PUBLIC LAW BOARD NO. 6508

Award Nos. 1-8
Case Nos. 1-8

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

CSX Transportation, Inc.

BACKGROUND:

The Carrier is a common carrier that provides interstate transportation through a substantial railroad system in many states in the eastern United States. The Organization represents certain maintenance of way employees employed by the Carrier. The parties entered into a collective bargaining agreement (the "System Agreement") effective June 1, 1999. The System Agreement replaced separate collective bargaining agreements that had applied to the Carrier and other railroads that the Carrier had acquired over a period of time and to the bargaining units that had existed at the Carrier and at such other railroads.

After June 1, 1999, a number of disputes developed between the parties concerning the Carrier's decision to contract out certain work. The United States District Court for the Middle District of Florida, Jacksonville Division, issued a temporary restraining order and preliminary injunction on March 24, 2000 and found the disputes to be minor disputes within the meaning of the Railway Labor Act. The Court barred the Organization from striking the Carrier over the disputed issues and indicated that

the mandatory arbitration procedures of the Railway Labor Act provided an appropriate mechanism to resolve the disputes between the parties. (Consolidated Cases 3:00-cv-237-J-21A and 3:00-cv-264-21B (Nimmons, U.S.D.J.).) On March 7, 2001, the United District Court issued an Order and Injunction that directed the parties to proceed to arbitration pursuant to the Railway Labor Act and continued the injunction until the completion of the arbitration proceeding. (Consolidated Cases 3:00-cv-237-J-21HTS and 3:00-cv-264-21HTS (Nimmons, U.S.D.J.).)

The parties entered into an Agreement, dated April 29, 2002, pursuant to Section 3, Second of the Railway Labor Act, as amended, to establish the Public Law Board to resolve eight consolidated cases. The National Mediation Board subsequently created Public Law Board No. 6508 as reflected in certain correspondence, dated May 28, 2002. The Undersigned was named to be the Neutral Member of the Public Law Board. A hearing was held at the offices of the National Mediation Board in Washington, District of Columbia, on August 19, 2002 at which time the representatives of the parties appeared. All concerned were afforded a full opportunity to offer evidence and argument and to examine and cross-examine witnesses consistent with the Agreement that created the Public Law Board. The parties waived any oath that may apply to the Neutral Member of the Public Law Board. Representatives of the parties subsequently met with the members of the Public Law Board on October 16, 2002 in Manhattan, New York and on November 3, 2002 in Flushing, New York to discuss

certain aspects of the dispute. The parties failed to resolve the dispute, which therefore required the present final and binding Findings, Opinion, and Award.

STATEMENT OF CLAIMS:

Case No. 1

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned outside forces (Altair Construction Company) to perform Maintenance of Way work (concrete and related repair work) at Bridge Mile Post 169.71 at the Collinwood Yard in Cleveland, Ohio beginning on October 11 and continuing through November 17, 1999, instead of Messrs. K. G. Champa, K. Watts, R. H. Zinni and J. A. D'Orazio [Carrier's File 12(00-0123) CSX].

2. As a consequence of the violation referred to in Part (1) above, Claimants K. G. Champa, K. Watts, R. H. Zinni and J. A. D'Orazio shall now each be compensated for one hundred twenty-eight (128) hours' pay at the B&B mechanic's straight time rate of pay.

Case No. 2

1. The Carrier violated the Agreement when it assigned outside forces (Scordos Company) to perform Maintenance of Way work (painting and related work) at Bridge Mile Posts BR170.21 and BR169.61 at the Collinwood Yard in Cleveland, Ohio on September 11, 12, 13, 14, 15, 16 and 17, 1999, instead of Messrs. J. D'Orazio, S. J. LaCavera, P. S. Shea, G. Pongonis and R. Sheridan [Carrier's File 12(00-0120) CSX].

2. As a consequence of the violation referred to in Part (1) above, Claimant J. D'Orazio shall now be compensated for fifty-six (56) hours' pay at the B&B foreman's time and one-half rate of pay and Claimants S. J. LaCavera, P. S. Shea, G. Pongonis and R. Sheridan shall now each be compensated for fifty-six (56) hours' pay at their respective B&B mechanic's time and one-half rate of pay.

Case No. 3

1. The Carrier violated the Agreement when it assigned outside forces (Krusoe Sign Company) to perform Maintenance of Way work (painting and related work) on the million gallon fuel tank in Collinwood Yard at Cleveland, Ohio on October 7, 8 and 11, 1999, instead of B&B Mechanics R. H. Zinni, F. Hoyt and K. Watts [Carrier's File 12(00-0122) CSX].

2. As a consequence of the violation referred to in Part (1) above, Claimants R. H. Zinni, F. Hoyt and K. Watts shall now each be compensated for twenty-four (24) hours' pay at their respective straight time rates of pay.

Case No. 4

1. The Carrier violated the Agreement when it assigned outside forces (Scordos Company) to perform Maintenance of Way work (painting and related work) at Bridge Mile Post BR171.12 at the Collinwood Yard in Cleveland, Ohio on September 18, 19, 21, 22, 23, 24, 25, 27, 28 and 29, 1999, instead of Messrs. J. D'Orazio, K. G. Champa, K. Watts, R. H. Zinni and F. Hoyt [Carrier's File 12(00-0121) CSX].

2. As a consequence of the violation referred to in Part (1) above, Claimant J. D'Orazio shall now be compensated for ninety (90) hours' pay at the B&B foreman's time and one-half rate of pay, Claimants F. Hoyt and R. H. Zinni shall now each be compensated for ninety (90) hours' pay at the B&B mechanic's time and one-half rate of pay and Claimants K. G. Champa and K. Watts shall now be compensated for sixty-six (66) hours' pay at the B&B mechanic's time and one-half rate of pay.

The parties failed to submit formal statements of the claims for Case No. 5, Case No. 6, Case No. 7, and Case No. 8. The Organization summarized the Claims as follows in its consolidated submission for these cases:

Case No. 5 - concerns the contracting out of maintenance and repair work on the East 200th Street bridge (Mile Post 171.87) at Collinwood Yard on the Cleveland Seniority District during November and December of 1999. The work involved removing deteriorating concrete, installing reinforcing bars and new steel beams and then pouring new concrete to repair the existing wing walls, side walls and center pier and build new ballast deck curbs.

Case No. 6 - concerns track dismantling and construction work at the west end of Blacks Run Yard (Mile Post PLE 22.1 to Mile Post 22.4) on the Three Rivers West Seniority District during April through September of 2000. The work involved dismantling existing tracks, grading the roadbed and constructing two switches and approximately 3,100 feet of new track. In this case, CSXT compounded its violation of the Scope rule by contracting out the work in question without providing advance written notice to General Chairman Geller pursuant to Article IV of the May 17, 1968 National Agreement.

Case No. 7 - concerns the contracting out of maintenance work on the westbound Yardmaster's Tower (Mile Post QD 173) at Collinwood Yard on the Cleveland Seniority District on October 24 and 25, 2000. The Work involved touch-up painting on the Yardmaster's tower building. . . . CSXT compounded its violation of the Scope Rule by contracting out the work in Case No. 7 without providing advance written notice to General Chairman Geller pursuant to Article IV of the May 17, 1968 National Agreement.

Case No. 8 - concerns the installation of a drainage system at the west end of the diesel terminal at Collinwood Yard on the Cleveland Seniority District during November of 2000. The work involved digging a trench along the track leading to the Locomotive Shop and installing perforated drain pipe and catch basins.

PERTINENT PROVISIONS

Agreement between CSX Transportation Inc. and
Its Maintenance of Way Employees Represented by the
Brotherhood of Maintenance of Way Employes
Effective June 1, 1999

SCOPE

[Paragraph 1] These rules shall be the agreement between CSX Transportation, Inc., and its employees of the classifications herein set forth represented by the Brotherhood of Maintenance of Way Employes, engaged in work recognized as Maintenance of Way work, such as inspection, construction, dismantling, demolition, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences, road crossings,

and roadbed, 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.

[Paragraph 2] The following work is reserved to BMWE members: all work in connection with the construction, maintenance, repair, inspection or dismantling of tracks, bridges, buildings, and other structures or facilities used in the operation of the carrier in the performance of common carrier service on property owned by the carrier. This work will include rail, guard rail, switch stand, switch point, frog, tie, plate, spike, anchor, joint, gauge rod, derail and bolt installation and removal,; erection and maintenance of signs, such as mile posts,speed restriction signs, resume speed signs, crossing and station signs, warning signs, and signs attached to buildings or other structures (except billboards); construction of track panels; welding, grinding, burning, and cutting; ballast unloading, regulating, equalizing, and stabilizing; track and switch undercutting; cribbing between ties; track surfacing and lining; snow removal (track structures and right of way); road crossing installation and renewal work; asphalting of road crossings (unless required by outside agencies), culvert installation, repairs, cleaning and removal; yard cleaning; security and ornamental fences; distribution and collection of new and used track, bridge and building material; operate machines, equipment, and vehicles; transporting maintenance of way employees; mowing; installation, maintenance, and repairs of turntables, platforms, walkways, and handrails; head wall and retaining wall erection; cleaning, sandblasting, and painting of machines, equipment, bridges, turntables, platforms, walkways, handrails, buildings, and other structures or facilities; rough and finish carpentry work; concrete and masonry work; grouting plumbing, and drainage system installation, maintenance, and repair work; fuel and water service work; roof installation, repairs, and removal; drawbridge operation and maintenance and any other work customarily or traditionally performed by BMWE represented employees. In the application of this Rule, it is understood that such provisions are not intended to infringe upon the work rights of another craft as established. It is also understood that this list is not exhaustive.

[Paragraph 3] It is agreed that in the application of this Scope that any work which is being performed on the property of any former component railroad by employees other than employees covered by this Agreement may continue to be performed by such other employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement; and it is also understood that work not covered by this Agreement which is being performed on the property of any former component railroad by employees covered by this Agreement will not be removed from such employees at the locations at which

such work was performed by past practice or agreement on the effective date of this Agreement.

[Paragraph 4] In the event the carrier plans to contract out work within the scope of this Agreement, except in emergencies, the carrier shall notify the General Chairmen involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. "Emergencies" applies to fires, floods, heavy snow and like circumstances.

[Paragraph 5] If the General Chairmen, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and Organization Representatives shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

All National Contracting Agreements apply, see Appendix "M'

. . . .

RULE 1-SENIORITY CLASSES

The seniority classes and primary duties of each class are:

<u>B & B Department</u>

A. Inspector Roster:
. . . .
B. Bridge and Building Roster:
. . . .
C. Plumber Roster:
. . . .
D. Machine Operator Roster:
. . . .
E. Bridge Roster:
. . . .

<u>Track Department</u>

A. Inspector Roster:
. . . .
B. Track Roster:
. . . .
C. Machine Operator Rosters:
. . . .
D. Vehicle Operator Roster:
. . . .
E. Lubricator Maintainer Roster:

. . . .

F. Crossing Watchman Roster:

. . . .

Welding Department

A. Welding Roster:

. . . .

RULE 3-SELECTION OF POSITIONS

Section 1. Assignment to position

In the assignment of employees to positions under this Agreement, seniority shall govern. The word "seniority" as used in this Rule means, first, seniority in the class in which the assignment is to be made, and thereafter, in the lower classes, respectively, in the same group in the order in which they appear on the seniority district roster. If required, the awardee will be given equal and fair instruction and training up to a period of thirty (30) days depending on the position in order to become qualified for the position. Employees making application for or bidding advertised positions that do not possess seniority in the class will be given preference as follows:

. . . .

Section 2. Qualifications for positions when exercising seniority.

An employee exercising seniority will be permitted, on written request, or may be required, to give a reasonable, practical demonstration of his qualifications to perform the duties of the position. In the event no agreement occurs on the performance of an employee, he may request a committee to be formed of one (1) Union Representative and one (1) Company Representative to determine qualifications. If determination of the committee is not satisfactory to the employee he may follow the procedures under Rule 24 of this Agreement.

Section 3. Advertisement and Award

. . . .

Section 4. Filling Temporary vacancies

. . . .

Section 5. Failure to qualify-Advertised position

. . . .

Section 6. Application for former position vacated.

. . . .

RULE 4-SENIORITY

Section 1. Seniority date
(a) Except as provided in rule 3, Section 5, seniority begins at the time the employee's pay starts. If two (2) or more employees start to work on the same day, their seniority rank on the roster will be in alphabetical order. An employee assigned to a position of higher class than trackman will begin to earn seniority in such higher class and lower class on the same seniority roster in which he has not previously acquired seniority from the date first awarded an advertised position in such higher class. He will retain and accumulate seniority in the lower class from which assigned. An employee entering service in a class above that of trackman will acquire seniority in that class from the date assigned to an advertised position and will establish seniority as of the same date in all lower classes on the same seniority roster. An employee displacing a junior employee who was promoted in his absence in accordance with Rule 5(a) shall acquire the same seniority date as the employee displaced and shall rank immediately above such employee

. . . .

Section 2. Exercise of seniority.

(a) Except as otherwise provided, an employee may exercise seniority to a position for which he is qualified:

1. when his position is abolished;
2. when the senior employee displacing him physically assumes the duties of the position;

. . . .

Section 3. Return to service

An employee not in service will be subject to return to work from furlough in seniority order in any class to a fixed headquartered position in which he holds seniority not requiring a change in residence. If he fails to return to service within ten (10) days from date notified by certified mail to his last recorded address for a position or vacancy of thirty (30) days or more duration, he will forfeit seniority only in the district and class recalled to under this Agreement. Forfeiture of seniority under this paragraph will not apply when an employee furnishes satisfactory evidence to the officer signatory to notification that failure to respond within ten (10) days was due to conditions beyond his control. Copy of recall letter shall be furnished the designated union representative.

Section 4. Appointment to official or supervisory positions-Retention of seniority

. . . .

Section 5. Seniority Districts

The seniority rights of employees are confined to their respective seniority districts, as follows:

CSXT SENIORITY DISTRICTS

Former B & O
. . . .
Former B OCT

Former C & El
Former Conrail
. . . .
Former C & O (Chesapeake)
. . . .
Former C&O (Pere Marquette)
. . . .
Former Georgia Group (GA, A&WP, WR of A, AJT)

Former L & N
. . .
Former Monon
Former RF & P
Former Seaboard Coast Line
. . . .
Former Western Maryland
. . . .

Section 6. Seniority Rosters

(a) A roster, revised as of January 1 and to be posted by March 1, showing the employee's seniority date in the appropriate seniority district will be posted within such seniority district at headquarter points where employees are required to work. Copies of all rosters will be furnished the General Chairmen and the involved local representative(s).

(b) Employees shall have ninety (90) days from the date the roster is posted to file a protest, in writing, with the designated officer of the Company, with copy furnished to the General Chairman and local representative. Employees off duty on leave of absence, furlough, sickness, disability, jury duty or suspension at the time the roster is posted will have not less than ninety (90) days from the date they return to duty to enter protest.

(c) No change on seniority rosters will be made by the Company without conference and agreement with the involved union representative.

APPENDIX "M"
SUBCONTRACTING-NATIONAL AGREEMENTS 1968, 1981, 1996

ARTICLE XV - SUBCONTRACTING

Section 1

The amount of subcontracting on a carrier, measured by the ratio of adjusted engineering department purchased services (such services reduced by costs not related to contracting) to the total engineering department budget for the five-year period 1992-1996, will not be increased without employee protective consequences. In the event that subcontracting increases beyond that level, any employee covered by this Agreement who is furloughed as a direct result of such increased subcontracting shall be provided New York Dock level protection for a dismissed employee, subject to the responsibilities associated with such protection.

Section 2

Existing rules concerning contracting out applicable to employees covered by this Agreement will remain in full effect.

APPENDIX "U"
MAY 23, 1999 STRONGSVILLE AGREEMENT AND SIDE LETTERS

MEMORANDUM OF AGREEMENT

. . . .

