

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30537  
Docket No. MW-30615  
94-3-92-3-392

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

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

STATEMENT OF CLAIM:

"Claim in behalf of W. G. Devlin and 6 others account outside contractor paved crossings on May 31 and June 21 and 26, 1991."

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 Claim is closely similar to that reviewed in Third Division Award 30540. The Board here reaches the same conclusion as in that Award.

AWARD

Claim denied.

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Award No. 30537  
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**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  
AWARDS 30521, 30537, 30538, 30539, 30541,  
30542 and 30544, DOCKETS MW-29746,  
MW-30615, MW-30632, MW-30692,  
MW-30748, MW-30788 and MW-30929  
(Referee Marx)

In these awards, the Majority cited its palpably erroneous reasoning elaborated within Award 30540 as alleged justification to deny the instant claims. In view of the errors discussed and cited in the Labor Member's Dissent to Award 30540, it is obvious that the findings of the Majority in these awards 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 BMW 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."

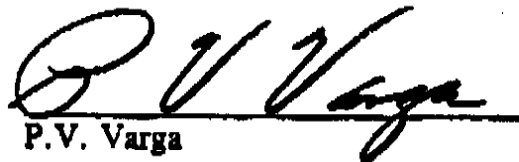
The majority made a basic finding in applying the factual record to the agreement, i.e., the Organization can lay claim to cold patch or black top work but it cannot lay claim to "hot asphalt" work.

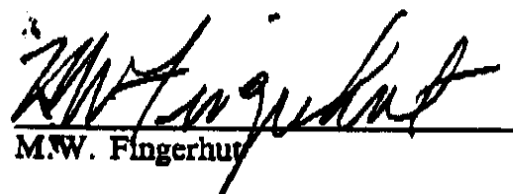
The second key element in these cases, all but ignored by the dissent, is the fact that notice of contracting was given to the Organization. Unlike the cases leading to Awards 10-13 of SBA 1016, the Carrier in the instant paving cases gave notice and met and discussed the issues with BMW representatives.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

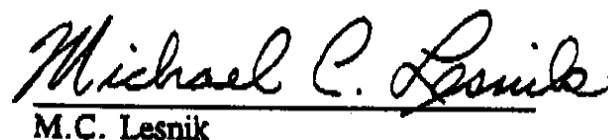
and review of leasing options. These actions met the Carrier's obligations under the Scope.

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 Employees 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 Employees, 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 employees. If Maintenance of Way employees 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 employees. 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 employees 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 employees. For the Carrier Members' edification, the quotation of eight (8) employee 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.

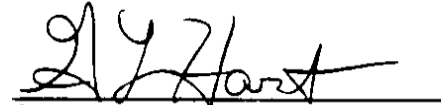
If there is one point in the Carrier Members' Response on which we can agree, it is that merely labeling an award "palpably erroneous" does not make it so. However, the Labor Member's Dissent did not merely label awards palpably erroneous, but explained



Labor Member's Response  
Award 30540  
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the reasons why the subject awards are palpably erroneous. Nothing in the Carrier Members' Response changes that fact.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "G. L. Hart", written over a horizontal line.

G. L. Hart  
Labor Member