Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36023
Docket No. MW-34860
02-3-98-3-569

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 Agreement was violated when the Carrier assigned outside forces (Poole Paving) to perform paving and clean-up work on the Columbus Seniority District at North Tower Road, Buckeye Yard on October 26, 1996; Mile Post 113.9 at East Central Avenue on October 28, 1996; Mile Post 243.3 at Demmick Road on October 30, 1996; Mosteller Road on November 8, 1996, and Sharon Road on December 4, 1996 (System Docket MW-4701).

(2) As a consequence of the violations referred to in Part (1) above, two (2) senior furloughed vehicle operators, two (2) senior furloughed Class 2 Machine operators, one (1) senior furloughed foreman one (1) senior furloughed trackman from the Columbus Seniority District shall each be allowed fifty (50) 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.

Other than the specific dates involved and that no paving was performed at Demmick Road and Mosteller Road, the issues and contentions of the parties are the same as those considered and disposed of in Third Division Award 36022 and are equally applicable herein.

AWARD

Claim sustained in accordance with the Findings.

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."**

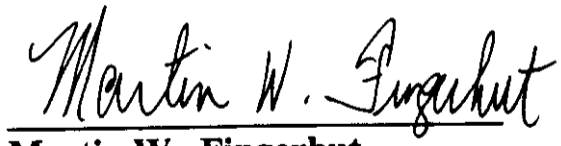
The Majority here then concludes that "these statements were not sufficiently rebutted by the Carrier..." Obviously, to have pointed out that such

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

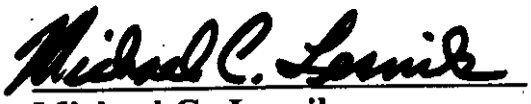
Finally, instead of identifying specific Claimants, the Organization has only identified the aggrieved individuals as the senior furloughed foreman, machine operator, vehicle operators and/or trackman on the Columbus or Southwest Seniority Districts during the May-October 1996 period. Such action in 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



Martin W. Fingerhut



Michael C. Lesnik