Whereas, all issues relating to selection of forces, applicable collective bargaining agreements, seniority district organization, shop consolidations, subcontracting, Shared Asset Areas and disposition of the Conrail Supplemental Unemployment Benefit Plan have been resolved in the January 14, 1999 Arbitrated Implementing Agreement pursuant to New York Dock made with CSXT, NSR and CR through arbitration pursuant to Section 4 of the New York Dock labor protective conditions, and;

Whereas, the parties to this Memorandum of Agreement have, after reviewing the terms of said Arbitrated Implementing Agreement, wish to make voluntary adjustment to certain specific terms of said Arbitrated Implementing Agreement as it relates to CSXT;

IT IS THEREFORE AGREED:

. . . .

Section 2 - The parties have agreed to a new single collective bargaining agreement with BMWE which will establish a consolidated workforce on the new expanded CSXT System . . . . By its terms, the new CSXT System BMWE Agreement will be effective on "split date" which is expected to be June 1, 1999.

Section 3 - The employees on allocated CRC lines to be operated by CSXT will participate in the CSXT System Production Gang Agreement . . . .

Section 4. a. - Twelve (12) new "Service Lane Work Territories" ("SLWTs") are hereby established for "floating; i.e. other than point headquartered" Track and Bridge and Facility positions failing into the category between System Production Gang work and basic point headquartered maintenance work; e.g., an AFE gang that would perform work over multiple seniority districts. Such gangs consisting of any number of employees may perform any work covered by the scope of the new Maintenance of Way Agreement and may be established effective on "split date". It is recognized that as these gangs are established a corresponding number of positions in floating district or other similar type gangs may be abolished. It is also understood that the establishment of SLWT gangs will not diminish the carrier's right to retain or establish seniority district floating gangs where warranted. On the other hand the establishment of SLWT gangs will not be used as a device to eliminate basic maintenance forces (See Side Letter). A copy of a map and a listing of seniority districts contemplated in each SLWT are attached (Attachments "E" and "F"). Employees holding seniority on a seniority district that is split between more than on SLWT will only be obligated for protective benefit eligibility, including but not limited to SUB, to protect SLWT work on one SLWT, whichever is nearest in proximity to the employee's place of residence.

. . . .

Section 4. g. - If the Carrier wishes to reduce the number of SLWTs below 8, agreement with the Organization will be required.

. . . .

Section 7 - In lieu of Article I, Section 1 (h) of the Arbitrated Implementing Agreement, the parties have agreed that three specifically identified projects on Conrail lines to be operated by CSXT may be completed with contractors, if necessary (See attached list of projects). Otherwise, the subcontracting provisions of the various collective bargaining agreements will govern any subcontracting that is proposed between the effective date of this agreement and "split date". Thereafter, the terms of the National Subcontracting Rule (May 17, 1968, as amended by subsequent national agreements) will govern subcontracting matters under the new CSXT System BMWE Agreement.

. . . .

Section 12 - To the extent this settlement agreement is inconsistent with any Agreement entered into previous to this Agreement, the provisions of this Agreement will prevail.

MAY 17, 1968 NATIONAL AGREEMENT

ARTICLE IV - CONTRACTING OUT

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement.

OCTOBER 17, 1986 NATIONAL AGREEMENT

ARTICLE VIII - PROCEDURES FOR HANDLING NOTICES RELATED TO SUBCONTRACTING

Notices related to subcontracting served pursuant to the Railway Labor Act, as amended, on individual carriers which are pending on the date of this Agreement and any such new notices served on individual carriers subsequent to the date of this Agreement shall be handled in accordance with the terms of the Railway Labor Act, as amended, subject to the procedures outlined below. Where the organization has served or serves such a notice, the carrier may continue to progress or serve proposals

pursuant to the provisions of the Railway Labor Act, as amended, for concurrent handling therewith that would achieve offsetting productivity improvements and/or cost savings.

(i) Such notices will not be progressed to mediation for a minimum of 90 calendar days following the date of initial conference on the notice(s) or the date of this Agreement whichever is later, so as to afford the parties an opportunity to reach an agreement in direct negotiations.

(ii) With respect to any such notice progressed to mediation, the parties will urge the National Mediation Board to conduct mediation for a minimum of 90 calendar days from the date such notice is docketed by the National Mediation Board.

(iii)(a) At any time after the National Mediation Board has advised the parties that it is considering a proffer of arbitration on any such notice, the National Carriers' Conference Committee, or a subcommittee thereof, shall meet with the President and appropriate officers of the organization, for the purpose of seeking to assist the parties in composing their differences. Unless otherwise agreed, an initial meeting shall be held within thirty days of receipt of such notification from the Board. Separate and/or joint meetings may be called with the responsible officials of the organization and the carrier.

(b) The authority and responsibility for handling such notices, and the position of the parties with respect to such notices will not be disturbed by this procedure and will remain vested in the responsible officials of the carrier and the organization.

(iv) At any time after 90 days from the date the parties first meet under the arrangements described in (iii) above if no agreement has been reached, the notices involves in that dispute may be submitted at the request of either party to an Advisory Fact-Finding Panel consisting of six (6) members, two (2) to be selected by the organization, two (2) to be selected by the carrier and two (2) public members to be selected by mutual agreement of the parties and appointed by the National Mediation Board. The appointment of the public members shall be made within (10) calendar days of the date of request. If the parties cannot agree upon the selection of the two (2) public members, the Mediation Board shall make such selection. The Advisory Fact Finding Panel shall investigate promptly the facts as to the dispute and make a written report to the parties, setting forth advisory recommendations for resolution of the dispute. Such report shall be issued within sixty (60) calendar days from the date of the appointment of the two (2) public members. The time limit for issuing the report may be extended by agreement between the organization and carrier members of the Panel. However, in the event the carrier and organization members are unable to

agree on an extension of time, the public members may extend the time limit on their own motion for one (1) additional thirty (30) calendar day period. The procedures and manner of investigation of the Advisory Fact-Finding Panel shall be established by the Panel.

(v) Following the issuance of the report of the Advisory Fact-Finding Panel, mediation will resume.

HOPKINS-BERGE DECEMBER 11, 1981 LETTER
(Chairman of National Railway Labor Conference to
President of Brotherhood of Maintenance of Way Employes)
(signed by Hopkins and Berge)

During negotiations leading to the December 11, 1981 National Agreement, the parties reviewed in detail existing practices with respect to contracting out of work and the prospects for further enhancing the productivity of the carriers' forces.

The carriers expressed the position in these discussions that the existing rule in the May 17, 1968 National Agreement, properly applied, adequately safeguarded work opportunities for their employees while preserving the carriers' right to contract out work in situations where warranted. The organization, however, believed it necessary to restrict such carriers' rights because of its concerns that work within the scope of the applicable schedule agreement is contracted out unnecessarily.

Conversely, during our discussions of the carriers' proposals, you indicated a willingness to continue to explore ways and means of achieving a more efficient and economical utilization of the work force.

The parties believe that there are opportunities available to reduce the problems now arising over contracting of work. As a first step, it is agreed that a Labor-Management Committee will be established. The Committee shall consist of six members to be appointed within thirty days of the date of the December 11, 1981 National Agreement. Three members shall be appointed by the Brotherhood of Maintenance of Way Employes and three members by the National Carriers' Conference Committee. The members of the Committee will be permitted to call upon other parties to participate in meetings or otherwise assist at any time.

The initial meeting of the Committee shall occur within sixty days of the date of the December 11, 1981 National Agreement. At that meeting, the parties will establish a regular meeting schedule so as to ensure that meetings will be held on a periodic basis.

The Committee shall retain authority to continue discussions

on these subjects for the purpose of developing mutually acceptable recommendations that would permit greater work opportunities for maintenance of way employees as well as improve the carriers' productivity by providing more flexibility in the utilization of such employees.

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor.

Notwithstanding any other provision of the December 11, 1981 National Agreement, the parties shall be free to serve notices concerning the matters herein at any time after January 1, 1984. However, such notices shall not become effective before July 1, 1984.

Please indicate your concurrence by affixing your signature in the space provided below.

Very truly yours,

/s/
Charles I. Hopkins, Jr.

I concur:

/s/
[O.M. Berge]

CONTENTIONS OF THE ORGANIZATION

The Organization asserts that the Scope Rule of the June 1, 1999 Agreement reserves the disputed work to members of the Organization. The Organization maintains that the Scope Rule contains clear and unambiguous language that superseded the 13 collective bargaining agreements that existed before June 1, 1999. It is the position of the Organization that the prior

collective bargaining agreements reserved certain work to members of the Organization, but also contained many exceptions that permitted the respective carriers to contract out work. The Organization cites the following examples: Rule 1 (Scope) and Rule 2 (Exceptions to Rule 1) of the Louisville and Nashville Railroad Company agreement effective October 1, 1993; Rule 83 (Contract Work) of the Chesapeake and Ohio Railroad Company agreement effective July 1, 1955; and the Scope provision of the Baltimore and Ohio Railroad Company agreement effective October 1, 1968.

The Organization comments that the agreements that involved the Carrier (CSXT) before June 1, 1999 contained provisions that required the Carrier to notify and confer with the General Chairman when the Carrier intended to contract out scope work. The Organization explains that some of the former agreements contained local notice and conference rules--such as the October 24, 1957 letter of agreement for the Chesapeake and Ohio Railroad Company and the June 13, 1978 letter of agreement for the Baltimore and Ohio Railroad Company--and other agreements adopted the notice and conference provisions of Article IV of the May 17, 1968 National Agreement. The Organization observes that the notice and conference provisions of Article IV promoted good-faith discussions between the parties to limit disputes and did not affect the contracting out rights contained in the local agreements. The Organization discerns that Article IV served as a no-strike clause because the Organization had agreed to enforce

the work reservation rules contained in the local agreements by processing claims. The Organization specifies that the Letter of Agreement, dated December 11, 1981, in the National Agreement also addressed contracting out. The Organization therefore finds that the Carrier did not have a monolithic, longstanding right to contract out scope-covered work.

The Organization recounts that the local scope and work reservation rules and the local and national notice and conference rules on the various predecessor properties led to hundreds of claims and many arbitrations. The Organization relates that the carriers often failed to comply with the notice and conference rules and therefore lost the arbitrations. The Organization points out that the notice and conference rules did not authorize the carriers to contract out so the disputes then required the Organization to prove that the contract language or a past practice reserved the work for the employees represented by the Organization. If the Organization met such a burden, the Organization chronicles that the burden of proof shifted to the particular carrier to prove that an exception permitted the contracting out. The Organization highlights Award 35377 (2001) (Wallin, Arb.) as containing a summary of the relevant principles.

The Organization pinpoints that the acquisition of the Consolidated Rail Corporation (Conrail) by the Carrier (CSXT) and by the Norfolk Southern Railway led to negotiations for an implementing agreement to address various difficult issues: a

single agreement; larger regional operating territories for mobile gangs; contracting out; and work rules that affected productivity. The Organization describes that the difficult issues led the parties to use the 1996 Agreement between the Organization and the Indiana Harbor Belt Railroad (a Conrail subsidiary) as a model for the parties. The Organization clarifies that the parties agreed that the existing national rules would prevail over the Indiana Harbor Belt Railroad Agreement's local rules. The Organization verifies that the Scope Rule of the June 1, 1999 Agreement--like the Scope Rule in the Indiana Belt Harbor Railroad Agreement--explicitly reserved specific work to the employees represented by the Organization and eliminated the contracting out exceptions that had existed in the former agreements. In the context of the bargaining history between the parties, the Organization attributes great significance to the absence of such contracting out exceptions and treats the absence of the exceptions as proof that the parties had eliminated such exceptions from being used to permit contracting out in the future. The Organization elaborates that in exchange the Carrier (CSXT) received the right to work mobile Bridge and Building crews and Track crews over 12 large territories, which were designated as Service Lanes, in 23 states.

As an example, the Organization argues that the Carrier, in a letter dated August 3, 1999, notified General Chairman Geller about the Carrier's intent to contract out certain work despite

the Scope Rule contained in the June 1, 1999 Agreement and the absence from the June 1, 1999 Agreement of the exceptions for contracting out that the predecessor agreements had contained. The Organization attacks the Carrier for relying on such nonexistent exceptions to justify the contracting out. The Organization mentions that on August 9, 1999 General Chairman Geller received the August 3, 1999 notice and in a letter dated August 10, 1999 objected to the Carrier's proposed action and requested a meeting with the Carrier to discuss the matter. The Organization confirms that the parties discussed the matter on August 20, 1999, however, the Carrier decided to contract out the disputed work. The Organization perceives that the "BC" [blind copy] entry at the end of the August 3, 1999 notice, which instructed certain individuals not to begin the contracting out work before August 18, 1999, demonstrated that the Carrier never intended to have good-faith discussions about the matter. The Organization stresses that the actual conference occurred on August 20, 1999, two days after the Carrier's Labor Relations Officer had authorized the Engineering Department and the Contract Coordinator to begin the disputed work. The Organization reveals that the Carrier ultimately assigned the work to a contractor (Altair Construction Company) on October 11, 1999 although the Carrier had failed to try to assign such disputed work to the Carrier's employees, had failed to assign the Carrier's equipment or lease equipment for performing the disputed work during the period since the issuance of the August

3, 1999 notice even though the Carrier had justified the lack of a crane or a boom truck for contracting out the disputed work. The Organization adds that the contractor subsequently did not use a crane or a boom truck to perform the disputed work and the Carrier had qualified employees in the bargaining unit available to perform the disputed work. The Organization notes that the Organization timely and properly processed this Claim.

The Organization reiterates that the Scope Rule clearly and unambiguously reserves the disputed work for the Organization's members, who also had customarily, traditionally, and historically performed such work. The Organization proclaims that the parties negotiated certain exceptions to the Scope Rule and did not include contracting out as such an exception. As a result, the Organization urges that a plain reading of the Scope Rule precludes the Carrier from contracting out the disputed work and eliminates the need to consider extrinsic evidence such as objective and/or subjective bargaining history to decide the Claim even though the bargaining history supports the Organization's position. In this regard the Organization emphasizes that the parties knew how to include exceptions for contracting out in other agreements so the absence of such an exception from the June 1, 1999 Agreement proves that the parties did not intend for the June 1, 1999 Agreement to permit the Carrier to contract out the disputed work. The Organization therefore rejects the Carrier's defense that the Carrier lacked the necessary equipment or available qualified employees to

perform the disputed work and detects that in any event the Carrier could have rented or leaded the necessary equipment or made employees available to perform the disputed work as required by the December 11, 1981 Letter of Agreement, in which the parties had agreed to reduce contracting out and increase the use of employees represented by the Organization. The Organization refers to certain arbitral precedent to support the Organization's position concerning the 1981 Letter of Agreement.

The Organization disagrees with the Carrier's position that after the Carrier notifies and confers with a General Chairman the Carrier has the unilateral right to contract out any work. The Organization considers such an argument to be contrary to the purpose of the notice and conference provisions and an effort by the Carrier to destroy two provisions of the Scope Rule. The Organization relies on Award 35337 (Third Division) (2001) (Wallin, Arb.) to prove that such an argument lacks merit since the creation of the notice provisions in the 1968 National Agreement. The Organization continues that the similar Scope Rule in the Indiana Harbor Belt Railroad Agreement led the Indiana Harbor Belt Railroad to concede in writing that the Indiana Harbor Belt Railroad could not contract out work covered by the Scope Rule merely by first serving notice and by conferring with a General Chairman. The Organization submits certain arbitral authority from the Third Division to prove that less restrictive provisions in the Conrail Scope Rule precluded Conrail from contracting out work after Conrail had followed the

notice and conference provisions in the Conrail Agreement.

The Organization details that the clear and unambiguous language of the Scope Rule supports the Organization's position by defining certain work--including the disputed work--as reserved to BMWE members. In the absence of such specificity, the Organization attests that the employees represented by the Organization still would have the right to perform the disputed work because the employees had customarily, traditionally, and historically performed the disputed work. The Organization affirms that the Carrier failed to disagree with the Organization's representation that the employees had historically performed the disputed work.

The Organization contends that the third paragraph of the Scope Rule constitutes a specific exception to the Scope Rule, however, the exception does not include the disputed work. The Organization interprets the third paragraph of the Scope Rule as a way to prevent jurisdictional disputes after the merger of the various railroads. AS the third paragraph of the Scope Rule omits outside contractors, the Organization reasons that arbitral precedent for construing language reflects that by expressing the exception concerning jurisdictional disputes the parties necessarily intended to exclude outside contractors from the exception.

