Adjustment No. 1016, as noted above, the Majority went on to find that:

> "These sustaining Awards obviously support the Organization's claim to 'paving (blacktop) and related clean-up.' *** More significantly, Award 10 does not offer a precise description of the type of crossing work which was involved."

It is interesting that the Majority found it "significant" that Award 10 of Special Board of Adjustment No. 1016 did not offer a precise description of the type of crossing work which was involved. Asphalt crossings are paved with hot asphalt and Special Board of Adjustment No. 1016 found the contracting out of such work to be in violation of the Agreement. While Award 10 does not include the magic words "hot asphalt", one wonders how much more precise it would have needed to be for the Majority in this case to have reached the conclusion that "paving (blacktop)" includes cold patching and hot paving. Obviously, both endeavors are subsumed under the more general heading of "paving (blacktop)", which Special Board of Adjustment No. 1016 found to be reserved to Maintenance of Way employes under this Agreement.

Notwithstanding that the Majority was wrong to find a distinction between hot and cold asphalt paving work, such distinction should have had no bearing on the final resolution of this case. It has often been held that it is the work which is the subject of the Agreement and the work is not removed from the Scope of the Agreement merely because the Carrier wishes to have the work performed by using certain methods or machinery. See Third Division Awards 28486, 28590 and Award 54 of Public Law Board No. 1844. The work involved here was asphalt paving and the Carrier's determination to have the asphalt paving performed by the specific method of hot application would not serve to remove the work from the Scope of the Agreement in any event.

In addition to the foregoing, the Majority also erred where it held:

> "*** The Carrier asserts that this 'hot asphalt' work has regularly been contracted and has not been performed by Maintenance of Way forces. The Organization has demonstrated that black top work generally is covered under the Scope Rule (as found by the above-cited Special Board of Adjustment No. 1016 Award). There is no support, however, for the view that Maintenance of Way forces have been used for 'hot asphalt' with any frequency or regularity. ***"

It should be noted that here the Majority correctly characterized the Carrier's position relative to the existence of a past practice of contracting out this work as an assertion. It is so

well established that the party asserting a controlling practice must meet the burden of proving such a practice existed and represent a mutually agreed interpretation of the Agreement that awards supporting this principle are unnecessary. In this case, the Carrier's assertion of a past practice of contracting out this work remained unsupported by any probative evidence during the entire handling of this dispute on the property. However, elsewhere within the award, the Majority states:

> "*** There is convincing evidence that the 'hot asphalt' work has not been regularly performed by Carrier forces ***"

This finding is wrong. Apparently, the Majority did not adequately scrutinize the Carrier's alleged past practice evidence because, if it had, it would have found that although the Carrier did supply records indicating it had contracted out some asphalt paving work in the past, the incidents referred to therein occurred after the dispute addressed in Award 10 of Special Board of Adjustment No. 1016 arose. Furthermore, a significant number of the incidents referred to therein are the subject of claims filed with the Carrier, some of which are the very claims addressed in this series of awards. For example, all of the incidents involved in this award, which the Majority chose as its lead case, are included in the Carrier's alleged past practice evidence. It is well established that citation of repeated violations of the Agreement cannot

serve as probative evidence of a controlling practice. This is especially true here, where the Organization has repeatedly objected to the same kind of violations before the incidents cited as evidence of a practice occurred and has filed claims involving the very incidents the Carrier attempts to use to support its claim of a past practice. In view of the foregoing, there can be no question but that the Carrier failed to meet its burden of proving the existence of a controlling past practice in this case.

