Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36022
Docket No. MW-34638
02-3-98-3-294

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Poole Paving) to perform crossing repair work (paving work and related clean-up work) on the grade crossing at Pearl Street (Mile Post 45.3) and Edgar Street (Mile Post 45.7) on the Toledo Branch on June 7, 1996 (System Docket MW-4615).

(2) The Carrier violated the Agreement when it assigned outside forces (Poole Paving) to perform crossing repair work (paving work and related clean-up work) on the grade crossings at Walnut Street in Muncie, Indiana on July 15, 1996; Hartman Road (Mile Post 161.5) on July 16, 1996; and Children's Home Road (Mile Post 142.5); Tangents Road (Mile Post 145.06) and State Route 128 (Mile Post 156.4) on July 19, 1996 on the Cleveland to Indianapolis Line (System Docket MW-4616).

(3) The Carrier violated the Agreement when it assigned outside forces (Poole Paving) to perform crossing repair work (paving work and related clean-up work) on the grade crossings at Mile Post 135.1, Dow Secondary on April 26, 1996; Mile Post 136.2, Indianapolis to St. Louis Line on April 31 and May 1, 1996; Mile Post 134.99, Dow Secondary on May 2 and 3, 1996; and Mile Post 140.6, Cleveland to Indianapolis Line on May 16, 1996 (System Docket MW-4617).

(4) The Carrier violated the Agreement when it assigned outside forces (Poole Paving) to perform crossing repair work (paving work and related clean-up work) on the grade crossings at Alex Road on October 4, 1996; Oxford State Road on October 21, 1996; and Tylersville Road on October 25, 1996 on the Columbus to Cincinnati Line (System Docket MW-4618).

(5) The Carrier violated the Agreement when it assigned outside forces (Poole Paving) to perform crossing repair work (paving work and related clean-up work) on various grade crossings on the Cleveland to Indianapolis Line on the Columbus and Southwest Seniority Districts on July 31 and August 1, 21 and 22, 1996 (System Docket MW-4619).

(6) The Carrier also violated the Agreement when it did not give the General Chairman a proper good-faith advance written notice of its intention to contract out the work described in Parts (1) through (5) above.

(7) As a consequence of the violations referred to in Parts (1) and/or (6) above, the two senior furloughed vehicle operators, two senior furloughed Class 2 Machine Operators, one senior furloughed foreman and one senior furloughed trackman on the Columbus Seniority District shall each be allowed the appropriate straight time rate of pay for an equal proportionate share of the total number of man-hours expended by the outside forces performing the work described in Part (1) hereof.

(8) As a consequence of the violations referred to in Parts (2) and/or (6) above, the two senior furloughed vehicle operators, two senior furloughed Class 2 Machine Operators, one senior furloughed foreman and one senior furloughed trackman on the Columbus and Southwest Seniority Districts shall each be allowed thirty (30) hours pay at the applicable rate for the time consumed by the outside forces performing the work described in Part (2) hereof.

(9) As a consequence of the violations referred to in Parts (3) and/or (6) above, the two senior furloughed vehicle operators, two senior furloughed Class 2 Machine Operators, one senior furloughed foreman and one senior furloughed trackman on the Columbus and Southwest Seniority Districts shall each be allowed sixty (60) hours pay at the applicable rate for the time consumed by the outside forces performing the work described in Part (3) hereof.

(10) As a consequence of the violations referred to in Parts (4) and/or (6) above, the two senior furloughed vehicle operators, two senior furloughed Class 2 Machine Operators, one senior furloughed foreman and one senior furloughed trackman on the Columbus and Southwest Seniority Districts shall each be allowed thirty (30) hours pay at the applicable rate for the time consumed by the outside forces performing the work described in Part (4) hereof.

(11) As a consequence of the violations referred to in Parts (5) and/or (6) above, the two senior furloughed vehicle operators, two senior furloughed Class 2 Machine Operators, one senior furloughed foreman and one senior furloughed trackman on the Columbus and Southwest Seniority Districts shall each be allowed forty (40) hours pay at the applicable rate for the time consumed by the outside forces performing the work described in Part (5) hereof."