In the alternative the Organization offers the bargaining history to prove that the prior Scope Rules for the various former railroads contained specific exceptions that permitted

certain contracting out. Thus the Organization submits that the parties knew how to draft such language when they intended to do so. The Organization certifies that the bargaining history between the parties for over twenty years linked contracting out to the use of mobile regional and system-wide production gangs and that the June 1, 1999 System Agreement finally resolved these issues.

The Organization alleges that the Carrier's argument that it lacked adequate equipment does not constitute a valid defense to the contractual violation because the Agreement, which omits an equipment exception, covers work rather than equipment according to certain arbitral precedent. The Organization repeats that the rules in the agreements before the Scope Rule in the June 1, 1999 Agreement contained exceptions for a lack of adequate equipment. The Organization dismisses, as erroneous and misleading, the Carrier's assertion that no boom truck or crane was available to enable the performance of certain disputed work and declares that the contractor did not use such equipment to perform the disputed work. Consistent with certain arbitral precedent, the Organization finds that the Carrier had a duty to make a good-faith effort to rent or lease such equipment, if necessary, to perform the disputed work as confirmed by the December 11, 1981 Letter of Agreement.

The Organization challenges the Carrier's assertion that qualified available employees did not exist to perform the disputed work. The Organization cautions that no specific

exceptions exist concerning a lack of employees and arbitral precedent indicates that a carrier's failure to maintain an adequate size workforce does not constitute an excuse for violating an agreement by assigning work to outside contractors. The Organization identifies that the rules in the agreements before the Scope Rule in the June 1, 1999 Agreement contained exceptions for a lack of available manpower whereas the Scope Rule in the June 1, 1999 Agreement omits such an exception. The Organization contests the Carrier's lack of adequate employees argument as vague because the record omits any specific evidence about special skills or special qualifications that the Carrier required to have the disputed work performed. Instead, the Organization portrays the employees represented by the Organization to have been qualified to perform the disputed work and to have been available to perform the disputed work even though the Carrier decided not to assign the disputed work to the employees of the Carrier. The Organization faults the Carrier for failing to make any effort to assign its employees to perform the disputed work as reflected by the Carrier's assignment of certain employees from Service Lanes to other locations and by failing to bulletin new positions to perform some of the disputed work. The Organization complains that the Carrier drastically reduced and depleted the size of the workforce. The Organization blames the Carrier for knowingly having an inadequate force systemwide and for violating the Scope Rule in the June 1, 1999 Agreement and the good-faith requirement of the December 11, 1981

Letter of Agreement. The Organization underscores that the Federal Railroad Administration found in July 1999 that the Carrier failed to employ sufficient employees to maintain the railroad operations and would have to hire 718 Maintenance of Way employees to be in compliance with the practice of other Class 1 railroads. As a result, the Organization condemns the Carrier for relying on a lack of manpower argument.

The Organization chastises the Carrier for arguing that the notice and conference provisions permitted the Carrier to contract out work regardless of the work reservation provision in the Scope Rule in the June 1, 1999 Agreement. The Organization regards the clear and unambiguous language of Article IV of the 1968 National Agreement as preserving the Organization's substantive right to claim work reserved for BMWE-represented employees. The Organization understands that the Scope Rule provides that all national contracting agreements apply such as the 1968 National Subcontracting Agreement. The Organization does not view the inclusion of the national subcontracting rules as creating a substantive right for the Carrier to subcontract scope-covered work because of the supremacy of the existing contractual rights on each property.

The Organization views the Carrier's position as causing absurd and nonsensical results by using one provision to destroy two other provisions of the Scope Rule in the June 1, 1999 Agreement. The Organization posits that the last sentence in the fifth paragraph on the Scope Rule in the June 1, 1999 Agreement

authorizes the Organization to "progress claims" and therefore recognizes that the Carrier's decision to contract out certain work may violate the Agreement even after the Carrier provided proper notice and participated in a conference. The Organization invokes the fundamental principle that construction of an ambiguous contract--assuming that such an ambiguity were to exist--should favor a reasonable interpretation rather than a meaningless interpretation. The Organization assesses that the Carrier's interpretation also would destroy the entire first and second paragraphs of the Scope Rule by leaving no work reserved for members of the Organization so long as the Carrier had complied with the notice and conference provisions of the fourth and fifth paragraphs of the Scope Rule. The Organization chastises the Carrier for attempting to create a substantive right to contract out work from the notice and conference provisions of the fourth and fifth paragraphs of the Scope Rule.

Consistent with certain past and more recent arbitral precedent, the Organization opposes any notion that the present dispute constitutes a case of first impression by indicating the length of time and the amount of precedent that exists about the May 17, 1968 National Agreement. The Organization recognizes that the Scope Rule in the Indiana Harbor Belt Railroad Agreement constituted the model for the present disputed Scope Rule and only allowed the carrier to contract out work reserved to BMWE members after the carrier had obtained the consent of the Organization as had occurred in a written Memorandum of Agreement

dated August 12, 1999. Thus the Organization insists that the management of the Indiana Harbor Belt Railroad and the Organization agree about the correct meaning of the Scope Rule language in the Indiana Harbor Belt Railroad Agreement, which is conceptually identical to the CSXT Scope Rule and which requires the General Chairman's consent for contracting out to occur.

The Organization analyzes certain Third Division arbitral precedent concerning the Scope Rule of the February 1, 1982 Conrail Agreement as having sustained the Organization's contracting out claims even though the carrier had complied with the contractual notice and conference provisions. The Organization senses that the CSXT Scope Rule constitutes an even more restrictive approach regarding contracting out because of the detailed description of the actual work that the Scope Rule reserves for the members of the Organization.

If the bargaining history between the parties were to become relevant, the Organization understands that the Organization's negotiators communicated to the Carrier's negotiators that the new Scope Rule reserved to the Organization's members the referenced work and barred such contracting out as a quid pro quo for the creation of Service Lanes that worked across seniority districts. The Organization notices that the Carrier failed to refute the Organization's version of the bargaining history during the handling of the dispute on the property.

As remedies for each Claim, the Organization requests that each Claimant be made whole to compensate the Claimants for their

lost work opportunities and to protect the integrity of the Agreement. The Organization surmises that such remedies will address the Carrier's reduction in the size of the bargaining unit and will redress the Claimants' loss of potential daily overtime, weekend overtime, or re-scheduling of such non-emergency work into the future. Although the Claimants were fully employed, the Organization concludes that ample arbitral precedent supports such a remedy--in general--and on the Carrier's property--in particular. The Organization asks that the Claims be sustained.

CONTENTIONS OF THE CARRIER

The Carrier asserts that the Organization has the burden to prove that the Carrier violated a specific provision of the System Agreement by contracting out the disputed work. The Carrier maintains that the Scope Rule does not constitute an absolute bar to contracting out of scope-covered work without the consent of a General Chairman. It is the position of the Carrier that the plain language of the System Agreement explicitly contemplates contracting out. In the alternative the Carrier argues that the bargaining history for the System Agreement reflects that the Carrier retained the longstanding right to contract out when a legitimate business need exists.

The Carrier specifies that the Scope Rule permits contracting out without the consent of the Organization. The Carrier observes that no language in the Scope Rule prohibits the contracting out of scope-covered work. The Carrier comments that

the System Agreement authorizes contracting out of work covered by the Scope Rule and provides a procedure to enable such contracting out by the Carrier.

The Carrier describes that the Scope Rule contains five unnumbered paragraphs. The Carrier portrays the first paragraph and the second paragraph as indicating the work that the System Agreement covers because the first paragraph contains broad categories of work and the second paragraph contains more details about such work. The Carrier rejects the Organization's reliance on the introductory clause in the second paragraph ([t]he following work is reserved to BMWE members") as providing an "iron clad" reservation of work to BMWE members that cannot be contracted out without the Organization's consent because the Carrier points out that arbitral precedent does not construe a scope rule to be an absolute bar against contracting out such work. The Carrier explains that some of the former scope rules (such as Rule 59 of the Chesapeake and Ohio Railroad (Northern Region) and Rule 66 of Chesapeake and Ohio Railroad (Southern Region) contained such detailed language, however, the Carrier could contract out such work when justified as reflected by the Organization's submission of claims for only 215 of the 634 contracting out notices from CSXT, the ultimate progression of only 111 of the 215 claims to arbitration, and the Carrier's success in arbitration regarding most of the claims.

The Carrier interprets the work "reserved" in the second paragraph of the Scope Rule as indicating that the employees

represented by the Organization will perform the work rather than members of other crafts. The Carrier insists that such language does not bar contracting out and that other scope rules (Rule in the Louisville and Nashville Railroad Agreement and Rule 1 in the Seaboard System Agreement) did not bar contracting out when justified.

The Carrier emphasizes that the work "reserved" in the second paragraph of the Scope Rule cannot negate the language in the fourth paragraph and in the fifth paragraph of the Scope Rule nor Appendix M and Appendix U of the System Agreement, which incorporate into the System Agreement the national contracting rules. Instead, the Carrier views the fourth paragraph and the fifth paragraph as the procedures for contracting out. The Carrier stresses that the clause "work within the scope of this Agreement" in the fourth paragraph reflects that the Carrier may contract out such work consistent with the notice and conference provisions in the fourth paragraph and the fifth paragraph. The Carrier underscores that the General Chairman lacks a right to veto the contracting out but retains the right to file a claim and progress the claim to arbitration for adjudication. The Carrier evaluates the absence of express contracting out exceptions as being insignificant because certain prior contracts, which did not contain such exceptions, nevertheless permitted contracting out of scope-covered work.

The Carrier reasons that the parties could have included express language to bar contracting out scope-covered work if

such an understanding existed. In the absence of such language about such a historically significant issue to the industry and the parties and in the context of the national subcontracting rule that permits subcontracting, the Carrier proclaims that the parties would not make a major change to prohibit contracting out so unclear. The Carrier notes that the Organization knew how to create such language as reflected by the Organization's Section 6 notice, dated November 1, 1999, for national bargaining. The Carrier considers the Organization's effort to eliminate contracting out during the national bargaining to be an admission that the June 1, 1999 System Agreement lacks such a prohibition. The Carrier also considers the Organization's communication to the members of the bargaining unit immediately after the negotiation of the System Agreement as evidence that the Organization knew that the System Agreement permitted the Carrier to continue to retain the right to contract out scope-covered work.

The Carrier reads Appendix U of the System Agreement (the "Strongsville Agreement") as recognition that the Carrier retained the right to contract out. The Carrier highlights that the Strongsville Agreement occurred in March 1999 in connection with the transfer of certain Conrail assets to the Carrier (CSXT) and the Norfolk Southern Railroad and the subsequent negotiation by the Organization and the Carrier (CSXT) of the new system-wide agreement. The Carrier recounts that the Strongsville Agreement eliminated a provision in the implementing agreement that would

have permitted the Carrier (CSXT) and the Norfolk Southern Railroad to contract out certain work arising from the transfer of the Conrail assets without notice to the Organization. The Carrier discerns that the Organization feared that the Carrier (CSXT) and the Norfolk Southern Railroad would use the contracting out provision in the implementing agreement to contract out a large amount of work without notifying the Organization. The Carrier points out that the Carrier needed to be able to contract out certain projects arising from the transfer of the Conrail assets without notifying the Organization and that the Carrier could contract out other projects by complying with the 1968 National Agreement. The Carrier cites Section 7 of the Strongsville Agreement as providing that after June 1, 1999 (the so-called "split date" of the Conrail assets) the National Subcontracting Rule (which originated on May 17, 1968 and which certain national agreements subsequently amended) covered contracting out. The Carrier classifies the disputed work as related to the Conrail transaction and therefore subject to Section 7 of the Strongsville Agreement, which permits the Carrier to contract out scope-covered work after the Carrier notifies the Organization. The Carrier deems Section 7 of the Strongsville Agreement to negate the Organization's position that the Scope Rule in the System Agreement prohibits all contracting out because an ironclad prohibition against all contracting out would preclude any contracting out pursuant to the 1968 National Agreement.

The Carrier adds that Appendix M of the System Agreement incorporates the 1968, 1981, and 1996 national subcontracting agreements into the System Agreement and thereby demonstrates that the parties intended to permit contracting out of scope-covered work. The Carrier elaborates that Article XI of the 1996 Agreement permits contracting out subject to certain employee protection.

The Carrier attacks the Organization's interpretation of the Scope Rule for violating the canons of contract interpretation and construction. The Carrier contends that extensive arbitral authority requires reading an entire contract together by giving meaning to every word and every provision. The Carrier criticizes the Organization for isolating the dispute to the word "reserved" in the Scope Rule while ignoring all of the other provisions that relate to contracting out.

The Carrier relies on extensive arbitral precedent concerning other scope rules as evidence that contracting out may occur even though a scope rule exists so long as a carrier provides appropriate notice and confers with the Organization pursuant to the National Agreement. The Carrier submits that a scope rule that identifies specific types of work permits contracting out even if the Organization fails to consent to such contracting out. The Carrier reiterates that a carrier that complies with the applicable notice and conference provisions, such as those contained in the fourth paragraph and the fifth paragraph of the Scope Rule in the System Agreement, may contract

out scope-covered work. The Carrier rejects the Organization's position that the notice and conference provisions require the consent of the Organization before contracting out may occur.

The Carrier surmises that the Organization's failure to challenge approximately one-half of the contracting out by the Carrier since the System Agreement became effective on June 1, 1999 contradicts the Organization's positions that the Scope Rule barred all contracting out. Furthermore, the Carrier reveals that the Organization also either withdrew or abandoned 28 such claims.

The Carrier offers the bargaining history of the parties as evidence that no intent existed to bar all contracting out of scope-covered work. In accordance with certain arbitral precedent, the Carrier confirms that bargaining history constitutes appropriate evidence to prove the meaning of ambiguous or unclear contract language. The Carrier chronicles that both parties have used bargaining history to address the present dispute. The Carrier tracks the history of the negotiations that led to the Scope Rule and the System Agreement. The Carrier features the concerns that existed with the relevant implementing agreement that led the parties to use the language from the Indiana Harbor Belt Railroad Agreement as the starting point for negotiating the System Agreement. The Carrier disputes the Organization's argument that the detailed Scope Rule in the System Agreement barred contracting out in exchange for the Organization's agreement to create service lanes across large

territories. The Carrier portrays the Organization as failing to communicate to the Carrier's negotiators that by using the word "reserved" the Organization intended to prohibit all contracting out of scope-covered work. The Carrier attributes the use of the recently negotiated Indiana Harbor Belt Railroad Agreement as a template for the negotiations between the Organization and the Carrier to the inability of the Organization's General Chairman to identify a single agreement to use as a template and to the presence of the Indiana Harbor Belt Railroad Agreement on a computer disk. The Carrier clarifies that the Carrier communicated to the Organization that the Carrier did not intend for the intent, practices, or precedents of the Indiana Harbor Belt Railroad Agreement to become part of the System Agreement. The Carrier continues that the parties revised much of the language of the Indiana Harbor Belt Railroad Agreement while also agreeing to the scope rule from the Indiana Harbor Belt Railroad Agreement with the understanding that the Carrier could continue to contract out scope-covered work as necessary and that the parties would incorporate the relevant contracting out rules from the National Agreement into the System Agreement. The Carrier assesses that the Organization disagreed with the January 14, 1999 **Fredenberger** Award, which became necessary because the parties had failed to negotiate an implementing agreement in connection with the Conrail transaction. As a result, the Carrier attests that the parties ultimately negotiated the System Agreement, which superseded the Fredenberger Award, which had

provided for three large consolidated seniority districts, an absence of prior rights for employees on their old seniority districts, and the right of the Carrier to contract out without notifying the Organization. Thus the Carrier finds that the Strongsville Agreement in March 1999 occurred under these circumstances without much discussion about contracting out and with the incorporation of the national contracting out rules as a way for the Carrier to contract out scope-covered work.

