Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30544
Docket No. MW-30929
94-3-92-3-748

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 (PavMaster) to perform grade crossing paving work on a crossing located in the Carrier's Conway, Pennsylvania Yard Facility on November 28, 1990 (System Docket MW-1837).

(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, Track Foreman K. Altman, Machine Operators J. Peterson and W. W. Sabot, Vehicle Operator R. B. Burdette and Trackman G. Lowmiller shall each be allowed eight (8) hours' pay at their respective pro rate 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 Claim is another in a series concerning the Carrier's action in contracting to outside firms the work of repair of public crossing over the Carrier's tracks. Unlike the other instances reviewed by the Board, the Carrier did not provide advance notice to the General Chairman of this work.

According to the Carrier, this was "emergency" work in the repair of a crossing where a derailment had occurred. In addition, the Carrier contended that the work had to be performed by November 30, a date on which asphalt plants close for the season. The work was performed on November 28.

The Organization argues that the derailment had occurred two months earlier, and temporary repair of the crossing was done at that time. On this basis, the Organization contends that notice could readily have been given.

The Board finds there is some doubt that the Carrier could rely on the "emergency" exception to the Scope Rule's notice requirement. Aside from this point, however, it is the Carrier's contention that this was a "hot asphalt" application. On this basis, the Board necessarily follows the finding in Third Division Award 30540. That Award made the determination that "hot asphalt" work could be contracted to outside forces. Thus, the failure to give advance notice is not a determinative factor 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.

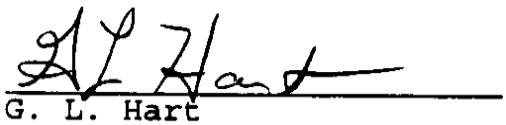
NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

LABOR MEMBER'S DISSENT
TO
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 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 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
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Respectfully submitted,

G. L. Hart
Labor Member

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