Under this Agreement, the relevant standards for finding scope coverage are whether the work is generally recognized as Maintenance of Way work and/or whether the work was being performed by Maintenance of Way employes as of the effective date of the Agreement. The parties have agreed that generally recognized Maintenance of Way work is that work which is "customarily" performed by Maintenance of Way employes. If Maintenance of Way employes customarily perform certain work or if they performed that work as of the effective date of the Agreement, such work is scope covered. Presumably the Majority attempted to determine whether the Organization had established customary performance of the work in order to prove scope coverage and its finding that there was no support for the view that Maintenance of Way forces have been used for "hot asphalt" work with any frequency or regularity was a determination relative to the customary performance test. However, in reaching

the conclusion it did in this regard, one must assume that the Majority overlooked the written statements in the record from 103 current and former employes of Conrail and its predecessors as evidence of the fact that Conrail Maintenance of Way employes customarily performed asphalt paving (both hot paving and cold patching) whenever such work was required. Perhaps the most striking feature of the Majority's finding is that Special Board of Adjustment No. 1016 was presented with 53 of the same written statements and found them sufficient to conclude that paving crossings was scope covered work and that assigning such work to outsiders was a violation of the Agreement which required a sustaining award. The following are typical of the statements which were supplied to the Carrier during the handling of this dispute and presented to this Board for consideration:

> "*** I have been on the Railroad since 1970. during this time I have been involved in blacktoping (sic) cross useing (sic) hot mix. We hauld (sic) the hot mix in our boom turck (sic) to the crossing. We hauld (sic) the hot mix forn (sic) Brewess Plant in lanster Ohio. We used a vibrating compactor to roll out the crossings. The roller was rented. ***" (Employes' Exhibit "A", Sheet 1)
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> "Since I have been employ (sic) on Conrail, I have pave road crossing on Conrail sevral (sic) location. Some location are Bera and Gailon on Cleveland and Indpls. State - 60 and State - 162 at Neuilonds, Ohio - 1985 State Road - 57 and State - 58 - 1982" (Employes' Exhibit "A", Sheet 8)
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> - - - - -

"I started on Conrail Sep. 23, 1973 seen I been on Conrail I have helped paved crossings at several location on Conrail. Some of these locations were between Columbus and Sayton on SE - 811 SE - 812 in the years between 1981 threw (sic) 1985." (Employes' Exhibit "A", Sheet 15)

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"Since I have been on Conrail I have help pave crossings at sevrel (sic) locations on Conrail. Some of these locations are Middletown, Dayton, Fairborn, Sharonville in thi (sic) years between 1980 - 1985. ***" (Employes' Exhibit "A", Sheet 17)

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"*** I am writing you concerning the contracting work done on this Division by Contracters (sic) who do paving work on R.R. Crossings. For your information I am qualified to do this type work and can confer this by the dates I did the sames. In 1977, 1978, 1982, 1983 from Ansonia to Anderson to Fortville to the Southwest & Columbus Division in General. ***" (Employes' Exhibit "A", Sheet 44)

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"During in my employment with rail road I have helped pave crossings using hot mix. We hauled the hot mix in our Dump trucks. I worked as a trackman I shoveling the hot mix onto the crossing. We then rolled the hot mix out with a roller that belonged to the company. ***" (Attachment No. 1 to Employes' Exhibit "G-10", Sheet 6)

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"1980 Putnam Street East Liverpool Ohio Bayard Branch - Conrail Trucks were used to get the blacktop also rented rollers from D&G in Beaver Falls." (Attachment No. 1 to Employes' Exhibit "G-10", Sheet 19)

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"I (T. E. Slater) used Boom Truck to haul black top. In 1983-84 while work at the 43rd Street Project we did numerous crossing from Pittsburgh to Oakmount using front

> "end loader (my bid in job) compactor and various hand tools, some own by Conrail and some leased." (Attachment No. 1 to Employes' Exhibit "G-10", Sheet 21)

The above-quoted statements clearly show that Maintenance of Way employes customarily perform hot asphalt paving work on this property.

Finally, the most basic fallacy contained in this award occurs where the Majority applies the erroneous distinction between hot and cold asphalt paving. First the Majority finds that blacktop work generally is covered under the Scope Rule. This finding is obviously correct. As discussed above, however, the Majority went on to find that there is no support for the view that Maintenance of Way forces have been used for "hot asphalt" work with any frequency or regularity and concludes by denying the claim on that basis.