The Carrier dismisses the Organization's position linking the regional mobile gangs to the prohibition of contracting out because no such discussion occurred; because the Organization failed to agree to regional mobile gangs and merely agreed to mobile gangs working in smaller service lanes; because no connection existed between the use of the Indiana Harbor Belt Railroad Agreement as a template in November 1998 and the agreement for service lanes in March 1999; and because the Carrier never agreed to forego the important right to contract out. The Carrier declares that the System Agreement replaced 13 agreements with one agreement, replaced 400 job classifications with approximately 16 job classifications, and provided the Carrier with flexibility by having service lane work teams. Similarly, the Carrier verifies that the Organization avoided the Fredenberger arbitration award, obtained pay increases for many members because the consolidation of job classifications retained the highest pay rate for each classification, and eliminated the provision of the Fredenberger arbitration award that would have

permitted the Carrier to contract out without notifying the Organization.

The Carrier repeats the understanding by the parties about the limited purpose of the use as a template of the Indiana Harbor Belt Railroad Agreement. The Carrier indicates that the management of the Indiana Harbor Belt Railroad does not agree with the Organization's interpretation of the scope rule in the Indiana Harbor Belt Railroad Agreement. Instead, the Carrier understands that the Indiana Harbor Belt Railroad retained the right to contract out when necessary to do so. The Carrier denies that an agreement on August 12, 1999 between the Indiana Harbor Belt Railroad and the Organization affects the earlier June 1, 1999 System Agreement. The Carrier mentions that the Organization filed a Section 6 notice to eliminate all contracting out by the Indiana Harbor Belt Railroad and such a Section 6 notice proves that the restriction advanced by the Organization did not exist.

The Carrier reviews that during negotiations the Carrier communicated to the Organization that the Carrier still might need to contract out some work. Accordingly, the Carrier repeats that the Carrier continued to believe that the System Agreement permitted contracting out. The Carrier affirms that the Carrier would not have executed the System Agreement if the Organization had communicated that the Organization intended to prohibit all contracting out. Instead, the Carrier claims that the Carrier would have retained the implementing agreement fashioned by

Arbitrator Fredenberger.

The Carrier downplays the Organization's position that the Carrier violated Rule 1, Rule 3, and Rule 4 because such violations first require a violation of the Scope Rule. In the absence of a violation of the Scope Rule, the Carrier discards the allegations about Rule 1, Rule 3, and Rule 4.

The Carrier faults the Organization's position concerning alleged violation of the rules of the National Agreement. The Carrier depicts the Organization's position as too vague for failing to cite a specific rule or a specific National Agreement to prove that the Carrier had a duty to obtain equipment by renting or by leasing.

With respect to the 1981 Agreement, the Carrier discloses that no restriction exists to a carrier's right to subcontract and the parties failed to implement the agreement to form a committee to study subcontracting. The Carrier construes the agreement to use good faith efforts to reduce subcontracting and increase the use of the maintenance of way forces (which included renting equipment) to be a general commitment limited by practical considerations. The Carrier responds that the Carrier has rented equipment and has invested in new equipment for use by the maintenance of way forces. As the Carrier's contracting out practice after the System Agreement remained similar to the Carrier's contracting out practice before the System Agreement, the Carrier perceives that no violation of the 1981 National Agreement occurred. The Carrier detects that the Organization

failed to object in the past that the Carrier had not leased or purchased equipment. With respect to the disputed work, the Carrier certifies that the employees were working on the Carrier's projects so no employees were available to perform the disputed work in a timely manner if the Carrier had rented additional equipment. The Carrier amplifies that no duty exists for the Carrier to reschedule work or to divide projects to create work opportunities for the employees when the employees are fully employed.

The Carrier concludes that the Carrier has a right to contract out when a legitimate need exists to do so and that an ultimate review of the Carrier's right to contract out occurs in arbitration on a case-by-case basis. The Carrier cautions that the System Agreement omits any indication that the parties intended to make a radical change to this arrangement, which applies a rule of reasonableness to each decision. The Carrier notices that the System Agreement omits any particular situation that justifies contracting out, but arbitral precedent provides guidance that permits the contracting out of the disputed work. As evidence of the propriety of the Carrier's decision to contract out the disputed work, the Carrier enumerates the lack of sufficient manpower after the transfer of the Conrail assets, the special needs that existed in the Cleveland area as a result of the acquisition of certain Conrail assets by the Carrier, the failure of the Organization to prove that the Claimants had performed the disputed work in the past inasmuch as Conrail had

contracted out such work in the past, and the Organization's acquiescence to the contracting out of such work in the past.

If a contractual violation occurred, the Carrier challenges the propriety of awarding any monetary remedy to the Claimants, who were fully employed. The Carrier characterizes any monetary remedy as a windfall and regards the applicable arbitral precedent as precluding an award of any type of damages. The Carrier therefore urges that all of the Claims be denied.

FINDINGS:

This Board, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and the Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act, as amended,; and

2. That the Board has jurisdiction over this dispute.

OPINION OF THE BOARD:

I. Introduction

The eight consolidated cases involve contract language interpretation. The Organization--as the moving party--has the burden to prove its case by a fair preponderance of the evidence.

In analyzing the record, the Public Law Board underscores that the April 29, 2002 Agreement between the parties that established the Public Law Board limits the jurisdiction of the Public Law Board:

> The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules and working conditions, nor shall it have the authority

to add contractual terms or establish new rules.

The Public Law Board understands that the present dispute constitutes a matter of first impression under the June 1, 1999 System Agreement and that scores of other similar disputes remain unresolved by the parties. Because of the importance and sensitivity of this highly complex dispute, the Public Law Board discerns that the parties therefore created a voluminous record that includes over 150 cases of arbitral precedent, a number of judicial decisions, many excerpts of prior collective bargaining agreements, transcripts of certain prior proceedings, affidavits of participants in the bargaining process, and many other documents. In essence, the present record, when viewed in its entirety, provides a comprehensive history of much of the development of contracting out in the railroad industry over many decades of tension between the Organization and the carriers.

After repeatedly and thoroughly reviewing this elaborate record with great care, the treatment of contracting out by the parties in the railroad industry over many decades reveals an ongoing, persistent, and tenacious struggle by the parties to resolve their intense competing interests over a highly sensitive issue. Quite understandably, the Organization views contracting out as an assault on the integrity and future viability of the bargaining unit and the employees in the bargaining unit whereas the Carrier views contracting out as an absolutely necessary method to be able to operate the property in an efficient and cost effective manner in a competitive and demanding environment.

Thus the record indicates that the present dispute did not arise in a vacuum by any means. On the contrary, the present tension between the parties is an outgrowth of the lengthy history between the parties concerning contracting out. The present eight consolidated cases provide the parties with an important opportunity to obtain a clarification of the meaning and application of the June 1, 1999 System Agreement so that the parties may proceed into the future with a clearer understanding of their respective rights and obligations under the System Agreement.

It should be acknowledged that the complexity of the present dispute and the elaborate record presented by the parties has required an extraordinary amount of effort to absorb all of the information presented in the record and to prepare a final decision for each of the eight consolidated cases.

II. The Meaning of the System Agreement

The second paragraph of the Scope Rule of the June 1, 1999 System Agreement contains the following critically important and pivotal clause in the first sentence: "[t]he following work is reserved to BMWE members . . . ." The term "reserved" has a long history in the railroad industry as reflected by its presence in many prior collective bargaining agreements and by the special attention that it has received in many prior arbitration decisions. The decision of the parties, who are among the most sophisticated practitioners in the field of labor-management relations, to include the term "reserved" therefore reflects a

calculated and knowing decision to enhance the pre-existing strong presumption that bargaining unit members must perform the subsequently enumerated work. As a consequence, the informed decision by the parties to include the term "reserved" in the Scope Rule confirms the understanding by the parties to strengthen the Scope Rule. Thus the second paragraph of the Scope Rule clearly and plainly indicates that only BMWE members have a right to perform the enumerated work.

With respect to the present dispute, the Scope Rule, however, has two other particularly important paragraphs: the fourth paragraph and the fifth paragraph. With the exception of the emergency situations exclusion, the notice requirement in the fourth paragraph and the conference opportunity in the fifth paragraph of the Scope Rule also provide a rather clear, plain, and well-established structure for the parties to follow when the possibility of contracting out may occur. In this regard the record omits sufficient persuasive evidence to prove that the language in the Scope Rule or the bargaining history as reflected in the record vested the General Chairmen with the sole authority to bar the Carrier from contracting out work if the parties failed to reach an understanding concerning the contracting out. In agreeing to this overall approach, the parties did not adopt the notice and conference requirements as a mere inconvenience to the Carrier's Engineering Department or to the Carrier's personnel in employee relations. On the contrary, the notice and conference requirements constitute a central, material, and vital

part of the delicate balance the parties have achieved to address the operational needs of the Carrier and the job preservation concerns of the Organization.

The possibility that contracting out may occur, on its face, contradicts the reservation of the relevant work to BMWE members as set forth in the first paragraph of the Scope Rule. The parties, however, agreed to leave the fourth paragraph and the fifth paragraph intact and the first paragraph intact. The decision by the parties to proceed in this manner indicates that the parties may never be able to agree in a clear, comprehensive, and complete way about contracting out. As a result, the juxtaposition of the second paragraph, the fourth paragraph, and the fifth paragraph creates an internal ambiguity in the Scope Rule. By doing so, the parties essentially have resolved one thing: they have developed a tolerance for ambiguity protected by ultimate arbitral review of the relatively few cases that generate an impasse.

This approach is somewhat analogous to the ongoing tension between the parties over many years about remedies for contract violations. Many arbitral decisions exist that struggle to determine whether claimants may receive a monetary award when the claimants were fully employed at the time of a contractual violation. In Award Number 21646 (1977) (Ables, Referee), the Third Division observed:

> The Organization is well aware of the decisions issued under Article IV, in which compensation was denied where the employes were employed in their regular jobs and

> suffered no loss of wages. This precedent was set in Award 18305 (Dugan) where the "full employment" concept was established in which damages were denied even upon finding a violation of the agreement. But the Organization states that for over 40 years the question of damages has swung back and forth like a pendulum in a grandfather's clock. "The pendulum is now on the side of payment because of lost earning opportunities." Recent Award 19899 (Sickles) and early awards before the National Agreement in Article IV give comfort to the Organization. In these cases compensation was awarded for failure to notify or discuss in accordance with the agreement.

(Award Number 21646 at 3.) The decision by the parties to use such powerful language in the first paragraph of the Scope Rule while continuing to include the notice and conference provisions in the fourth paragraph and in the fifth paragraph without any defined exceptions (other than the reference to emergencies) and without an explicit prohibition against all contracting out constitutes persuasive evidence that the pendulum is now further on the side of the Organization. This determination is further buttressed by the decision of the parties to refer to the National Agreements in 1968, 1981, and 1996 in Appendix "M" of the June 1, 1999 System Agreement and to include the Strongsville Agreement in Appendix "U" of the June 1, 1999 System Agreement. In short and if the Carrier has complied in all respects with the notice and conference provisions of the Scope Rule as supplemented by the applicable national agreements, the Carrier must demonstrate a highly compelling reason to rebut the very strong presumption that the work covered by the second paragraph of the Scope Rule will be performed by BMWE members. As a

consequence of the way the parties drafted and adopted the present Scope Rule, such a determination must be made on a case-by-case basis after strict scrutiny of the justification offered by the Carrier to support the need for contracting out scope-covered work. Any change to this arrangement is a matter for yet further collective bargaining, not arbitration.

In reaching these conclusions, it should be noted that the record contains extensive conflicting evidence about certain aspects of the bargaining history between the parties that resulted in the ultimate adoption of the Scope Rule and the other provisions of the June 1, 1999 System Agreement. After a thorough review of all of this conflicting evidence about the bargaining history, no basis exists to resolve such purported misunderstandings, different perspectives, and overall disagreements referred to in the record.

III. The Application of the System Agreement

A. Case No. 1

The record indicates that in a letter, dated August 3, 1999, the Carrier's Director of Employee Relations J. H. Wilson notified the Organization's General Chairman P. K. Geller and General Chairman J. A. Cook about the Carrier's intent to contract out the disputed work. The letter indicated, in pertinent part, that:

> This letter will serve as notification of intent for contractor to provide the service of masonry repairs, handrails and the partial painting of four (4) bridges in Euclid, Ohio. The bridges are identified as follows:

Location	Milepost
East 200th St.	171.87
East 222nd St.	171.20
Babbit Road	170.21
East 260th St.	169.51

Each of the above mentioned bridges have a high volume of traffic. It is estimated that it will take approximately 18 months to complete this project.

Carrier does not have adequate equipment boom trucks, crane, grout pump, concrete pump, and a compressor laid up or available, qualified operators with which the work may be done. There are no furloughed employees on the Cleveland Division Seniority District.

(Organization Exhibit G and Carrier Exhibit A.) Chairman Geller responded to Director of Employee Relations Wilson in a letter, dated August 10, 1999, that provided, in pertinent part:

> I cannot accede to your requests contending the M/W doesn't possess the qualifications and equipment to perform this work. These remarks are contrary to fact. The type of work mentioned is governed by our Scope Rule simply because the above work mentioned has historically been performed by the B&B Department.
>
> I believe you are aware the BMWE is opposed to contracting any work that accrues to the M/W Department. It is very difficult to ascertain the work involved in this project based on your nebulous notice. As a reminder, the June 1, 1999 Scope of our Agreement covered the following:
>
> . . . .
>
> Furthermore, your letter contends the carrier does not possess adequate equipment. The National Contracting Rules require the carrier to make an effort to obtain equipment by renting or leasing, without operators. If you made an effort, please provide this office with a list of vendors contacted. If you need assistance in this area, the BMWE can furnish you a list of vendors willing to lease or rent equipment without operators.

> At this point considering the vagueness of the notice, I believe the M/W Department is fully capable of performing the work described in this instance. Please arrange to list the above for discussion in compliance with the fourth paragraph of our Scope Rule. Please be sure our meeting is scheduled to be held prior to any work taking place in this project.

(Organization Exhibit H and Carrier Exhibit B.) Assistant General Chairman T. J. Nemeth filed a Claim, dated November 23, 1999, to Division Engineer K. A. Downard concerning the disputed work. (Organization Exhibit I and Carrier Exhibit C.) The Division Engineer denied the Claim in a letter, dated January 14, 2000, to General Chairman Geller. (Organization Exhibit I and Carrier Exhibit D.) Assistant General Chairman Nemeth appealed the denial of the Claim in a letter, dated February 17, 2000, to Director of Employee Relations Wilson. The appeal indicated, in pertinent part, that:

> On the claim dates it was determined by the Carrier Supervision to use this outside concern, to perform duties that are consistent with the functions of M of W Employees prescribed in Our Agreement. Rather than calling the Claimants who were ready, willing, qualified and able to perform these duties, the Carrier Supervision used these outside contractors. Because of poor planning on the Carrier's part, the employees of this seniority district were deprived of this work.
>
> . . . .
>
> The carrier representative further asserted that and I quote, "all Carrier forces have remained working and involved in their daily duties." In other words the Claimants were on duty, underpay and lost no monetary compensation. First such an assertion is simply an acknowledgement that the Carrier

> violated the Agreement since it is attempting to reduce its monetary liability. Secondly, the Carrier did not present any evidence that it made any attempt to schedule this work so that the Claimants could have performed it. It was poor planning by the Carrier to afford these contractors this work. Thirdly, even if the Claimants were working at the time of the violation, the NRAB has consistently ruled that a monetary remedy can be sustained to protect the integrity of the Agreement. Furthermore, since 1982 the Cleveland Seniority District B & B Department has been reduced from 48 active employees to 11 with only 4 positions on the basic maintenance force. . . .

(Organization Exhibit I and Carrier Exhibit E.)

In a letter dated July 6, 2000, Senior Director of Labor Relations, J. H. Wilson, denied the appeal of the Claim and explained, in pertinent part, that:

> With regard to the listed claim, in accordance with the fourth unnumbered paragraph of the Scope Rule, CSXT provided BMWE with a written notice . . . dated August 3, 1999, of its intent to contract out this work. BMWE requested a conference; CSXT then met with BMWE to discuss this contracting out notice as required by unnumbered paragraph 5 of the Scope Rule. At the conference, BMWE did not persuade CSXT that the contracting out was not justified. Since CSXT had a legitimate business reason to go forward with this contracting out, it did so. This again was in accordance with the fifth unnumbered paragraph of the Scope Rule in the System Agreement, which recognizes CSXT's right to proceed with the contracting.
>
> Unlike many prior collective bargaining agreements between CSXT and the BMWE, CSXT's right to contract is not limited to specific enumerated reasons such as lack of manpower, special equipment or special skills. The new System Agreement imposes only procedural requirements, i.e., notice and conference on contracting. CSXT clearly complied with those procedural requirements in this case.

