Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32508
Docket No. MW-31333
98-3-93-3-277

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen 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 outside concerns (J.M.G. Excavating Company) to perform grade crossing paving work on the Route 100 road crossing in Macungie, Pennsylvania (old Reading Main Line) on September 4, 5 and 6, 1991 (System Docket MW-2425).

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

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman G. Mondschein, Class 2 Machine Operator L. Diehl, Vehicle Operators I. Rodriguez, R. Mindler and Trackmen T. Bauer and R. Lenahan shall each be allowed thirty (30) hours' pay at their respective straight time rates."

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.

Claimant G. Mondschein holds seniority as a Foreman and Claimant L. Diehl holds seniority as a Class 2 Machine Operator on the New Jersey Seniority District/Philadelphia Division. Claimants I. Rodriguez and R. Mindler hold seniority as Vehicle Operators and Claimants T. Bauer and R. Lenahan hold seniority as Trackmen on the New Jersey Seniority District/Philadelphia. Each was regularly assigned to positions in their respective classes at the time this dispute arose.

On April 22, 1991, Carrier apprised the Organization that:

"As information, we intend to contract for the repaving of various public road crossings on the New Jersey Seniority District of the Philadelphia Division during the 1991 production season. The project will require approximately 1438 tons of asphalt.

As you know, it is our position that the repaving work of this type is not work covered by the Scope of our Agreement and that such repaving was not done by our MW forces in the territory or system wide either as of the date of our Agreement or thereafter.

Furthermore, even if we had available employees and such work could be construed as coming within the Scope, despite the clear practice thereunder to the contrary, Conrail does not possess the necessary equipment nor the skills to perform this work. Even assuming that we could obtain the equipment and train our employees, the cost of performing this work would significantly exceed the cost involved in utilizing a full-time professional paving contractor."

The General Chairman requested a meeting to discuss the impending contracting transaction. At a meeting held on June 14, 1991, both the General Chairman and the Senior Director expressed opposing views as to whether the contracting transactions violated the BMWE Scope Rule. Nonetheless, the contracting transaction commenced, and J.M.G. Excavating Company (hereinafter referred to as "contractor") worked a total of three ten hour days on the project.

On September 24, 1991 the District Chairman submitted a claim on behalf of the above listed Trackmen. According to the District Chairman:

> "Blacktopping work has customarily and historically been performed by BMWE forces and is contractually reserved to them under the Scope Rule and Rule 1. Therefore, it is clear that Conrail violated these rules when it contracted out this work instead of assigning it to the Claimants who were qualified and available. In addition, Conrail violated the Scope Rule and the December 11, 1981 Letter of Agreement when it failed to timely notify the General Chairman of its intention to contract out this work fifteen (15) days in advance of the contracting transaction.
>
> As a consequence of this violation the Claimants are each claiming a total of three (3), ten (10) hour days of pay at their respective straight time rates of pay for the position being claimed or a total of thirty (30) hours pay for each claimant."

Carrier denied the claim premised upon the following:

> "Repairing work of this type is not work covered by the Scope of our Agreement, and such repair has not been one (sic) by MofW forces in the territory or system-wide, either as of the date of the Agreement or thereafter.
>
> Furthermore, even if such work could be construed as coming within the Scope, despite the clear practice thereunder to the contrary, Conrail does not possess the necessary equipment nor the skills to perform this work. Even assuming that we could obtain the equipment and train our employees, the cost of performing this work would significantly exceed the cost involved in utilizing a full-time professional paving contractor.

Based on the above, your claim is denied."

At the outset, the Organization premised its claim on Carrier's alleged failure to timely advise the General Chairman of its intent to contract out the work in dispute. However, Carrier did notify the Organization in the April 22, 1991 correspondence quoted above. Further, Carrier Senior Director met and conferred with the General Chairman on June 14, 1991, before the subcontracting was finalized. Based on these facts, the assertions that Carrier failed to comply in good faith with the notice and conference requirements of the Scope Rule are not proven on this record.

Turning to the merits of this dispute, it is patent to all concerned that there are now two lines of cases on the central question presented in this record. The seminal decisions by Special Board of Adjustment No. 1016 (Referee Blackwell), an arbitration tribunal between these Parties on the property, held unequivocally as follows: "the disputed work of paving (blacktop) and related clean-up at grade crossings . . . falls within the purview of the Scope Rule of the confronting Maintenance of Way Agreement." The determinations of SBA No. 1016 on this point were ostensibly distinguished, but expressly not reversed, by the Third Division in Award 30540 (Referee Marx), as follows (Emphasis added): "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."

The "convincing evidence" ostensibly relied upon by the Board in Award 30540 (Referee Marx) and a series of some 13 companion cases, (all but one of which were decided by the same Referee who decided Award 30540), is not persuasively made out on the record before us in the instant case. Accordingly, we find no adequate basis for declining to treat the decisions of SBA No. 1016 (Referee Blackwell) in Awards 9, 10 *et al* as dispositive of the present case.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of March 1998.

