Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32505
Docket No. MW-31126
98-3-93-3-111

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 an outside concern (Poole Paving) to perform grade crossing paving work on the Boltin Street Road Crossing at Mile Post 14.1, 5th Street Road Crossing at Mile Post 14.2, June Street Road Crossing at Mile Post 14.3 and 4th and Terry Street Road Crossings at Mile Post 14.5 on the Xenia Secondary on July 22, 23, 24, 25, 26, 29, 30, 31, August 1 and 2, 1991 (System Docket MW-2351).

(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, the senior furloughed Columbus Division vehicle operator, track foreman, Class 2 Machine Operator and trackman shall each be allowed eighty (80) hours' pay at their respective 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.

Claimants in this dispute are the senior furloughed Track Foreman, the senior furloughed Class 2 Machine Operator, the senior furloughed Vehicle Operator and the senior furloughed Trackman, each of whom held seniority on the Columbus Division Seniority Rosters in their respective classes at the time of this dispute.

On May 16, 1991, Carrier apprized the General Chairman as follows:

> "As information, we intend to contract for the repaving of various road crossings on the Columbus Seniority District of the Indianapolis Division during the 1991 production season as indicated on Attachment 'A' hereto. The project will require approximately 145 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 Organization requested that Carrier furnish "specific" information regarding the points asserted in the foregoing notice. However Carrier demurred, maintaining

that the work in dispute was not scope covered and that the notice was nothing more than a formality.

Commencing July 22, 1991, Poole Paving (hereinafter referred to as "Poole") performed grade crossing paving work on the Boltin Street Road Crossing At M.P. 14.1, 5th Street Road Crossing at M.P. 14.2, June Street Road Crossing at M.P. 14.3 and 4th and Terry Street Road Crossings at M.P. 14.5 on the Xenia Secondary. Poole utilized one Vehicle Operator, one Foreman, one Machine Operator and one Laborer to perform the work, which included tearing out crossings, paving over the same crossings and hauling the resulting debris to another location on Carrier property. The work was performed with one dump truck and one backhoe. The Poole employees worked eight hours on each of the dates at issue.

On September 16, 1991 the Organization submitted the instant claim reading in pertinent part as follows:

> "The Claimants are claiming the work of the Vehicle Operator, 1 Foreman, 1 Class Two Machine Operator, and 1 Trackman listed above. The Claimants were ready, willing and qualified to perform the work performed by the contractor but were not permitted to perform the work because Conrail employed the Contractor to do the work.
>
> Therefore we are asking that each Claimant be paid 80 hours of pay at each of their respective rates of pay. That would be 8 hours pay for each of the claim dates.
>
> The equipment the Contractor used to perform this work could have been easily acquired but the Carrier did not even try.
>
> We are asking the claim be allowed as presented."

Carrier denied the claim premised upon the following:

> "The paving, tearing out of crossings and hauling of debris is not specifically identified by the Scope Rule as being reserved for BMWE covered employees. In addition, it has been the practice on the Columbus seniority district to contract the paving of highway crossings for as long as

anyone can remember. Your claim this work has or should accrue to the BMWE is without precedent.

Furthermore, G. Bent, in a letter dated May 16, 1991 to J. Cassese, Sr., put the Organization on notice that Conrail was intending to contract this work out, and justified the decision by stating that Conrail does not possess the necessary equipment, nor the skills to perform this work.

To successfully argue violation of the Scope Rule, you must have the specific language of the Rule or past practice on your side; you have neither.

Notwithstanding the reasons for denial given above, your claim is defective in that you have failed to specifically identify the Claimants; identifying employees who have supposedly been harmed financially by the Company's actions as simply senior furloughed vehicle operator, foreman, trackman and machine operator is insufficient."

The issues presented in this case have been contested between these Parties for more than a decade. Neither the Parties nor this Board are sailing in uncharted waters. On April 5, 1991, Special Board of Adjustment No. 1016 (Referee Blackwell) issued the seminal precedent decisions in Awards 9 and 10, dealing with claims essentially identical to the instant matter. When confronted in the cases decided in Awards 9 and 10 with virtually the same facts and issues presented in the instant matter, the SBA No. 1016 majority held:

Award No. 9

"The parties' submissions present comprehensive historical analysis of Board treatment of problems arising under the Maintenance of Way Scope Rule, along with a large body of prior authorities which have ruled on these problems with mixed results. Notwithstanding these mixed results, the awards submitted of record indicate the existence of a growing consensus favoring the proposition that the Carrier will usually be held accountable if the Carrier has violated the notice requirements in the Scope Rule of the MofWE Agreement, in circumstances where the disputed work has been performed, albeit not exclusively, by Maintenance of Way

Employees. One of the apparent justifications for this proposition is that the Agreement text, first paragraph of the Scope Rule, brings under the scope Rule '. . . work which, as of the effective date of this Agreement, was being performed by these Employees. . . .' This provision of the Scope Rule effectively negates the Carrier's contention that the exclusivity test, on a system-wide basis, must be met to bring work under the confronting Scope Rule."