> Your arguments regarding the historical practice, and the availability of equipment, or Carrier reference to having no furloughed employees is acknowledgement by the Carrier of a rule violation are not relevant, considering the clear language of the Agreement. Carrier does not acknowledge any Rule violation.

(Organization Exhibit I and Carrier Exhibit M.)

In a letter, dated September 11, 2000, to Director of Employee Relations Wilson, General Chairman Geller vehemently objected to the Carrier's action. (Organization Exhibit I.) In a letter, dated February 22, 2001, to Director of Employee Relations Wilson, General Chairman Geller further observed:

> the Scope provisions of the IHB Agreement are similar in many substantive respects to the CSXT Scope provisions. Please note that IHB reads and understands these Scope provisions to mean that work identified in the Scope Rule is "reserved to BMWE members by the Scope Rule" and thus, "could not be contracted without the consent of BMWE." In other words, another carrier reads and understands agreement provisions similar to provisions in the June 1, 1999 CSXT Agreement to mean that Scope covered work can not be contracted without the consent of BMWE. To the extent there are differences in the CSXT and IHB Agreements, I believe that the CSXT Agreement is even more favorable to BMWE.

(Organization Exhibit I and Carrier Exhibit N.) In a letter, dated May 11, 2001, to Director of Employee Relations Wilson, General Chairman Geller commented about the bargaining history concerning the System Agreement:

> while we do not believe it is necessary to look to bargaining history in light of the clear Scope Rule language, we also believe that the bargaining history fully supports BMWE's position and not CSXT's.

(Organization Exhibit 1 and Carrier Exhibit O.)

Senior Director of Labor Relations Wilson sent a letter, dated May 21, 2001, to General Chairman Cook and General Chairman Dodd concerning the effect, if any, of the Indiana Harbor Belt Railroad Agreement on the System Agreement:

> CSXT does not agree that the basic IHB-BMWE Agreement or the August 12, 1999 agreement between IHB and BMWE supports your position that the scope rule in the June 1, 1999 System Agreement requires the consent of BMWE to any contracting out of work subject to the rule.
>
> . . . .
>
> Thus, how IHB and BMWE apply the scope rule in the IHB Agreement on IHB has no bearing on the proper application of the scope rule in the June 1, 1999 System Agreement. The CSXT scope rule has a completely different bargaining history and context than the IHB-BMWE scope rule.
>
> For this reason, the fact that IHB and BMWE entered into the August 12, 1999 Agreement resolving a scope rule dispute under the IHB-BMWE Agreement is irrelevant to the application of the CSXT-BMWE Agreement. Indeed, the August 12, 1999 Agreement was entered into after the June 1, 1999 System Agreement and was obviously not a factor in reaching the June 1, 1999 Agreement.
>
> . . . I understand that IHB disagrees with BMWE that it cannot contract out scope covered work. I understand that it is IHB's position that it can contract scope covered work as long as it gives prior notice, conferences with BMWE (if requested), and can show a need to contract the work in question.
>
> . . . .
>
> CSXT had the right to contract out work prior to the June 1, 1999 Agreement. If the parties had intended that contracting out only occur if the Organization concurred, the

> new scope rule would say so. It would not allow CSXT to proceed with contracting of scope covered work even if the Organization objected.

(Carrier Exhibit P.)

Senior Director of Labor Relations Wilson sent a letter, dated June 6, 2001, to General Chairmen Cook, Dodd, Geller, and Glisson that reiterated the Carrier's position that the Carrier "can contract out scope-covered work when it has a justification to do so, as it did prior to the Agreement." (Organization Exhibit 2 and Carrier Exhibit Q.) Senior Director Wilson added:

> . . . The maintenance of way bargaining unit remains strong. CSXT continues to hire and train maintenance of way forces consistent with what is practical in today's financial environment. CSXT has hired 491 maintenance of way employees since June 1, 1999. CSXT also has made substantial investments in roadway equipment used by its maintenance of way employees. For example, in the period 1994-2001, CSXT invested $18.5 million in new roadway equipment . . . . CSXT also rebuilt a substantial amount of roadway equipment in its own roadway equipment shop . . . . And, CSXT is constantly leasing roadway equipment for use by its employees.

(Organization Exhibit 2 and Carrier Exhibit Q.)

A careful review of the extensive record indicates that the Organization proved by a preponderance of the evidence that the disputed work falls within paragraph two of the Scope Rule. The record omits persuasive evidence from the Carrier that a compelling reason existed to contract out the disputed work. Although the Carrier asserted that it lacked certain equipment and that its own employees were engaged in performing other work, the record omits sufficient persuasive evidence that the Carrier

could not have rented or leased the necessary equipment or scheduled the work at a time when its own employees in the bargaining unit could have performed the work. Thus insufficient evidence exists that the Carrier had a compelling need to contract out the scope-covered work. As a consequence, the Claimants shall receive compensatory damages for the loss of the opportunity to perform the disputed work and as an appropriate method to preserve the integrity of the Agreement. The Award shall indicate that the Claim is sustained.

B. Case No. 2

The record indicates that in a letter, dated August 3, 1999, the Carrier's Director of Employee Relations J. H. Wilson notified the Organization's General Chairman P. K. Geller and General Chairman J. A. Cook about the Carrier's intent to contract out the disputed work. The letter indicated, in pertinent part, that:

> This letter will serve as notification of intent for contractor to provide the service of masonry repairs, handrails and the partial painting of four (4) bridges in Euclid, Ohio. The bridges are identified as follows:
>
> | Location | Milepost |
> |---|---|
> | East 200th St. | 171.87 |
> | East 222nd St. | 171.20 |
> | Babbit Road | 170.21 |
> | East 260th St. | 169.51 |
>
> Each of the above mentioned bridges have a high volume of traffic. It is estimated that it will take approximately 18 months to complete this project.
> Carrier does not have adequate equipment boom trucks, crane, grout pump, concrete pump, and a compressor laid up or available,

> qualified operators with which the work may be done. There are no furloughed employees on the Cleveland Division Seniority District.

(Organization Exhibit G and Carrier Exhibit A.) Chairman Geller responded to Director of Employee Relations Wilson in a letter, dated August 10, 1999, that provided, in pertinent part:

> I cannot accede to your requests contending the M/W doesn't possess the qualifications and equipment to perform this work. These remarks are contrary to fact. The type of work mentioned is governed by our Scope Rule simply because the above work mentioned has historically been performed by the B&B Department.
>
> I believe you are aware the BMWE is opposed to contracting any work that accrues to the M/W Department. It is very difficult to ascertain the work involved in this project based on your nebulous notice. As a reminder, the June 1, 1999 Scope of our Agreement covered the following:
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>
> Furthermore, your letter contends the carrier does not possess adequate equipment. The National Contracting Rules require the carrier to make an effort to obtain equipment by renting or leasing, without operators. If you made an effort, please provide this office with a list of vendors contacted. If you need assistance in this area, the BMWE can furnish you a list of vendors willing to lease or rent equipment without operators.
>
> At this point considering the vagueness of the notice, I believe the M/W Department is fully capable of performing the work described in this instance. Please arrange to list the above for discussion in compliance with the fourth paragraph of our Scope Rule. Please be sure our meeting is scheduled to be held prior to any work taking place in this project.

(Organization Exhibit H and Carrier Exhibit B.) Assistant

General Chairman T. J. Nemeth filed a Claim, dated November 10, 1999, to Division Engineer K. A. Downard concerning the disputed work. (Organization Exhibit I and Carrier Exhibit C.) The Division Engineer denied the Claim in a letter, dated January 7, 2000, to General Chairman Geller. (Organization Exhibit I and Carrier Exhibit D.) Assistant General Chairman Nemeth appealed the denial of the Claim in a letter, dated February 17, 2000, to Director of Employee Relations Wilson. The appeal indicated, in pertinent part, that:

> On the claim dates it was determined by the Carrier Supervision to use this outside concern, to perform duties that are consistent with the functions of M of W Employees prescribed in Our Agreement. Rather than calling the Claimants who were ready, willing, qualified and able to perform these duties, the Carrier Supervision used these outside contractors. Because of poor planning on the Carrier's part, the employees of this seniority district were deprived of this work.
>
> . . . .
>
> The carrier representative further asserted that and I quote, "all Carrier forces have remained working and involved in their daily duties." In other words the Claimants were on duty, underpay and lost no monetary compensation. First such an assertion is simply an acknowledgement that the Carrier violated the Agreement since it is attempting to reduce its monetary liability. Secondly, the Carrier did not present any evidence that it made any attempt to schedule this work so that the Claimants could have performed it. It was poor planning by the Carrier to afford these contractors this work. Thirdly, even if the Claimants were working at the time of the violation, the NRAB has consistently ruled that a monetary remedy can be sustained to protect the integrity of the Agreement. Furthermore, since 1982 the Cleveland

> Seniority District B & B Department has been reduced from 48 active employees to 11 with only 4 positions on the basic maintenance force. . . .

(Organization Exhibit I and Carrier Exhibit E.)

In a letter dated July 6, 2000, Senior Director of Labor Relations, J. H. Wilson, denied the appeal of the Claim and explained, in pertinent part, that:

> With regard to the listed claim, in accordance with the fourth unnumbered paragraph of the Scope Rule, CSXT provided BMWE with a written notice . . . dated August 3, 1999, of its intent to contract out this work. BMWE requested a conference; CSXT then met with BMWE to discuss this contracting out notice as required by unnumbered paragraph 5 of the Scope Rule. At the conference, BMWE did not persuade CSXT that the contracting out was not justified. Since CSXT had a legitimate business reason to go forward with this contracting out, it did so. This again was in accordance with the fifth unnumbered paragraph of the Scope Rule in the System Agreement, which recognizes CSXT's right to proceed with the contracting.
>
> Unlike many prior collective bargaining agreements between CSXT and the BMWE, CSXT's right to contract is not limited to specific enumerated reasons such as lack of manpower, special equipment or special skills. The new System Agreement imposes only procedural requirements, i.e., notice and conference on contracting. CSXT clearly complied with those procedural requirements in this case. Your arguments regarding the historical practice, and the availability of equipment, or Carrier reference to having no furloughed employees is acknowledgement by the Carrier of a rule violation are not relevant, considering the clear language of the Agreement.

(Organization Exhibit I and Carrier Exhibit M.)

In a letter, dated September 11, 2000, to Director of

Employee Relations Wilson, General Chairman Geller vehemently objected to the Carrier's action. (Organization Exhibit I.)

In a letter, dated February 22, 2001, to Director of Employee Relations Wilson, General Chairman Geller observed:

> the Scope provisions of the IHB Agreement are similar in many substantive respects to the CSXT Scope provisions. Please note that IHB reads and understands these Scope provisions to mean that work identified in the Scope Rule is "reserved to BMWE members by the Scope Rule" and thus, "could not be contracted without the consent of BMWE." In other words, another carrier reads and understands agreement provisions similar to provisions in the June 1, 1999 CSXT Agreement to mean that Scope covered work can not be contracted without the consent of BMWE. To the extent there are differences in the CSXT and IHB Agreements, I believe that the CSXT Agreement is even more favorable to BMWE.

(Organization Exhibit I and Carrier Exhibit N.) In a letter, dated May 11, 2001, to Director of Employee Relations Wilson, General Chairman Geller commented about the bargaining history concerning the System Agreement:

> while we do not believe it is necessary to look to bargaining history in light of the clear Scope Rule language, we also believe that the bargaining history fully supports BMWE's position and not CSXT's.

(Organization Exhibit 1 and Carrier Exhibit O.)

Senior Director of Labor Relations Wilson sent a letter, dated May 21, 2001, to General Chairman Cook and General Chairman Dodd concerning the effect, if any, of the Indiana Harbor Belt Railroad Agreement on the System Agreement:

> CSXT does not agree that the basic IHB-BMWE Agreement or the August 12, 1999 agreement between IHB and BMWE supports your position

> that the scope rule in the June 1, 1999 System Agreement requires the consent of BMWE to any contracting out of work subject to the rule.
>
> . . . .
>
> Thus, how IHB and BMWE apply the scope rule in the IHB Agreement on IHB has no bearing on the proper application of the scope rule in the June 1, 1999 System Agreement. The CSXT scope rule has a completely different bargaining history and context than the IHB-BMWE scope rule.
>
> For this reason, the fact that IHB and BMWE entered into the August 12, 1999 Agreement resolving a scope rule dispute under the IHB-BMWE Agreement is irrelevant to the application of the CSXT-BMWE Agreement. Indeed, the August 12, 1999 Agreement was entered into after the June 1, 1999 System Agreement and was obviously not a factor in reaching the June 1, 1999 Agreement.
>
> . . . I understand that IHB disagrees with BMWE that it cannot contract out scope covered work. I understand that it is IHB's position that it can contract scope covered work as long as it gives prior notice, conferences with BMWE (if requested), and can show a need to contract the work in question.
>
> . . . .
>
> CSXT had the right to contract out work prior to the June 1, 1999 Agreement. If the parties had intended that contracting out only occur if the Organization concurred, the new scope rule would say so. It would not allow CSXT to proceed with contracting of scope covered work even if the Organization objected.

(Carrier Exhibit P.)

Senior Director of Labor Relations Wilson sent a letter, dated June 6, 2001, to General Chairmen Cook, Dodd, Geller, and Glisson that reiterated the Carrier's position that the Carrier

"can contract out scope-covered work when it has a justification to do so, as it did prior to the Agreement." (Organization Exhibit 2 and Carrier Exhibit Q.) Senior Director Wilson added:

> . . . The maintenance of way bargaining unit remains strong. CSXT continues to hire and train maintenance of way forces consistent with what is practical in today's financial environment. CSXT has hired 491 maintenance of way employees since June 1, 1999. CSXT also has made substantial investments in roadway equipment used by its maintenance of way employees. For example, in the period 1994-2001, CSXT invested $18.5 million in new roadway equipment . . . . CSXT also rebuilt a substantial amount of roadway equipment in its own roadway equipment shop . . . . And, CSXT is constantly leasing roadway equipment for use by its employees.

(Organization Exhibit 2 and Carrier Exhibit Q.)

Case No. 2 is in all material ways similar to Case No. 1. Based on the reasoning set forth in the analysis of Case No. 1, the Claim for Case No. 2 is sustained.

C. Case No. 3

The record indicates that in a letter, dated September 13, 1999, the Carrier's Director of Employee Relations J. H. Wilson notified the Organization's General Chairman P. K. Geller and General Chairman J. A. Cook about the Carrier's intent to contract out the disputed work. The letter indicated, in pertinent part, that:

> This letter will serve as notification of intent to contract for the removal and replacement of an existing Conrail logo on a storage tank, the CSX logo. The Contractor will prime and paint out the existing conrail logo, and apply by stencil 55" high CSX letters. The Contractor will also paint over existing hazardous material symbols and apply

> new symbols provided by CSX. The surfaces will be prepared and painted according to specifications agreed to by CSX and Sherwin Williams. A total man-hours of 800 is estimated to complete this project.
>
> The work will be done on the Great Lakes Service lane, milepost QD 173.8, in Collinwood Yard, Cleveland, Ohio. We intend to contract this work because we do not have available an air compressor, man-lift, and sandblasting equipment, or sufficient manpower available to perform this work. Furthermore, there are no sub-department bridge employees furloughed, and all active employees on the Cleveland Seniority District are engaged in other work.