Aside from the fact that, as shown above, the finding that there is no support for the view that Maintenance of Way forces have been used for "hot asphalt" work with any frequency or regularity is wrong, even if it were correct, the conclusion drawn from this determination is not logical. The following summary of the Majority's line of "reasoning" clearly shows the fallacy embodied therein:

A. Work of a certain category is reserved to the Employes.

B. The work in question is of a specific type within the category.

C. Therefore, the work in question is not reserved to the Employes.

Obviously the conclusion of the Majority cannot logically be reached from the premises set forth. Hence, the Majority's conclusion is based on a fallacy. This award is largely based on that erroneous conclusion and an award based on a fallacy is palpably erroneous and without value as precedent.

In view of the foregoing, as well as the errors which were not discussed herein, it is obvious that the findings of the Majority are grievously in error and of no value as precedent.

Respectfully submitted,

G. L. Hart
Labor Member

Carrier Members Concurring Opinion
to Award 30540 and
Reply to the Organization's Dissent
to Awards 30540, 30521, 30537,
30538, 30539, 30541, 30542,
30543, 30544

Award No. 30540 is the product of a multitude of claims, extensive on-property discussions, and exhaustive research by both the Carrier and the Organization. The record in the cases before the Board, resulting in Award 30540, as well as companion Awards 30521, 30537, 30538, 30539, 30541, 30542, 30543, 30544, was far more extensive than that before SBA 1016 in Award No. 10; and the argument more complete. Neither party can claim not to have had a fair opportunity to make its case. The Employees failed in their efforts to rewrite the long standing practices on this property, and thus cry "erroneous reasoning": they failed in their burden of establishing a contractual violation and thus cry "no value as precedent." In fact the Neutral, no novice to impassioned pleas, should be commended for wading through a mountain of material, and understanding correctly the pertinent facts and burdens of proof.

In Award 30540, as well as in the Awards listed above, the majority correctly analyzed three crucial points: first, the nature of the work in dispute; second, the fact that the Carrier gave notice to the Organization as provided in the Scope; and, third, the Organization's burden of proof.

Throughout the handling of this and earlier paving disputes, the Carrier has consistently maintained that the work of paving highway crossings had not accrued to the BMWE and has been consistently contracted, although the Carrier's forces have, at times, performed temporary patching work. This distinction was clearly stated in the Senior Director's letter of July 16, 1992 (a part of the record in Award 30542):

> "The placement of the temporary asphalt which is analogous to patching pot holes (generally cold patch) is usually done by Conrail forces because it does not require special skills or equipment. Typically, the installation of a finished highway surface requires an asphalt paving machine, roller and insulated dump truck (for transporting the asphalt in a warm state) Conrail does not possess this type of equipment and, as shown infra, cannot be easily leased as you contend."

The majority made a basic finding in applying the factual record to the agreement, i.e., the Organization can lay claim to cold patch or black top work but it cannot lay claim to "hot asphalt" work.

The second key element in these cases, all but ignored by the dissent, is the fact that notice of contracting was given to the Organization. Unlike the cases leading to Awards 10-13 of SBA 1016, the Carrier in the instant paving cases gave notice and met and discussed the issues with BMWE representatives. This information exchange included a detailed cost analysis

and review of leasing options. These actions met the Carrier's obligations under the Scope.

Finally, the Dissent is so taken with its outrage that it even confuses the fundamental burden in this or any rules case. The Scope rule is silent on paving (hot, cold or otherwise) and clearly the Organization has the burden of establishing both coverage by the Scope and a contractual violation. The Majority's conclusion that the Employees have failed to demonstrate a consistent practice of performing the disputed work of hot paving is hardly shown to be erroneous by the Dissent's quotation of eight statements, only two of which make any mention of hot paving. In the Dissent's view, the Organization's failure of proof becomes the Majority's erroneous conclusion.