(CORRECTED)

Carrier Members' Dissent
to Award 32508 (docket MW-31333)
Referee Eischen

One of the principle purposes of the Railway Labor Act is... "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." (Section 1, (5)). As the Majority recognizes, the contracting of paving of highway grade crossings has resulted in numerous claims and several arbitration decisions. Rather than undertake a thorough analysis of the facts, contractual rights and prior interpretations, the Majority simply finds "that there are now two lines of cases on the central question presented in this record" and then proceeds to ignore binding precedent by this very same tribunal and follows another decision which it clearly does not understand and has taken no effort to analyze. Instead of laying this dispute to rest, this Award will likely foster more claims on an issue which could have been conclusively decided by this Board if it were able to have reviewed and made an informed disposition of this matter.

To put the merits dispute most simply, this carrier is not, and never has been, in the business of paving highways. It is, of course, a railroad. Conrail, as most other Class 1 carriers, has consistently contracted for the finished paving of highway grade crossings following the rehabilitation of the railroad crossing by railroad forces. Nothing in the Scope Rule mentions paving, and the Organization has consistently failed to convince Neutrals who have made a painstaking review of the facts, that past practice has evolved to a level of a contract right to such work. Third Division Awards 30521, 30532-43, 31305, 31523.

This Award is "palpably wrong" and should not be followed in the future. Simultaneously with the consideration of the claims which lead to Award 32508 (and Award No. 32505), an on property Public Law Board, PLB 5938, considered the very same issue of notice, contractor performance of paving of crossings and the extensive prior handling of these disputes on this property. In stark contrast to the pro forma analysis given by the Majority in Award 32508, PLB 5938 (composed of the General Chairman, and then subsequently replaced by the BMWE Special Assistant to the President, and the Carriers' highest designated officer for claims and grievances) thoroughly reviewed both the facts of record in the claims before it and the lengthy history of the dispute as ruled upon by several Neutrals. Case No. 1 of PLB 5938 involved three successive rounds of argument by the Organization (the initial argument of the case to Referee Malin and two executive sessions) and as thorough a review of the facts, the contract and the lengthy arbitral jurisprudence on this subject as any arbitration proceeding which has reviewed this subject matter. It should also be noted that the merits were very exhaustively explored in Third Division Award 30540, something distinctly lacking in the decisions of SBA 1016. (It is noteworthy that this Division did not consider Award No. 1 of PLB 5938 initially issued in May 1997 as it was still in its multiple stages of argument and executive review while Award 32508 had been argued. The Award of PLB 5938 was finally issued in February, 1998.)

Unlike the Majority in Award 32508, which merely selected one prior Award over another, Award No. 1 of PLB 5938 undertook a three stage analysis of the issues and precedent. First, it correctly read the Awards from SBA 1016 (as clearly stated in the actual language used in SBA 1016 Award No. 9) as ruling only in regard to the Carrier's failure to provide notice. As stated by the majority

in PLB 5938, Award No. 1: "SBA 1016, Award No. 10, did not hold that Carrier is prohibited from contracting out paving work at grade crossings. Rather, it held that the manner in which Carrier effected the contracting out, i.e by not first giving the Organization notice and an opportunity to meet and discuss the proposed contracting, violated the agreement". Subsequent Awards by SBA 1016 also turned on the notice issue, as held by PLB 5938: "Thus, the failure to give notice was central to the sustaining of all of the subcontracting of paving work claims before SBA 1016".

PLB 5938 also rejected the Organization's numerous attempts to convince it that Third Division Award 30540 was "palpably wrong". Indeed, PLB 5938 reviewed the same facts before the Third Division paving cases and concurred in the analysis found by Neutral Marx in Award 30540. In PLB 5938 we find:

> "...we are unable to agree with the Organization that the award is palpably wrong. Comparing the claims before SBA 1016 with the claims before the Third Division makes it clear that they involved the same type of paving; i.e., hot asphalt paving. However, it also is clear that SBA 1016 never addressed the question whether it was significant that the paving involved hot asphalt. Third Division Award No. 30540 was the first authority to address that question on this property."

Finally, PLB 5938, as had Third Division Award 30540, performed its own independent review of the evidence and the Carrier's obligations under the contract. The majority concluded as follows:

> "To summarize our holdings, because the work involved paving, it was scope covered and Carrier was obligated to give notice and meet with the Organization upon request. Carrier did give such notice and did conduct the required meeting. Because the record does not establish that the employees regularly and customarily performed hot asphalt paving, however, the Organization had a relatively heavy burden to show that Carrier was precluded from contracting out the work following a good faith discussion of alternatives with the Organization. The Organization failed to carry that burden in the instant case. Therefore, the claim must be denied".

Contrary to the assertion in Award 32508, there are not two lines of cases on this subject. Prior to Award 32508 there was a coherent and consistent analysis which held that the Carrier was obligated to provide notice, to meet if requested, and give the opportunity to the Organization to convince the Carrier to use its forces rather than to contract for the work. (See Third Division Awards 30540, 31523, 31871 and PLB 5938, Award No. 1). Nothing in Award 32508 impugns the validity of those holdings. It is clear to all who read Award 32508 in contrast to Award No. 1 of PLB 5938 (which is incorporated as part of this Dissent), that Award 32508 has no foundation, incorrectly misstates prior rulings, and ignores without justification binding precedent on this Division. For all of these reasons this award is clearly "palpably wrong" and we therefore DISSENT.