(Organization Exhibit G and Carrier Exhibit A.) Chairman Geller responded to Director of Employee Relations Wilson in a letter, dated September 22, 1999, that provided, in pertinent part:

> I believe you are aware the BMWE is opposed to contracting any work that accrues to the M/W Department. Since when have the B&B forces been incapable of painting a logo on the above identified tank? I do not accede to your notice as the B&B has <u>historically</u> performed this type of work. One cannot argue that painting is not maintenance/repair work. There is no evidence of an emergency here or that the B&B forces are not capable of performing this work. I direct you to our Scope Rule: As a reminder, the June 1, 1999 Scope of our Agreement covers the following:
>
> . . . .
>
> **Furthermore**, your letter contends the carrier **does not possess** adequate equipment. The **National Contracting Rules require the carrier to make an effort to obtain equipment by renting or leasing, without operators. If you made an effort**, please provide this office with a list of vendors contacted. If you need assistance in this area, the BMWE can furnish you a list of vendors willing to lease or rent equipment without operators.
>
> At this point considering the vagueness of

> the notice, I believe the M/W Department is fully capable of performing the work described in this instance. Please arrange to list the above for discussion in compliance with the fourth paragraph of our Scope Rule. Please be sure our meeting is scheduled to be held prior to any work taking place in this project.

(Organization Exhibit H and Carrier Exhibit B.) Assistant General Chairman T. J. Nemeth filed a Claim, dated November 10, 1999, to Division Engineer K. A. Downard concerning the disputed work. (Organization Exhibit I and Carrier Exhibit C.) The Division Engineer denied the Claim in a letter, dated January 7, 2000, to General Chairman Geller. (Organization Exhibit I and Carrier Exhibit D.) Assistant General Chairman Nemeth appealed the denial of the Claim in a letter, dated February 17, 2000, to Director of Employee Relations Wilson. The appeal indicated, in pertinent part, that:

> On the claim dates it was determined by the Carrier Supervision to use this outside concern, to perform duties that are consistent with the functions of M of W Employees prescribed in Our Agreement. Rather than calling the Claimants who were ready, willing, qualified and able to perform these duties, the Carrier Supervision used these outside contractors. Because of poor planning on the Carrier's part, the employees of this seniority district were deprived of this work.
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> The carrier representative further asserted that and I quote, "all Carrier forces have remained working and involved in their daily duties." In other words the Claimants were on duty, underpay and lost no monetary compensation. First such an assertion is simply an acknowledgement that the Carrier violated the Agreement since it is attempting

> to reduce its monetary liability. Secondly, the Carrier did not present any evidence that it made any attempt to schedule this work so that the Claimants could have performed it. It was poor planning by the Carrier to afford these contractors this work. Thirdly, even if the Claimants were working at the time of the violation, the NRAB has consistently ruled that a monetary remedy can be sustained to protect the integrity of the Agreement. Furthermore, since 1982 the Cleveland Seniority District B & B Department has been reduced from 48 active employees to 11 with only 4 positions on the basic maintenance force. . . .

(Organization Exhibit I and Carrier Exhibit E.)

In a letter dated July 6, 2000, Senior Director of Labor Relations, J. H. Wilson, denied the appeal of the Claim and explained, in pertinent part, that:

> With regard to the listed claim, in accordance with the fourth unnumbered paragraph of the Scope Rule, CSXT provided BMWE with a written notice . . . dated August 3, 1999, and September 13, 1999 respectively of its intent to contract out this work. BMWE requested a conference; CSXT then met with BMWE to discuss this contracting out notice as required by unnumbered paragraph 5 of the Scope Rule. At the conference, BMWE did not persuade CSXT that the contracting out was not justified. Since CSXT had a legitimate business reason to go forward with this contracting out, it did so. This again was in accordance with the fifth unnumbered paragraph of the Scope Rule in the System Agreement, which recognizes CSXT's right to proceed with the contracting.
>
> Unlike many prior collective bargaining agreements between CSXT and the BMWE, CSXT's right to contract is not limited to specific enumerated reasons such as lack of manpower, special equipment or special skills. The new System Agreement imposes only procedural requirements, i.e., notice and conference on contracting. CSXT clearly complied with those procedural requirements in this case.

> Your arguments regarding the historical practice, and the availability of equipment, or Carrier reference that "all forces have remained working and involved in their daily duties [sic] is acknowledgement by the Carrier of a rule violation are not relevant, considering the clear language of the Agreement.

(Organization Exhibit I and Carrier Exhibit M.)

In a letter, dated September 11, 2000, to Director of Employee Relations Wilson, General Chairman Geller vehemently objected to the Carrier's action. (Organization Exhibit I.) General Chairman Geller sent a corrected letter, dated October 11, 2000, to Director of Employee Relations Wilson to correct the September 11, 2000 letter by identifying the Claimants in the case as R. Zinni, F. Hoyt, and K. Watts. (Organization Exhibit I.)

In a letter, dated February 22, 2001, to Director of Employee Relations Wilson, General Chairman Geller observed:

> the Scope provisions of the IHB Agreement are similar in many substantive respects to the CSXT Scope provisions. Please note that IHB reads and understands these Scope provisions to mean that work identified in the Scope Rule is "reserved to BMWE members by the Scope Rule" and thus, "could not be contracted without the consent of BMWE." In other words, another carrier reads and understands agreement provisions similar to provisions in the June 1, 1999 CSXT Agreement to mean that Scope covered work can not be contracted without the consent of BMWE. To the extent there are differences in the CSXT and IHB Agreements, I believe that the CSXT Agreement is even more favorable to BMWE.

(Organization Exhibit I and Carrier Exhibit N.) In a letter, dated May 11, 2001, to Director of Employee Relations Wilson,

General Chairman Geller commented about the bargaining history concerning the System Agreement:

> while we do not believe it is necessary to look to bargaining history in light of the clear Scope Rule language, we also believe that the bargaining history fully supports BMWE's position and not CSXT's.

(Organization Exhibit 1 and Carrier Exhibit O.)

Senior Director of Labor Relations Wilson sent a letter, dated May 21, 2001, to General Chairman Cook and General Chairman Dodd concerning the effect, if any, of the Indiana Harbor Belt Railroad Agreement on the System Agreement:

> CSXT does not agree that the basic IHB-BMWE Agreement or the August 12, 1999 agreement between IHB and BMWE supports your position that the scope rule in the June 1, 1999 System Agreement requires the consent of BMWE to any contracting out of work subject to the rule.
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> Thus, how IHB and BMWE apply the scope rule in the IHB Agreement on IHB has no bearing on the proper application of the scope rule in the June 1, 1999 System Agreement. The CSXT scope rule has a completely different bargaining history and context than the IHB-BMWE scope rule.
>
> For this reason, the fact that IHB and BMWE entered into the August 12, 1999 Agreement resolving a scope rule dispute under the IHB-BMWE Agreement is irrelevant to the application of the CSXT-BMWE Agreement. Indeed, the August 12, 1999 Agreement was entered into after the June 1, 1999 System Agreement and was obviously not a factor in reaching the June 1, 1999 Agreement.
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> . . . I understand that IHB disagrees with BMWE that it cannot contract out scope covered work. I understand that it is IHB's position that it can contract scope covered

> work as long as it gives prior notice, conferences with BMWE (if requested), and can show a need to contract the work in question.
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> CSXT had the right to contract out work prior to the June 1, 1999 Agreement. If the parties had intended that contracting out only occur if the Organization concurred, the new scope rule would say so. It would not allow CSXT to proceed with contracting of scope covered work even if the Organization objected.

(Carrier Exhibit P.)

Senior Director of Labor Relations Wilson sent a letter, dated June 6, 2001, to General Chairmen Cook, Dodd, Geller, and Glisson that reiterated the Carrier's position that the Carrier "can contract out scope-covered work when it has a justification to do so, as it did prior to the Agreement." (Organization Exhibit 2 and Carrier Exhibit Q.) Senior Director Wilson added:

> . . . The maintenance of way bargaining unit remains strong. CSXT continues to hire and train maintenance of way forces consistent with what is practical in today's financial environment. CSXT has hired 491 maintenance of way employees since June 1, 1999. CSXT also has made substantial investments in roadway equipment used by its maintenance of way employees. For example, in the period 1994-2001, CSXT invested $18.5 million in new roadway equipment . . . . CSXT also rebuilt a substantial amount of roadway equipment in its own roadway equipment shop . . . . And, CSXT is constantly leasing roadway equipment for use by its employees.

(Organization Exhibit 2 and Carrier Exhibit Q.)

The reasoning and analysis set forth in connection with Case No. 1 is equally applicable to the circumstances set forth with respect to Case No. 3 and is hereby adopted.

D. Case No. 4

The record indicates that in a letter, dated August 3, 1999, the Carrier's Director of Employee Relations J. H. Wilson notified the Organization's General Chairman P. K. Geller and General Chairman J. A. Cook about the Carrier's intent to contract out the disputed work. The letter indicated, in pertinent part, that:

> This letter will serve as notification of intent for contractor to provide the service of masonry repairs, handrails and the partial painting of four (4) bridges in Euclid, Ohio. The bridges are identified as follows:
>
> | Location | Milepost |
> |---|---|
> | East 200th St. | 171.87 |
> | East 222nd St. | 171.20 |
> | Babbit Road | 170.21 |
> | East 260th St. | 169.51 |
>
> Each of the above mentioned bridges have a high volume of traffic. It is estimated that it will take approximately 18 months to complete this project.
>
> Carrier does not have adequate equipment boom trucks, crane, grout pump, concrete pump, and a compressor laid up or available, qualified operators with which the work may be done. There are no furloughed employees on the Cleveland Division Seniority District.

(Organization Exhibit G and Carrier Exhibit A.) Chairman Geller responded to Director of Employee Relations Wilson in a letter, dated August 10, 1999, that provided, in pertinent part:

> I cannot accede to your requests contending the M/W doesn't possess the qualifications and equipment to perform this work. These remarks are contrary to fact. The type of work mentioned is governed by our Scope Rule simply because the above work mentioned has historically been performed by the B&B Department.

> I believe you are aware the BMWE is opposed to contracting any work that accrues to the M/W Department. It is very difficult to ascertain the work involved in this project based on your nebulous notice. As a reminder, the June 1, 1999 Scope of our Agreement covered the following:
>
> . . . .
>
> Furthermore, your letter contends the carrier does not possess adequate equipment. The National Contracting Rules require the carrier to make an effort to obtain equipment by renting or leasing, without operators. If you made an effort, please provide this office with a list of vendors contacted. If you need assistance in this area, the BMWE can furnish you a list of vendors willing to lease or rent equipment without operators.
>
> At this point considering the vagueness of the notice, I believe the M/W Department is fully capable of performing the work described in this instance. Please arrange to list the above for discussion in compliance with the fourth paragraph of our Scope Rule. Please be sure our meeting is scheduled to be held prior to any work taking place in this project.

(Organization Exhibit H and Carrier Exhibit B.) Assistant General Chairman T. J. Nemeth filed a Claim, dated November 10, 1999, to Division Engineer K. A. Downard concerning the disputed work. (Organization Exhibit I and Carrier Exhibit C.) The Regional Chief Engineer, K. A. Downard, denied the Claim in a letter, dated January 7, 2000, to General Chairman Geller. (Organization Exhibit I and Carrier Exhibit D.) Assistant General Chairman Nemeth appealed the denial of the Claim in a letter, dated February 17, 2000, to Director of Employee Relations Wilson. The appeal indicated, in pertinent part, that:

> On the claim dates it was determined by the

> Carrier Supervision to use this outside concern, to perform duties that are consistent with the functions of M of W Employees prescribed in Our Agreement. Rather than calling the Claimants who were ready, willing, qualified and able to perform these duties, the Carrier Supervision used these outside contractors. Because of poor planning on the Carrier's part, the employees of this seniority district were deprived of this work.
>
> . . . .
>
> The carrier representative further asserted that and I quote, "all Carrier forces have remained working and involved in their daily duties." In other words the Claimants were on duty, underpay and lost no monetary compensation. First such an assertion is simply an acknowledgement that the Carrier violated the Agreement since it is attempting to reduce its monetary liability. Secondly, the Carrier did not present any evidence that it made any attempt to schedule this work so that the Claimants could have performed it. It was poor planning by the Carrier to afford these contractors this work. Thirdly, even if the Claimants were working at the time of the violation, the NRAB has consistently ruled that a monetary remedy can be sustained to protect the integrity of the Agreement. Furthermore, since 1982 the Cleveland Seniority District B & B Department has been reduced from 48 active employees to 11 with only 4 positions on the basic maintenance force. . . .

(Organization Exhibit I and Carrier Exhibit E.)

In a letter dated July 6, 2000, Senior Director of Labor Relations, J. H. Wilson, denied the appeal of the Claim and explained, in pertinent part, that:

> With regard to the listed claim, in accordance with the fourth unnumbered paragraph of the Scope Rule, CSXT provided BMWE with a written notice . . . dated August 3, 1999, and September 13, 1999 respectively of its intent to contract out this work.

> BMWE requested a conference; CSXT then met with BMWE to discuss this contracting out notice as required by unnumbered paragraph 5 of the Scope Rule. At the conference, BMWE did not persuade CSXT that the contracting out was not justified. Since CSXT had a legitimate business reason to go forward with this contracting out, it did so. This again was in accordance with the fifth unnumbered paragraph of the Scope Rule in the System Agreement, which recognizes CSXT's right to proceed with the contracting.
>
> Unlike many prior collective bargaining agreements between CSXT and the BMWE, CSXT's right to contract is not limited to specific enumerated reasons such as lack of manpower, special equipment or special skills. The new System Agreement imposes only procedural requirements, i.e., notice and conference on contracting. CSXT clearly complied with those procedural requirements in this case. Your arguments regarding the historical practice, and the availability of equipment, or Carrier reference to having no furloughed employees is acknowledgement by the Carrier of a rule violation are not relevant, considering the clear language of the Agreement.

(Organization Exhibit I and Carrier Exhibit M.)

In a letter, dated September 11, 2000, to Director of Employee Relations Wilson, General Chairman Geller vehemently objected to the Carrier's action. (Organization Exhibit I.)

In a letter, dated February 22, 2001, to Director of Employee Relations Wilson, General Chairman Geller observed:

> the Scope provisions of the IHB Agreement are similar in many substantive respects to the CSXT Scope provisions. Please note that IHB reads and understands these Scope provisions to mean that work identified in the Scope Rule is "reserved to BMWE members by the Scope Rule" and thus, "could not be contracted without the consent of BMWE." In other words, another carrier reads and understands agreement provisions similar to

> provisions in the June 1, 1999 CSXT Agreement to mean that Scope covered work can not be contracted without the consent of BMWE. To the extent there are differences in the CSXT and IHB Agreements, I believe that the CSXT Agreement is even more favorable to BMWE.

(Organization Exhibit I and Carrier Exhibit N.) In a letter, dated May 11, 2001, to Director of Employee Relations Wilson, General Chairman Geller commented about the bargaining history concerning the System Agreement:

> while we do not believe it is necessary to look to bargaining history in light of the clear Scope Rule language, we also believe that the bargaining history fully supports BMWE's position and not CSXT's.

(Organization Exhibit 1 and Carrier Exhibit O.)

Senior Director of Labor Relations Wilson sent a letter, dated May 21, 2001, to General Chairman Cook and General Chairman Dodd concerning the effect, if any, of the Indiana Harbor Belt Railroad Agreement on the System Agreement:

> CSXT does not agree that the basic IHB-BMWE Agreement or the August 12, 1999 agreement between IHB and BMWE supports your position that the scope rule in the June 1, 1999 System Agreement requires the consent of BMWE to any contracting out of work subject to the rule.
>
> . . . .
>
> Thus, how IHB and BMWE apply the scope rule in the IHB Agreement on IHB has no bearing on the proper application of the scope rule in the June 1, 1999 System Agreement. The CSXT scope rule has a completely different bargaining history and context than the IHB-BMWE scope rule.
>
> For this reason, the fact that IHB and BMWE entered into the August 12, 1999 Agreement resolving a scope rule dispute

> under the IHB-BMWE Agreement is irrelevant to the application of the CSXT-BMWE Agreement. Indeed, the August 12, 1999 Agreement was entered into after the June 1, 1999 System Agreement and was obviously not a factor in reaching the June 1, 1999 Agreement.
>
> . . . I understand that IHB disagrees with BMWE that it cannot contract out scope covered work. I understand that it is IHB's position that it can contract scope covered work as long as it gives prior notice, conferences with BMWE (if requested), and can show a need to contract the work in question.
>
> . . . .
>
> CSXT had the right to contract out work prior to the June 1, 1999 Agreement. If the parties had intended that contracting out only occur if the Organization concurred, the new scope rule would say so. It would not allow CSXT to proceed with contracting of scope covered work even if the Organization objected.