Labeling an Award "palpably erroneous" does not make it so. The Majority's findings and well reasoned conclusions stem from a voluminous record aided by both sides' presentation of its best case. Award 30540 will indeed be of precedential value.

P.V. Varga

M.W. Fingerhut

M.C. Lesnik

LABOR MEMBER'S RESPONSE
TO
Carrier Members Concurring Opinion to Award 30540 and Reply to the Organization's Dissent to Awards 30540, 30521, 30537, 30538, 30539, 30541, 30542, 30543, 30544
(Referee Marx)

The reasons for which the above-captioned awards are palpably erroneous are thoroughly explained within the Labor Member's Dissents thereto and there is no reason to repeat all of them here. However, exception is taken to the Carrier Members' statement that "... the Dissent is so taken with its outrage that it even confuses the fundamental burden in this or any rules case. ***" First of all, the tone of the Dissent to Award 30540 can hardly be characterized as one of outrage. Secondly, and more importantly, there is no confusion as to the fundamental burden of proof in this case. Clearly, the Organization's burden was to show that the work involved was reserved to the Employes under the Scope of the Agreement (and make no mistake, although the Majority was somewhat vague, Award 30540 was denied on the basis of the erroneous finding that the work was not scope covered). What work is covered under the Scope of this Agreement? We look to the Scope Rule to find out:

"SCOPE

These rules shall be the agreement between Consolidated Rail Corporation (excluding Altoona Shops) and its employees of the classifications herein set forth represented by the Brotherhood of Maintenance of Way Employes, engaged in work generally recognized as Maintenance of Way work, such as, inspection, construction, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences and road

> "bed, and work which, as of the effective date of this Agreement, was being performed by these employees, and shall govern the rates of pay, rules and working conditions of such employees."

The parties have agreed that generally recognized Maintenance of Way work is that which is "customarily" performed by Maintenance of Way employes. If Maintenance of Way employes customarily perform certain work or if they performed that work as of the effective date of the Agreement, such work is scope covered. Clearly, the burden is on the Organization to prove either (1) that the work is generally recognized as Maintenance of Way work or (2) that the work was that which, as of the effective date of this Agreement, was being performed by these employes. There is not a burden "to demonstrate a consistent practice" under this Agreement, notwithstanding the position the Carrier Members have taken in their Response. The Majority's decision to impose that burden is palpably erroneous because it is not one of the standards to which the parties have agreed.

Even though proof of only one of the criteria cited within the Scope Rule is sufficient to establish scope coverage, the Organization proved both that its members had customarily performed the subject work and that the work was that which was being performed by Maintenance of Way employes as of the effective date of the Agreement. This was done by the submission of written statements

from one hundred three (103) current and former Conrail Maintenance of Way employes. For the Carrier Members' edification, the quotation of eight (8) employe statements within the Dissent was not meant to prove "*** a consistent practice of performing the disputed work ***" (a burden the Organization did not have) within the Dissent, but was merely to show a representative sample of the evidence of customary performance of the work and performance of the work as of the effective date of the Agreement, which the Majority erroneously overlooked in favor of the Carrier's unsupported assertions.

The Organization having met its burden, as discussed above, it was the Carrier which then asserted the defense that a controlling past practice of contracting out paving of crossings existed in opposition to the proven scope coverage. As the party asserting a controlling past practice, the Carrier then had the burden of proving such a practice. The Carrier came forth with absolutely no evidence of the existence of such a controlling practice. That the Carrier had such a burden of proof of a controlling practice is supported by a plethora of awards of this Board.

If there is one point in the Carrier Members' Response on which we can agree, it is that merely labeling an award "palpably erroneous" does not make it so. However, the Labor Member's Dissent did not merely label awards palpably erroneous, but explained

the reasons why the subject awards are palpably erroneous. Nothing in the Carrier Members' Response changes that fact.

Respectfully submitted,

G. L. Hart
Labor Member