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Award No. 10

". . . 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 MofWE 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 therefore be sustained."

Additionally, in Awards 11, 12, 82, 84, 85, 86, 87 and 88, SBA No. 1016 followed the reasoning enunciated in the above-quoted Awards and sustained all of those claims.

Despite repeated reargument by Carrier on the property of issues ostensibly determined with finality by SBA No. 1016 in Awards 9 and 10 and their progeny, the majority of that Board consistently reaffirmed its adherence to that line of precedent. See, *e.g.*, SBA No. 1016, Award 84 in which the majority of SBA No. 1016 exhaustively revisits all of the issues and arguments decided in its earlier holdings and reiterates in no uncertain terms:

". . . in line with this Board's precedent Award No. 10, the Board finds that the paving and repair of crossings in dispute in this case is covered by

the BMWE Scope Rule and that the Carrier provides no justifiable reason for contracting out said work. Therefore, the Board finds that the Carrier's actions in this matter violated the work jurisdiction provisions and the advance notice provisions of the Scope Rule in the Conrail BMWE Agreement. A sustaining award is thus in order. . . .

The Carrier's contention that the disputed work is not work that accrues to the BMWE is rejected on the basis of this Board's precedent Award No. 10, which expressly found 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.'*

The Board [SBA 1016] notes in addition that the herein disputed work is covered by the Scope Rule's specific terms and by the Scope Rule's provision that the Scope Rule covers work which was being performed by BMWE on the date of the Conrail-BMWE Agreement, i.e. February 1, 1982."

The points at issue appeared to have been resolved conclusively by SBA No. 1016. However, at that time the same issues had been submitted to the National Railroad Adjustment Board, Third Division. In denying a related claim which arose in 1990, the NRAB, with Referee Marx, found reason to distinguish that particular case on its facts from those decided previously by SBA No. 1016. See Third Division Award 30540 (H. Marx). Specifically, the Board in Award 30540 made determinative factual findings that Carrier had given the Organization the requisite notice and opportunity to confer before contracting out the claimed work and that the "additional responsibilities" of the Berge-Hopkins Letter of December 11, 1981 were not applicable on this Carrier's property (citing as authority SBA No. 1016, Award 66-A). Although expressly citing and ostensibly leaving undisturbed the line of precedent flowing from SBA No. 1016, Awards 9 and 10 on that basis, the majority in Award 30540 also offers some observations concerning the nature of the claimed paving work in that particular case, as follows:

> "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."

Upon careful consideration of the entire record in this matter, and ever mindful of the evidentiary parameters established for this Board by Circular No. 1, we find SBA Awards 9 and 10 dispositive of the instant claim. The distinguishing features which compelled a different conclusion in Third Division Award 30540 (Marx) are not demonstrated persuasively on the present record. Award 30540 is readily distinguishable because, *inter alia*, in our case Carrier did not give the Organization proper and timely Scope Rule notice.

In that connection, we note that the above-quoted seminal decisions of SBA No. 1016 in Awards 9 and 10 were dated April 5, 1991. More than five weeks later, by letter dated May 16, 1991, Carrier purported to notify the Organization of its "intent to contract" asphalt repaving work at various crossings on the Columbus Seniority District of the Indianapolis Subdivision, including the crossings on the Xenia Secondary referenced in this claim. However, persuasive record evidence shows that the specific work claimed had already been contracted out by Carrier before or simultaneously with the issuance of that May 16, 1991 letter to the BMWE General Chairman.

"Blind" copies of this same letter were received by the Carrier's Division General Manager on May 20, 1991 and by the Division Engineer; together with the "approved PA-9 No. 913154" (Requisition for outside services) and instructions to "maintain accurate records of the dates and number of contractor's employees used at each crossing." All this occurred less than a week after the May 16, 1991 letter was sent to the Organization and long before the conference to discuss the subcontracting. This was hardly good faith compliance by Carrier with the 15-day notice and opportunity to confer requirements of the Scope Rule.

Even if, *arguendo*, the "greater responsibilities of the Berge-Hopkins" are inapplicable, the facts of this record clearly demonstrate that when Carrier wrote the Organization to "advise" them that it "intended" to contract with Poole, that subcontract was already a *fait accompli*. Other issues joined on the property and argued

before this Board were persuasively determined by the decisions on SBA No. 1016, Awards 9, 10 et al, which we cannot find to be palpably erroneous or significantly distinguishable from the present case. Particularly since the decisions of SBA No. 1016 in Awards 9, 10 *et al* had been finalized in April 1991, Carrier's failure to comply in good faith with the Scope Rule in May-June 1991 requires a sustaining decision in the 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.