(Carrier Exhibit P.)

Senior Director of Labor Relations Wilson sent a letter, dated June 6, 2001, to General Chairmen Cook, Dodd, Geller, and Glisson that reiterated the Carrier's position that the Carrier "can contract out scope-covered work when it has a justification to do so, as it did prior to the Agreement." (Organization Exhibit 2 and Carrier Exhibit Q.) Senior Director Wilson added:

> . . . The maintenance of way bargaining unit remains strong. CSXT continues to hire and train maintenance of way forces consistent with what is practical in today's financial environment. CSXT has hired 491 maintenance of way employees since June 1, 1999. CSXT also has made substantial investments in roadway equipment used by its maintenance of way employees. For example, in the period 1994-2001, CSXT invested $18.5 million in new roadway equipment . . . . CSXT also rebuilt a substantial amount of roadway equipment in

its own roadway equipment shop . . . . And, CSXT is constantly leasing roadway equipment for use by its employees.

(Organization Exhibit 2 and Carrier Exhibit Q.)

Case No. 4 is in all material ways similar to Case No. 1. Based on the reasoning set forth in the analysis of Case No. 1, the Claim for Case No. 4 is sustained.

E. Case No. 5

The record indicates that in a letter, dated August 3, 1999, the Carrier's Director of Employee Relations J. H. Wilson notified the Organization's General Chairman P. K. Geller and General Chairman J. A. Cook about the Carrier's intent to contract out the disputed work. The letter indicated, in pertinent part, that:

> This letter will serve as notification of intent for contractor to provide the service of masonry repairs, handrails and the partial painting of four (4) bridges in Euclid, Ohio. The bridges are identified as follows:
>
> | Location | Milepost |
> |---|---|
> | East 200th St. | 171.87 |
> | East 222nd St. | 171.20 |
> | Babbit Road | 170.21 |
> | East 260th St. | 169.51 |
>
> Each of the above mentioned bridges have a high volume of traffic. It is estimated that it will take approximately 18 months to complete this project.
>
> Carrier does not have adequate equipment boom trucks, crane, grout pump, concrete pump, and a compressor laid up or available, qualified operators with which the work may be done. There are no furloughed employees on the Cleveland Division Seniority District.

(Organization Exhibit I-1 and Carrier Exhibit 88.) Chairman

Geller responded to Director of Employee Relations Wilson in a letter, dated August 10, 1999, that provided, in pertinent part:

> I cannot accede to your requests contending the M/W doesn't possess the qualifications and equipment to perform this work. These remarks are contrary to fact. The type of work mentioned is governed by our Scope Rule simply because the above work mentioned has historically been performed by the B&B Department.
>
> I believe you are aware the BMWE is opposed to contracting any work that accrues to the M/W Department. It is very difficult to ascertain the work involved in this project based on your nebulous notice. As a reminder, the June 1, 1999 Scope of our Agreement covered the following:
>
> . . . .
>
> Furthermore, your letter contends the carrier does not possess adequate equipment. The National Contracting Rules require the carrier to make an effort to obtain equipment by renting or leasing, without operators. If you made an effort, please provide this office with a list of vendors contacted. If you need assistance in this area, the BMWE can furnish you a list of vendors willing to lease or rent equipment without operators.
>
> At this point considering the vagueness of the notice, I believe the M/W Department is fully capable of performing the work described in this instance. Please arrange to list the above for discussion in compliance with the fourth paragraph of our Scope Rule. Please be sure our meeting is scheduled to be held prior to any work taking place in this project.

(Organization Exhibit I-2 and Carrier Exhibit 93.)

Assistant General Chairman T. J. Nemeth filed a Claim, dated January 13, 2000, to Division Engineer K. A. Downard concerning the disputed work. (Organization Exhibit I-3 and Carrier Exhibit

89.) Chief Regional Engineer Downard denied the Claim in a letter, dated March 6, 2000 to Assistant General Chairman Nemeth. (Organization Exhibit I-4 and Carrier Exhibit 90.) Assistant General Chairman Nemeth appealed the denial of the Claim in a letter, dated April 19, 2000, to Director of Employee Relations Wilson. The appeal indicated, in pertinent part, that:

> On the claim dates these employees of this contracting company worked (8) eight hours per day from 7:00 A.M. to 3:30 P.M. at the above location performing work that has and remains work which the Claimants have performed since they were hired by the Carriers and it's [sic] predecessors.
>
> . . . .
>
> The carrier further asserted "that there were no furloughed forces and has consequently had to contract this work with a proper notice." First such an assertion is simply an acknowledgement that the Carrier violated the Agreement since it is attempting to reduce its monetary liability. Secondly, the Carrier did not present any evidence that it made any attempt to schedule this work so that the Claimants could have performed it. Thirdly, even if the Claimants were working at the time of the violation, the NRAB has consistently ruled that a monetary remedy can be sustained to protect the integrity of the Agreement. Furthermore, since 1982 the Cleveland Seniority District B & B Department has been reduced from 48 active employees to 11 with only 4 positions on the basic maintenance force. . . .

(Organization Exhibit I-5 and Carrier Exhibit 91.)

In a letter dated June 20, 2001, Senior Director of Labor Relations, J. H. Wilson, denied the appeal of the Claim and explained, in pertinent part, that:

> With regard to the listed claims, and in accordance with the fourth unnumbered

> paragraph of the Scope Rule, CSXT provided BMWE with a written notice of its intent to contract out this work by letter. Since the BMWE requested a conference; CSXT then met in conferences with BMWE to discuss these contracting out notices as required by unnumbered paragraph 5 of the Scope Rule. At the conference, BMWE did not persuade CSXT that the contracting out was not justified. Since CSXT had a legitimate business reason to go forward with this contracting out, it did so. This again was in accordance with the fifth unnumbered paragraph of the Scope Rule in the System Agreement, which recognizes CSXT's right to proceed with the contracting.
>
> Unlike many prior collective bargaining agreements between CSXT and the BMWE, CSXT's right to contract is not limited to specific enumerated reasons such as lack of manpower, special equipment or special skills. The only requirements expressed imposed by the new System Agreement are procedural requirements, i.e., notice and conference on contracting. CSXT clearly complied with those procedural requirements in these cases.

(Organization Exhibit I-6 and Carrier Exhibit 92.)

In a letter, dated July 10, 2001, to Director of Employee Relations Wilson, General Chairman Geller vehemently objected to the Carrier's decision to contract out the disputed work. (Organization Exhibit I-7.)

In a letter, dated November 9, 2001, to General Chairman Geller, Senior Director of Employee Relations Wilson elaborated about the denial of the Claim:

> This is in further response to the captioned claim on behalf of seven (7) fully employed B&B Department employees for 208 hours pay each at their straight time rate for specified dates in November and December 1999, account the carrier contracted bridge repairs at East 200th Street in Euclid, Ohio.

> We previously responded to this claim on June 20, 2001. The instant case is yet another example of justified subcontracting in that CSXT cannot reasonably be expected to recruit and hire specially skilled employees on a temporary basis for projects of an occasional and short term duration and then furlough them until the next isolated short term project presents itself. This particular case involves contracting for repairs to a bridge in Euclid, Ohio under the terms of the System Agreement.
>
> . . . .
>
> In reviewing this file more closely, I must point out certain additional facts related to this claim. Initially, a review of the claimant's work records indicate they were unavailable on several days during the claimed period for vacation, personal leave days, safety training and other such reasons such as the nature of their assignments. Lastly, all of the claimants worked significant amounts of overtime during this period associated with their regular bid in assignments that would be anticipated, as this was the period of time in the year when all employees on a district are working. Copies of the employees' work histories, as always, are available to confirm these facts.

(Organization Exhibit I-9 and Carrier Exhibit 93.)

Case No. 5 is in all material ways similar to Case No. 1. Based on the reasoning set forth in the analysis of Case No. 1, the Claim for Case No. 5 is sustained.

F. Case No. 6

The record indicates that in a letter, dated December 6, 1999, the Carrier's Director of Employee Relations J. H. Wilson notified the Organization's General Chairman J. R. Cook about the Carrier's intent to contract out the disputed work. The letter indicated, in pertinent part, that:

> This letter will serve as Carrier's notification of intention to contract out the work of assembling and welding two (2) # 10 turnouts and the construction of 3,161 feet of yard track. CSX forces will install the turnouts after the Contractor has assembled them. Carrier forces will perform the flagging protection as required.
>
> Work will be performed on the Baltimore Service Lane, Pittsburgh Sub-division from milepost PLE-22.1 to PLE22.4. The work is to begin on or about the 21st of December. It is anticipated it will take 3100 man-hours to complete the project. The Contractor will provide labor, material, and equipment (loaders, graders, dozers, backhoes, tampers, dump trucks and hand tools) to complete the project.
>
> At this time there are no furloughed employee's on the Pittsburgh West Seniority District. All active employees are working on other important projects and day-to-day maintenance. Carrier does not have adequate equipment or forces laid off, sufficient both in number and skill, with which the work may be done.

(Carrier Exhibit 105.) The Director of Employee Relations sent a corrected letter, dated December 7, 1999, to General Chairman Cook and to General Chairman Geller. (Organization Exhibit J-10 and Carrier Exhibit 105.)

Assistant General Chairman T. J. Nemeth filed a Claim, dated June 15, 2000, to Chief Regional Engineer D. J. Evers concerning the disputed work. (Organization Exhibit J-1 and Carrier Exhibit 107.) Chief Regional Engineer Evers denied the Claim in a letter, dated August 10, 2000, to Assistant General Chairman Nemeth. (Organization Exhibit J-2 and Carrier Exhibit 108.) Assistant General Chairman Nemeth appealed the denial of the Claim in a letter, dated September 12, 2000, to Director of

Employee Relations Wilson. The appeal indicated, in pertinent part, that:

> On the claim dates these employees of this contracting company worked (10) ten hours per day from 7:00 A.M. to 5:30 P.M. at the above location performing work that has and remains work which the Claimants have performed since they were hired by the Carriers and it's [sic] predecessors. . . .
>
> . . . .
>
> The carrier further asserted that the Claimants were on duty, underpay and lost no monetary compensation. First such an assertion is simply an acknowledgement that the Carrier violated the Agreement since it is attempting to reduce its monetary liability.
>
> Secondly, the Carrier did not present any evidence that it made any attempt to schedule this work so that the Claimants could have performed it.
>
> Thirdly, even if the Claimants were working at the time of the violation, the NRAB has consistently ruled that a monetary remedy can be sustained to protect the integrity of the Agreement.

(Organization Exhibit J-3 and Carrier Exhibit 109.)

In a letter, dated June 22, 2001, to General Chairman Geller, Senior Director of Labor Relations Wilson denied the appeal. (Organization Exhibit J-4.) In a letter, dated July 11, 2001, to Director of Employee Relations Wilson, General Chairman Geller vehemently objected to the Carrier's decision to contract out the disputed work. (Organization Exhibit J-5.)

In a letter, dated October 29, 2001, to General Chairman Geller, Senior Director of Labor Relations J. H. Wilson

specified, in pertinent part, that:

> The construction of the side track was contracted out because it required more manpower and equipment than were available at the time. Indeed, this office spent considerable time and effort during this timeframe attempting to fill positions on System Production Gangs for critical tie and rail replacement projects which were ongoing during the same time the siding was being constructed. As a result of the integration of Conrail operations in 1999, all CSXT employees were occupied with other projects and day-to-day maintenance and, as noted by Regional Engineer Evers, the Claimants were all fully employed at all times relevant to this claim.
>
> This was, in fact, exactly the type of construction project arising from the integration that was contemplated in Section 7 of the Strongsville Agreement, and you were advised of CSXT's intent to contract the work under the terms of the Scope Rule and Section 7. This was new track construction, a singular but substantial project necessary to improve railroad operations in order to take advantage of the opportunities for new business generated by the Conrail integration. Such work has traditionally been contracted on the component railroads of CSXT for legitimate business reasons, and nothing in the Scope Rule of the 1999 Agreement prohibits CSXT from continuing to do so. As you noted in the summary of the new Agreement accompanying your April 12, 1999 [sic] to your membership, the procedures for CSXT to contract work "are the same or similar to the present procedures" in the Conrail Agreement.
>
> Further, the 1981 Berge/Hopkins Letter does not impose an obligation on carriers to hire additional employees in order to reduce subcontracting. Neither does Article XV of the 1996 Agreement, and your recitation of that provision does not add any validity to BMWE's positions. Contracting the track construction was permissible under, and did not violate, the Scope Rule of the 1999 System Agreement and, as the Scope Rule was

not violated, neither were Rules 1, 3 or 4.

(Organization Exhibit J-6 and Carrier Exhibit 110.)

In a letter, dated November 6, 2001, to Director of Employee Relations Wilson, General Chairman Geller strongly objected to the actions of the Carrier. (Organization Exhibit J-7.) In a letter, dated November 9, 2001, to General Chairman Geller, Senior Director of Labor Relations Wilson explained the Carrier's need to contract out the disputed work:

> In the present case, additional tracks were quickly needed at Blacks Run Yard to accommodate increased traffic. At the time this project arose, all of the Carrier's BMWE forces were working at full capacity on their programmed work, and each and every maintenance of way employee who wanted to work was fully employed.

(Organization Exhibit J-8.) In a letter, dated November 16, 2001, to Director of Employee Relations Wilson, General Chairman Geller vehemently objected to the Carrier's decision to contract out the disputed work. (Organization Exhibit J-9.)

In a letter, dated February 12, 2002, to General Chairman Geller, Senior Director of Labor Relations Wilson underscored that:

> at the time the work in dispute was needed and was performed, that the claimants, as well as all other CSXT employees were fully occupied on other pressing projects.

(Organization Exhibit J-10 and Carrier Exhibit 106.)

General Chairman Geller responded in a letter, dated February 14, 2002, that provided, in pertinent part:

> The fact remains the Carrier refuses to fill BMWE positions when they are vacated by

> retirement, termination, resignation, disability, etc. A large portion of employees are then forced to accept positions in mobile gangs all over the country and at the same time contractors are performing Scope work in their own cities and towns. Mr. Wilson many Arbitration decisions have held the Carrier's deliberate neglect of the man-power and equipment is not a reasonable excuse to contract out work.

(Organization Exhibit J-11 and Carrier Exhibit 110.) General Chairman Geller sent a further response, dated March 15, 2002, to Director of Employee Relations Wilson that referred to the ongoing disagreement between the parties about the existence of advance notice to the proper General Chairman by the Carrier in this case and that also reviewed the Organization's substantive position, which included criticism of the Carrier for failing to assign bargaining unit employees to perform the disputed work. (Organization Exhibit J-12 and Carrier Exhibit 110.)

Senior Director of Labor Relations J. B. Allred sent to a letter, dated March 21, 2002, to General Chairman Geller to clarify that the Carrier recognized that a tremendous burden would exist under the Scope Rule if the Carrier contracted out bargaining unit work while employees remained on furlough. (Organization Exhibit J-13 and Carrier Exhibit 110.)

A careful review of the record indicates that the Organization proved by a preponderance of the evidence that the disputed work falls within paragraph two of the Scope Rule. The record, however, contains persuasive evidence from the Carrier that under the unusual circumstances a compelling reason existed to contract out the disputed work. The Carrier provided

compelling evidence that it lacked certain equipment and sufficient employees to perform a pressing construction project that occurred under the special and highly unusual circumstances associated with the purchase of certain assets that had belonged to Conrail. As the Carrier's own employees were engaged in performing other important work, the record provides sufficient evidence that the Carrier could not have rented or leased the necessary equipment or scheduled the work at a time when its own employees in the bargaining unit could have performed the work in a timely manner. Thus sufficient evidence exists in this particular instance that the Carrier had a compelling need to contract out the scope-covered work. The Award shall indicate that the Claim is denied.