P. V. Varga

M. C. Lesnik

M. W. Fingerhut

4/23/98

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 32508, DOCKET MW-31333
(Referee Eischen)

The Carrier Members' Dissent could have more aptly been entitled the "Carrier Members' Calumny". Without a shred of evidence, the carrier members malign the neutral member by asserting that he: (1) ignored binding precedent; (2) followed previous decisions that he clearly did not understand and made no effort to analyze; (3) engaged in pro-forma analysis; (4) selected one prior award over another without analysis; (5) misstated prior ruling; and (6) wrote an award that has no foundation. Apparently not content to slander one neutral, the carrier members then go on to malign the neutral member of SBA No. 1016 by asserting that his seminal decisions on the merits of Conrail grade crossing cases were "distinctly lacking" in an exploration of the merits. Of course, none of these charges are true or remotely consistent with the record. In the end, these groundless charges reflect not on the neutrals, each of whom has rendered hundreds of Section 3 awards in distinguished careers that have spanned decades, but on the carrier members who have irresponsibly affixed their names to this shameless dissent.

Perhaps the most ironic aspect of the dissent is the first paragraph which professes to pay homage to prompt and orderly settlement of disputes and binding precedent. What the dissenters conveniently fail to point out is that SBA No. 1016 clearly resolved the grade crossing issue in Award Nos. 10, 11, 82, 84, 85, 86, 87 and 88. However, even after an extensive session which resulted in a special Addendum to Award No. 10, Conrail refused to accept this precedent and, in a blatant example of forum shopping, Conrail progressed another set of BMWE's grade crossing claims to the NRAB instead of settling them based on the existing precedent. Apparently the carrier members believe that precedent is binding only when it favors the carriers.

After successfully shopping for a new forum, Conrail set about misleading the neutral member in those cases (Docket MW-30707 and companion cases) by asserting that the SBA No. 1016 awards concerned cold-patch work and were of no precedential value in cases involving hot paving of grade crossings. This statement was patently untrue and is clearly disproven by a careful reading of the SBA No. 1016 awards and case records. Nevertheless, the neutral member in Docket MW-30707 was misled and rendered Award 30540 based on this false premise. In the instant case, the neutral member was not so easily misled. In fact, the carrier members' diatribe seems to have been sparked by the fact that the neutral member carefully analyzed all of the prior precedent and determined that there was no reason to distinguish the instant case from the controlling precedent established by the well-reasoned awards of SBA No. 1016.

Since the carrier members are not constrained by truth, they next go on to assert that BMWE has consistently failed to convince neutrals that grade crossing work is reserved to the BMWE forces by contract or practice; an assertion which is shown to be obviously false by simply reading SBA No. 1016, Award Nos. 10, 11, 82, 84, 85, 86, 87 and 88 and Third Division Awards 32505 and 32508. In these awards, two different neutrals with decades of experience and literally dozens (if not hundreds) of subcontracting awards under their belts, found grade crossing paving work to be reserved by the Conrail Scope Rule and supporting practice. Indeed, it would be difficult to conclude otherwise since as early as 1966, a Conrail predecessor touted the productivity of its special grade crossing gangs that removed old paving, renewed rail and ties in the crossing and then installed new paving with the carrier's own paving equipment (*Railway Track and Structures, January 1966, pp. 24-26*). Also see Awards 8756, 13318, 19619 and 28692 in which BMWE apparently was able to "convince neutrals" that grade crossing paving work was scope covered work.

The remainder of the dissent is expended extolling the virtues of Award 1 of PLB No. 5938, an award which is fatally flawed by its fundamental reliance on Award 30540. Instead of recognizing the inherent contradictions in Award 30540, as was done in the instant case, PLB No. 5938 took on the impossible task of attempting to reconcile Award 30540 and the awards of SBA No. 1016. Since Award 30540 is based on the false premise that the SBA No. 1016 awards applied only to cold-patch work, the awards can not be reconciled. While no one questions the good faith of the neutral member of PLB No. 5938, the task he set for himself was like pounding a square peg into a round hole. It simply could not be done without mangling the peg and the hole. In the final analysis, Award 1 of PLB No. 5838 should be afforded no precedential value not only because the facts and the rules have been mangled, but because it is founded on Award 30540 which itself rests on a false premise and is the fruit of blatant forum shopping.

Differences of opinion are the stuff of which arbitration is made, but the vitriol and calumny woven throughout the Carrier Members' Dissent have no place at the NRAB. The undeniable fact is that SBA No. 1016 set the precedent on grade crossing paving in a series of well-reasoned awards and it was only through forum shopping and confusion that the course was temporarily altered by Award 30540 and Award No. 1 of PLB No. 5938. As is evident from the reasoning in Award 32508, the neutral in this case reviewed all of the prior awards, correctly analyzed them and then astutely set the parties back on the course charted by SBA No. 1016. As we suspect future neutrals will divine from the clear reasoning in Award 32508, this is the correct course.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member