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.

The facts of the instant matter do not appear to be in dispute. On April 17, 1996, the Carrier sent a letter to the General Chairman regarding its intent to contract out crossing repaving work at various locations on the Indianapolis Division. The General Chairman received this letter on April 22, 1996. According to the Notice, the Carrier indicating that it was sending the notice "solely as information." Additionally, the Notice stated that the repaving work was not covered by the Scope of the Agreement. Finally, the Carrier claimed that it did not possess either the proper equipment or necessary skill to complete this work.

Pursuant to that Notice and subsequent discussions between the parties, the Carrier assigned an outside contractor (Poole Paving) to perform grade crossing repaving work on various road crossings located on the Cleveland to Indianapolis Line, Columbus to Cincinnati Line, and Columbus and Southwest Seniority Districts on April 26, 31, May 1, 2, 3, 16, June 7, July 15, 16, 19, 31, August 1, 21,22, October 4, 21 and 25, 1996.

In each of these instances, the outside contractor, Poole Paving used the equivalent of two vehicle operators, one foreman, two Class 2 operators, and one Trackman to perform the work of placing blacktopping materials over the rehabilitated road crossings and hauling away debris. The contractor's forces utilized equipment which consisted of a roller, dump truck, backhoe and hand tools to accomplish the work. It appears that Carrier forces performed all other aspects of the crossing rehabilitation work, including removal of the old crossing materials and reconstruction of the crossing (installation of ties, rails, etc.). The outside contractor typically utilized ten man-hours each on each of the dates in question. These facts do not appear to be in dispute.

The Organization takes the position that the Carrier violated the Agreement in this case. First, it claims that the Carrier did not provide proper notice to the General Chairman. Second, the Organization claims that the Carrier did not engage in good faith discussions regarding the contracting out of the work.

The subject work consisted of installation of various road crossings located on the Cleveland to Indianapolis Line, Columbus to Cincinnati Line and Southwest Seniority Districts between April 26 through October 25, 1996. According to the Organization, the Carrier had customarily assigned work of this nature to be performed by the Carrier's Maintenance of Way employees. The Organization further claims that this work is consistent with the Scope Rule. According to the Organization, the Carrier's

Maintenance of Way employees were fully qualified and capable of performing the designated work. The Organization contends that the Carrier made no attempt to rent or lease equipment for its BMWE forces to perform the subject work though it had an obligation to at least make a good faith attempt to do so. The work done by Poole Paving Company is within the jurisdiction of the Organization and therefore the Claimants should have completed such work. Because the Claimants were denied the right to complete the relevant work, the Organization argues that the Claimants should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. First, the Carrier contends that the Organization's claim is defective because it does not identify specific Claimants. Therefore, the Carrier is unable to identify an aggrieved party, which requires dismissal of the claim. Further, and perhaps more significantly, the Carrier contends that the work which was contracted out was that of hot asphalt paving which the Carrier asserts does not belong to BMWE-represented employees under either the express language of the Scope Rule or any binding past practice. According to the Carrier, controlling precedent involving these very same parties and identical issues has upheld the Carrier's position.

First, we note that we have rejected both parties' procedural defenses to the matter. Based on the record, we find that the Carrier did give proper notice to the Organization of the proposed contracting. As to the Carrier's contentions that no remedy can be awarded because the Claimants were not specifically named, we also reject this contention because we find that the Organization identified the relevant individuals with enough specificity to be able to later name those individuals in order to award them a remedy if need be.

Thus, we reach the substance of the "Scope" issue. Referee Gerald E. Wallin, in Special Board of Adjustment No. 1016, Award 150, framed the scope issue as follows:

> "In disputes of this kind, the threshold question for our analysis is that of scope coverage. There are generally two means of establishing scope coverage. The first is by citing language in the applicable scope rule that reserves the work in dispute to the Organization represented employees. The second method is required when the language of the scope rule is general. In that event, the Organization must shoulder the burden of proof to show that the employees it represents have customarily, traditionally

and historically performed the disputed work. It is well settled that exclusivity of past performance is not required in order to establish scope coverage vis-à-vis an outside contractor."

