Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32523
Docket No. MW-31613
98-3-93-3-620

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Atlantic
(Coastline Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned fifteen (15) employes of an outside concern (Dixie Road Builders, Inc.) to reconstruct a road crossing at Jenkins Street in Waycross, Georgia near Mile Post AN 587.4 on the Atlanta Division on Tuesday, February 11, 1992 |System File 92-50/12(92-749) SSY|.

(2) The Carrier also violated Rule 2, Section 1 when it failed to confer with the General Chairman and reach an understanding prior to contracting out the work in question.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the fifteen (15) senior furloughed Maintenance of Way employes in the Track Subdepartment, Group A, on the Atlanta-Waycross Seniority District, shall each be compensated at their appropriate pro-rata rates of pay for an equal proportionate share of the one hundred twenty (120) man-hours expended by the outside forces in the performance of the subject work."

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.

In this claim, the Organization asserts that Carrier violated the Agreement when it engaged 15 employees of Dixie Road Builders, an outside concern, to reconstruct a road crossing at Jenkins Street in Waycross, Georgia. The contractor's forces expended a total of 120 hours reconstructing the crossing. Due to the loss of work opportunity, the Claimants (15 senior furloughed Maintenance of Way employees in the Track Subdepartment on the Atlanta-Waycross Seniority District) seek a proportionate share of the 120 hours expended by the contractor's forces.

This case revisits the well-traveled question of whether paving work is scope covered. Both parties introduced a substantial number of prior Awards establishing that the early Award precedent recognized that paving work was scope covered and that contracting out of that work violated the Agreement. However, the most recent series of Awards, which represent the current authority, have established that this work is not reserved to the Organization's forces. We see no basis from deviating from this long line of Awards. Moreover, the record demonstrates that Carrier has a past practice dating back to at least the mid-1980's of having contractors pave road crossings on its property.

We are particularly persuaded, herein, by the Director of Employee Relations' response to the General Chairman's letter. That letter dated October 4, 1993 sets forth valid reasons for using contractors in this case, thereby defeating the assertion of bad faith. For example, Carrier notes that "the paving work requires special equipment that the Carrier does not possess. The work requires special skills and expertise as well . . . the paving of grade crossing approaches resembles roadway work not track work. . . . The ownership of the road, that is State, county, city, is another factor that determines what methods will be used to pave an approach."

In all, we have no choice but to decline the claim.

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 25th day of March 1998.

LABOR MEMBER'S DISSENT
TO
AWARD 32523, DOCKET MW-31613
(Referee Scheinman)

A strong dissent is required because the reasoning of the Majority is both misguided and flawed. An award which is misguided and flawed is obviously erroneous and of no value as precedent. While the Majority paid lip service to the many prior awards involving the parties hereto and the paving of road crossings by outside contractors, it blatantly neglected to consider the Carrier's *admitted failure to notify/confer* with the General Chairman. Contrary to the Majority's conclusions, both the early and the more recent on-property awards comprising the "current authority" have clearly required that the Carrier ***notify/confer*** with the General Chairman prior to such a contracting transaction. Because no notice/conference was held between the Carrier and the General Chairman prior to the subject work being performed by an outside contractor, Award **32523** is palpably erroneous, ignores the clear and unambiguous language of Rule 2 agreed to by the parties and **STANDS ALONE.**

Apparently, the Majority did not bother to read or understand the prior awards to reach its anomalous findings, but cavalierly paid them specious homage because on-property Awards **6200, 18287, 22591, 22917, 23498, 28936, 28942, 29202, 29430, 29432** (eight (8) cases held in abeyance thereto), **29580, 29824, 30194, 30608** and

31867 **ALL** found that the Carrier had violated the notice/conference requirements of the parties' Agreement. However, the Majority's misguided pronouncements did not stop with its negligent oversight of the Carrier's failure to confer with the General Chairman. The Majority erroneously found that:

> **"*** the record demonstrates that Carrier has a past practice dating back to at least the mid-1980's of having contractors pave road crossings on its property."**

As was carefully explained to the Majority at the referee hearing, to credit such a "past practice" would be a serious error. The referenced past practice relied upon incidents where the General Chairman had agreed to contracting at conference pursuant to notice in good faith and without prejudice, and otherwise was based on the incidents in the claims decided by the long line of on-property awards and/or cases held in abeyance thereto. Because it is commonly acknowledged that one violation cannot be used to justify another, this award can only fly in the face of good-faith discussions between the parties designed to reach an understanding regarding the conditions under which certain work will be performed and formalized by the parties in Rule 2 of the Agreement. Hence, Award **32523** does nothing but violence to the resolution of any contracting out of work dispute and the fundamental purpose for which Rule 2 was negotiated.

The Majority further erred when it accepted the Carrier's ***belated*** excuses for contracting the subject work as negating the Organization's accusation of Carrier bad faith. Again, the requirement to notify/confer is well established in the above-cited long line of on-property awards and upheld in the most recent on-property award prior hereto, Award **31867**, which held:

> "The language contained in Rule 2 of the Agreement is clear and unambiguous with respect to the contracting out of work. In pertinent part, Rule 2 states that in circumstances under which the Carrier intends to contract out work it must 'confer with the General Chairman and reach an understanding setting forth the conditions under which the work will be performed.' *** Based on the undisputed facts **concerning the Carrier's failure to provide timely good faith notice, this claim must be sustained**, without expressing or implying any opinion concerning its underlying merits."

Although Award 31867 was rendered after the parties argued this case, it was copied to the Majority under date of March 24, 1997, nearly a year to the date when this erroneous award was rendered. The important point, which the Majority in its headlong rush to deny a valid claim missed, was that ***any*** "reason", valid or otherwise, should have been discussed in conference with the General Chairman in good faith ***before*** the contracting transaction. Rule 2 expressly requires this. To proffer "reasons" *after the fact* is meaningless (see on-property Award **30790**). Where, as here, the Majority gives such "reasons" credence is liken to approval of

putting the cart before the horse. Simply stated, Award 32523 is ***poorly reasoned*** and **worthless**.

However, given the great number of disputes decided in the aforementioned long line of precedent on this property, **ALL** of which found "notice/conference" violations, the Carrier's actions in this case were a deliberate evasion of its ***known*** contractual obligations. Such flagrant, repeated violations inescapably evidence **BAD FAITH** and insofar as the Majority's decision ignored the fundamental prerequisite of good faith, it is **PALPABLY ERRONEOUS**.

In any event, the Majority plainly chose to credit the Carrier's belated assertions of special equipment and skills rather than the plethora of exceedingly detailed statements from forty (40) long-time employes who performed this particular work hundreds of times, ***not occasionally***, but whenever required by the Carrier as an integral part of road crossing TRACK MAINTENANCE. The Carrier presented no evidence of any attempt to rent whatever equipment was necessary (as it had many times in the past) for operation by its Maintenance of Way forces and identified no special skill which its forces lacked. Because the record evinces that the Carrier's Maintenance of Way forces have customarily paved hundreds of road crossings throughout its system, giving credence to the Carrier's belated bad-faith equipment and unspecified skills contentions, renders Award 32523 an absurdity.

In view of the foregoing, it is obvious that the findings of the Majority are misguided, flawed and of no value.

Respectfully submitted,

Roy C. Robinson
Labor Member