Thus, in the instant case, we must determine whether the work is scope covered. Preliminarily, we note that this is certainly not the first case that has addressed the instant issue. Again, we turn to Referee Wallin's synopsis in Special Board of Adjustment No. 1016, Award 150:

"The instant dispute is the latest in a long series of claims dealing with asphalt paving of rehabilitated grade crossings and associated clean up work. The decisions have gone both ways. Three of them have particularly good descriptions of the ten year history which eliminates the need for us to again attempt a restatement: See Third Division Award Nos. 30540 (Marx) and 32505 (Eischen) as well as Award 1 of Public Law Board 5938 (Malin).

For our purposes, the following brief summary is offered. Award 10 of this Special Board of Adjustment, issued in 1991 by Chairman Blackwell, found that the 'disputed work of paving (blacktop) and related clean up work at grade crossings . . .' was scope covered. Award 10 also found the Carrier to have violated the notice provisions of the Scope Rule. As the Addendum to Award 10 shows, those findings were upheld on reconsideration. It is noteworthy that Award 10 did not limit its findings only to the use of cold asphalt material; it drew no distinction between hot and cold asphalt mixes. Award 82 and several later awards of this Board adhered to the same findings regarding scope coverage.

In 1994, the Third Division denied a series of claims. The lead case, Award No. 30540, said 'There is no support, however, for the view that Maintenance of Way forces have been used for 'hot asphalt' with any frequency or regularity. This was a point stressed in the on-property handling of this dispute.*** The voluminous record provided by the parties does not offer persuasive evidence in contradiction of this statement.'

* * *

In February and March of 1998, Public Law Board 5938 and the Third Division, respectively, issued apparently divergent awards. Board No. 5938 wrote denial Award 1 that attempted to reconcile the prior awards. The Third Division, on the other hand, authored sustained Awards 32505 and 32508."

After a review of all the prior precedent discussed above, the Board finds that it would be futile to attempt to reconcile these decisions. Because of the variety of prior precedent, we have determined that we should look at the record that was developed by the parties during their handling of the matter on the property. After a review of the evidence, the Board finds that the Organization has been able to sustain its burden of proof in this matter. We note that the Organization provided approximately 88 statements from employees which indicated that they had worked on similar projects. While some of these statements only discussed the use of cold patch asphalt, a significant number specifically recounted the use of hot asphalt paving material. Further, these statements indicated that the work had been completed over a significant period of time. These statements were not sufficiently rebutted by the Carrier in the record produced on the property.

Based on these statements, we find that the Organization has established scope coverage in this matter. We cannot find that the work of paving road crossings is definitively encompassed within the plain language of the Scope Rule in which ". . . construction, repair and maintenance of . . . tracks . . . " was recognized as BMWE work. However, we do find that the evidence produced on the property by the Organization in this case shows that the Organization has been able to prove that its members have customarily performed both hot and cold asphalt paving at grade crossings.

Thus, we hold that the work performed in this matter was properly work within the scope of the Organization's members. Further, we cannot find that the Carrier has proven that the Organization's members were unable to complete the work or that the Carrier was unable to obtain the necessary equipment to complete the work.

In the instant case, we find that it appears that the work involved in this matter rightly belongs to the Organization. Further, we find that the Claimants could have operated the equipment used by the contractor, though there was not sufficient effort

made by the Carrier to obtain this equipment. Based on these conclusions, we find that the disputed work was contracted in violation of the parties' Agreement.

Thus, having determined that the Carrier violated the Agreement, we find that the relevant employees should be made whole for the lost work opportunities.

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 21st day of May, 2002.

Carrier Members' Dissent
to Awards 36022, 36023 (MW-34638, MW-34860)
(Referee Bierig)

Rather than restate all that has been raised by the parties in the protracted claim filing involving this matter, I would point the interested reader to Third Division Awards 30532-30543 (Marx), and all of the material attached thereto and PLB 5938 Award 1 (Malin) which ably confronted the contract provisions and the evidence presented by the parties.

Instead, the decision in these cases was not made upon the precedent that existed but on a recent decision that chose instead to ignore any and all precedent.

Although it was not quoted by the Majority, SBA 1016 Award 150 did note the following:

> "It is well settled that each case must be decided upon its unique evidentiary record, which is developed by the parties during their handling of the matter on the property. With the passage of time, different people become involved in that development and investigative techniques and expertise improve. It is entirely likely, therefore, that evidentiary records will vary case by case. Indeed, a careful reading of the prior awards suggest strongly that the submissions that confronted the neutrals, all of whom had substantial railroad arbitration experience, varied considerably from those of the previous cases. It is for this reason that contentions based on so-called prior precedent must be considered with extreme caution."

To say that, over the years, the parties have gotten better at making their arguments and supporting their positions is one that should be expected. The records provided in the Third Division dockets and in PLB 5938 were much more extensive than their predecessors. That such occurs is not a rational basis on which to ignore prior precedent. To ignore precedent is to force the parties, in each and every case, to "reinvent the wheel." Arbitration, particularly in this industry, relies upon precedent in order to winnow out the repeated manifestation of the same issue that has previously been decided. In these cases

the Majority has simply ignored its responsibility and has concluded that, "...it would be futile to attempt to reconcile these decisions."

In doing so it ignores the precedent relied upon by both parties. It also puts the arbitration of disputes in this industry in jeopardy of crashing under its own weight. After more than 60 years of settling disputes of varying kinds and descriptions, it is now the fashion that precedent, even if relied upon in the progression of a claim, doesn't matter.

The other point upon which the Majority finds "scope coverage" is in the "approximately 88 statement from employees which indicated that they had worked on similar projects" (page 7 of Award). These statements, dating from the 1960's are the same statements that were submitted as evidence in the early SBA 1016 cases, in the series of Third Division Awards and in PLB 5938 Award 1. In Award 30540, those statements were given their due-i.e. not relied upon (there is a flurry in the Organization's Dissent and in the Carrier Members' response). In PLB 5938 Award 1 we find the following:

> "We have examined with considerable care the more than 100 employee statements that the Organization submitted to demonstrate that employees routinely performed hot asphalt paving. Most of the statements were of very limited probative value because they referred simply to paving in general and some of those specifically mentioned cold asphalt work or pot hole patching. Some statements did refer specifically to hot asphalt work performed by employees. However, many of those referred to work performed in the 1970s, and a few in the 1960s. Such statements could not establish that the employees were performing the work as of the effective date of the 1982 Agreement. A few statements did refer to hot asphalt work performed in the early 1980s, but a number of others indicated that Carrier began contracting out such work in 1979. In light of this record, we did not establish that the employees regularly performed hot asphalt paving is palpably wrong."

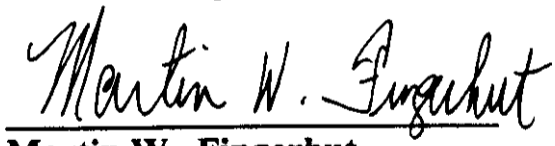
The Majority here then concludes that "these statements were not sufficiently rebutted by the Carrier..." Obviously, to have pointed out that such

material had been previously been found wanting, would be to accept some degree of precedent, something this Majority has chosen to ignore.

Finally, instead of identifying specific Claimants, the Organization has only identified the aggrieved individuals as the senior furloughed foreman, machine operator, vehicle operators and/or trackman on the Columbus or Southwest Seniority Districts during the May-October 1996 period. Such action in and of itself should have warranted the conclusion that the Organization could not identify any harmed employee. Now it is its burden to do so.

We strongly Dissent.

Paul V. Varga



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