G. Case No. 7

The record indicates that in a letter, dated June 13, 2000, the Carrier's Senior Director of Employee Relations, J. H. Wilson, notified the Organization's General Chairman P. K. Geller about the Carrier's intent to contract out the disputed work. The letter indicated, in pertinent part, that:

> This letter will serve as the Carrier's notice of intent to contract for renovation of the yardmaster's tower at milepost QD 173 Cleveland/Collinwood Yard, Ohio.
>
> The Contractor will sand bast [sic], with lead abatement and paint exterior steel structure, replace single glass with insulated glass, replace existing air conditioning unit and baseboard heaters, insulate the floor structure, replace floor tile, insulate the ceiling structure, replace ceiling tile, replace restroom partition, clean and paint interior, install new storage

counter.

> This project will be "turn key" including design, permitting and all related construction along with environmental requirements. Estimate man-hours are 942. The Contractor will provide labor and equipment, (i.e. lifts, trucks, special abatement equipment, painting equipment and other hand tools). All B&B forces on the CR/Cleveland Seniority District are working on other equally important work or day to day maintenance.

(Organization Exhibit K-1 and Carrier Exhibit 119.)

Chairman Geller responded to Director of Employee Relations Wilson in a letter, dated June 19, 2000, that provided, in pertinent part:

> I believe you are aware the BMWE is opposed to contracting any work that accrues to the M/W Department. Since when have the B&B forces been incapable of painting a logo on the above identified tank? I do not accede to your notice as the B&B has historically performed this type of work. One cannot argue that painting is not maintenance/repair work. There is no evidence of an emergency here or that the B&B forces are not capable of performing this work. I direct you to our Scope Rule: As a reminder, the June 1, 1999 Scope of our Agreement covers the following:
>
> . . . .
>
> Furthermore, your letter contends the carrier does not possess adequate equipment. The National Contracting Rules require the carrier to make an effort to obtain equipment by renting or leasing, without operators. If you made an effort, please provide this office with a list of vendors contacted. If you need assistance in this area, the BMWE can furnish you a list of vendors willing to lease or rent equipment without operators.
>
> At this point considering the vagueness of the notice, I believe the M/W Department is fully capable of performing the work

> described in this instance. Please arrange to list the above for discussion in compliance with the fourth paragraph of our Scope Rule. Please be sure our meeting is scheduled to be held prior to any work taking place in this project.

(Organization Exhibit K-2 and Carrier Exhibit 122.) Assistant General Chairman T. J. Nemeth filed a Claim, dated December 5, 2000, to Division Engineer K. A. Downard concerning the disputed work. (Organization Exhibit K-3 and Carrier Exhibit 120.) The Division Engineer denied the Claim in a letter, dated January 24, 2001, to Assistant General Chairman Nemeth. (Organization Exhibit K-4 and Carrier Exhibit 121.) Assistant General Chairman Nemeth appealed the denial of the Claim in a letter, dated February 5, 2001, to Director of Employee Relations Wilson. The appeal indicated, in pertinent part, that:

> On the claim dates these employees of this contracting company worked (8) eight hours per day from 7:00 A.M. to 3:30 P.M. at the above location performing work that has and remains work which the Claimants have performed since they were hired by the Carrier and it's [sic] predecessors This work consisted of touch up painting on work performed by Drake Construction this past summer on the building mentioned above. All of the work mentioned is the type of work that B&B employees of the Carrier are qualified [sic] perform in their normal course of duties.
>
> . . . .
>
> The carrier representative further asserted that the Claimants were engaged in other equally important projects and/or daily required maintenance and subsequently unavailable to complete this project in a timely manner. First such an assertion is simply an acknowledgement that the Carrier violated the Agreement since it is attempting

to reduce its monetary liability.

Secondly, the Carrier did not present any evidence that it made any attempt to schedule this work so that the Claimants could have performed it.

Thirdly, even if the Claimants were working at the time of the violation, the NRAB has consistently ruled that a monetary remedy can be sustained to protect the integrity of the Agreement.

(Organization Exhibit K-5 and Carrier Exhibit 122.)

In a letter dated June 20, 2001 to T. J. Nemeth, Senior Director of Labor Relations, J. H. Wilson, pointed out, in pertinent part, that:

With regard to the listed claims, and in accordance with the fourth unnumbered paragraph of the Scope Rule, CSXT provided BMWE with a written notice of its intent to contract out this work by letter. Since the BMWE requested a conference, CSXT then met with BMWE in conferences to discuss these contracting out notices as required by unnumbered paragraph 5 of the Scope Rule. At the conference, BMWE did not persuade CSXT that the contracting out was not justified. Since CSXT had a legitimate business reason to go forward with this contracting out, it did so. This again was in accordance with the fifth unnumbered paragraph of the Scope Rule in the System Agreement, which recognizes CSXT's right to proceed with the contracting.

Unlike many prior collective bargaining agreements between CSXT and the BMWE, CSXT's right to contract is not limited to specific enumerated reasons such as lack of manpower, special equipment or special skills. The only requirements expressly imposed by the new System Agreement are procedural requirements, i.e., notice and conference on contracting. CSXT clearly complied with those procedural requirements in these cases.

(Organization Exhibit K-6 and Carrier Exhibit 122.)

In a letter, dated July 9, 2001, to Director of Employee Relations Wilson, General Chairman Geller vehemently objected to the Carrier's decision to contract out the disputed work. (Organization Exhibit K-7.) The General Chairman also sent a letter, dated July 10, 2001, to Director Wilson that referred to the August 12, 1999 Letter of Agreement concerning the Indiana Belt Harbor Railroad as further support for the Organization's position. (Organization Exhibit K-8.)

In a letter, dated November 6, 2001, to General Chairman Geller, Senior Director of Labor Relations J. H. Wilson specified, in pertinent part, that:

> The touchup painting performed on October 24 and 25, 2000, was necessary for the original contractor to fulfill his contract with CSXT to complete the turnkey remodeling project. CSXT was not obligated by the Scope Rule or any other rule cited by BMWE to file a separate notice of intent for the general contractor's painting subcontractor to complete a punch list item finalizing the turnkey renovation project for which you had already been notified. Additionally, we note the BMWE has not submitted a claim for the remodeling project, only this touchup painting and some roof repair. As you know, CSXT is not required to piecemeal a turnkey project of this sort and magnitude in order to provide work opportunities for employees, particularly when they are fully employed, as claimants were and are. The instant case is a classic example of justified subcontracting in that CSXT cannot reasonably be expected to recruit and hire skilled employees on a temporary basis for projects of an occasional and short term duration and then furlough them until the next isolated short term project presents itself.
>
> Such short term, isolated and non-recurring work has traditionally been

> contracted on the component railroads of CSXT for legitimate business reasons, and nothing in the Scope Rule of the 1999 Agreement prohibits CSXT from continuing to do so. As you noted in the summary of the new Agreement accompanying your April 12, 1999 to your membership, the procedures for CSXT to contract work "are the same or similar to the present procedures" in the Conrail Agreement.
>
> Further, the 1981 Berge/Hopkins Letter does not impose an obligation on carriers to hire additional employees in order to reduce subcontracting. Neither does Article XV of the 1996 Agreement, and your recitation of that provision does not add any validity to BMWE's positions. Contracting the painting was permissible under, and did not violate, the Scope Rule of the 1999 System Agreement and, as the Scope Rule was not violated, neither were Rules 1, 3 or 4.

(Organization Exhibit K-9 and Carrier Exhibit 125.)

In a letter, dated November 16, 2001, to Director of Employee Relations Wilson, General Chairman Geller reiterated his strong objection to the Carrier's action. (Organization Exhibit K-10.)

A careful review of the record indicates that the Organization proved by a preponderance of the evidence that the disputed work falls within paragraph two of the Scope Rule. The record in this particular instance contains persuasive evidence from the Carrier that a compelling reason existed to contract out the disputed work. The Carrier provided compelling evidence that it would be unduly burdensome and impractical to assign the Claimants to perform in a timely manner the relatively small amount of disputed touch-up painting on a piecemeal basis in the context of the much larger project. As the Carrier's own

employees were engaged in performing other important work, the record provides sufficient evidence to have permitted the Carrier under these precise circumstances to contract out this relatively de minimis amount of work under the special circumstances reflected in the record. Thus sufficient evidence exists that the Carrier had a compelling need to contract out the scope-covered work. The Award shall indicate that the Claim is denied.

H. Case No. 8

The record indicates that in a letter, dated July 24, 2000, the Carrier's Senior Director of Labor Relations, J. H. Wilson, notified the Organization's General Chairman P. K. Geller about the Carrier's intent to contract out the disputed work. The letter indicated, in pertinent part, that:

> This letter will serve as the Carrier's notice of intent to contract to Install [sic] 550 feet of four inch perforated drain pipe at the West end of the Locomotive Facility, Cleveland Terminal, Cleveland, Ohio. The drain will be connected to the industrial collection system.
>
> The Contractor will provide labor and equipment to perform this work. The proposed start date is August 7th. Estimated mandays are 2. Personnel must have secured on track safety training and confined space entry. The Carrier does not have available the manpower or equipment to complete this work in a timely manner. All B&B forces on the CR/Cleveland Seniority District are working on other equally important work or day to day maintenance.

(Organization Exhibit L-1 and Carrier Exhibit 129.

In a letter, dated July 31, 2000, to Director of Employee Relations Wilson, General Chairman Geller opposed the contracting

out of the disputed work. (Organization Exhibit L-2.)

Assistant General Chairman T. J. Nemeth filed a Claim, dated December 13, 2000, to Chief Regional Engineer K. A. Downard concerning the disputed work. (Organization Exhibit L-3 and Carrier Exhibit 130.) The Chief Regional Engineer denied the Claim in a letter, dated February 1, 2001, to Assistant General Chairman Nemeth. (Organization Exhibit L-4 and Carrier Exhibit 131.) Assistant General Chairman Nemeth appealed the denial of the Claim in a letter, dated February 5, 2001, to Director of Employee Relations Wilson. The appeal indicated, in pertinent part, that:

> On the claim dates these employees of this contracting company worked (8) eight hours per day from 7:00 A.M. to 3:30 P.M. at the above location performing work that has and remains work which the Claimants have performed since they were hired by the Carrier and it's [sic] predecessors This work consisted of trenching the earth along the tracks leading into the Locomotive Shop and the installation of drain pipe and catch basins in those ditches, at the location mentioned above. All of the work mentioned is the type of work that B&B employees of the Carrier, are qualified [sic] perform in their normal course of duties.
>
> . . . .
>
> The Carrier did not present any evidence that it made any attempt to schedule this work so that the Claimants could have performed it.
>
> Secondly, even if the Claimants were working at the time of the violation, the NRAB has consistently ruled that a monetary remedy can be sustained to protect the integrity of the Agreement.

(Organization Exhibit L-5 and Carrier Exhibit 132.)

Senior Director of Labor Relations Wilson sent a letter, dated May 21, 2001, to General Chairman Cook and General Chairman Dodd concerning the effect, if any, of the Indiana Harbor Belt Railroad Agreement on the System Agreement:

> CSXT does not agree that the basic IHB-BMWE Agreement or the August 12, 1999 agreement between IHB and BMWE supports your position that the scope rule in the June 1, 1999 System Agreement requires the consent of BMWE to any contracting out of work subject to the rule.
>
> . . . .
>
> Thus, how IHB and BMWE apply the scope rule in the IHB Agreement on IHB has no bearing on the proper application of the scope rule in the June 1, 1999 System Agreement. The CSXT scope rule has a completely different bargaining history and context than the IHB-BMWE scope rule.
>
> For this reason, the fact that IHB and BMWE entered into the August 12, 1999 Agreement resolving a scope rule dispute under the IHB-BMWE Agreement is irrelevant to the application of the CSXT-BMWE Agreement. Indeed, the August 12, 1999 Agreement was entered into after the June 1, 1999 System Agreement and was obviously not a factor in reaching the June 1, 1999 Agreement.
>
> . . . I understand that IHB disagrees with BMWE that it cannot contract out scope covered work. I understand that it is IHB's position that it can contract scope covered work as long as it gives prior notice, conferences with BMWE (if requested), and can show a need to contract the work in question.
>
> . . . .
>
> CSXT had the right to contract out work prior to the June 1, 1999 Agreement. If the parties had intended that contracting out only occur if the Organization concurred, the new scope rule would say so. It would not allow CSXT to proceed with contracting of

> scope covered work even if the Organization objected.

(Carrier Exhibit 137.)

In a letter dated June 20, 2001 to T. J. Nemeth, Senior Director of Labor Relations, J. H. Wilson, pointed out, in pertinent part, that:

> With regard to the listed claims, and in accordance with the fourth unnumbered paragraph of the Scope Rule, CSXT provided BMWE with a written notice of its intent to contract out this work by letter. Since the BMWE requested a conference, CSXT then met with BMWE in conferences to discuss these contracting out notices as required by unnumbered paragraph 5 of the Scope Rule. At the conference, BMWE did not persuade CSXT that the contracting out was not justified. Since CSXT had a legitimate business reason to go forward with this contracting out, it did so. This again was in accordance with the fifth unnumbered paragraph of the Scope Rule in the System Agreement, which recognizes CSXT's right to proceed with the contracting.
>
> Unlike many prior collective bargaining agreements between CSXT and the BMWE, CSXT's right to contract is not limited to specific enumerated reasons such as lack of manpower, special equipment or special skills. The only requirements expressly imposed by the new System Agreement are procedural requirements, i.e., notice and conference on contracting. CSXT clearly complied with those procedural requirements in these cases.

(Organization Exhibit L-6 and Carrier Exhibit 132.)

In a letter, dated July 10, 2001, to Director of Employee Relations Wilson, General Chairman Geller vehemently objected to the Carrier's decision to contract out the disputed work. (Organization Exhibit L-7.) The General Chairman also sent a letter, dated July 10, 2001, to Director Wilson that referred to

the August 12, 1999 Letter of Agreement concerning the Indiana Belt Harbor Railroad as further support for the Organization's position. (Organization Exhibit L-8.)

In a letter, dated November 6, 2001, to General Chairman Geller, Senior Director of Labor Relations J. H. Wilson specified, in pertinent part, that:

> The notice specifically noted that CSXT did not have available manpower or equipment to complete the work in a timely manner, and that all B&B forces were working. This was simply an isolated, nonrecurring drainage project above and beyond normal maintenance and beyond the timely capacity of Carrier's normal B&B workforce. The drainage piping was needed to expediently resolve a number of issues: (1) track drainage-the water at the West End of the locomotive shop would not drain, (2) an environmental concern-oil contaminated water needed to be directed to catch basins that carried the fluid to the pollution control facility and (3) a safety complaint-standing water created a walking hazard for employees going about their duties. Claimants Burroughs and Watts were otherwise fully occupied with their normal facilities maintenance duties at the time of the installation while Claimant Shea was working at another location in a bridge gang.
>
> The instant case is a classic example of justified subcontracting in that CSXT cannot reasonably be expected to recruit and hire skilled employees on a temporary basis for projects of an occasional and short term duration and then furlough them until the next isolated short term project presents itself.
>
> Such short term, isolated and non-recurring work has traditionally been contracted on the component railroads of CSXT for legitimate business reasons, and nothing in the Scope Rule of the 1999 Agreement prohibits CSXT from continuing to do so. As you noted in the summary of the new Agreement accompanying your April 12, 1999 to your

> membership, the procedures for CSXT to contract work "are the same or similar to the present procedures" in the Conrail Agreement.
>
> Further, the 1981 Berge/Hopkins Letter does not impose an obligation on carriers to hire additional employees in order to reduce subcontracting. Neither does Article XV of the 1996 Agreement, and your recitation of that provision does not add any validity to BMWE's positions. Contracting the painting was permissible under, and did not violate, the Scope Rule of the 1999 System Agreement and, as the Scope Rule was not violated, neither were Rules 1, 3 or 4.

(Organization Exhibit L-9 and Carrier Exhibit 132.)

In a letter, dated November 16, 2001, to Director of Employee Relations Wilson, General Chairman Geller reiterated the Organization's opposition to the Carrier contracting out the disputed work. (Organization Exhibit L-10.)

A careful review of the record indicates that the Organization proved by a preponderance of the evidence that the disputed work falls within paragraph two of the Scope Rule. The record, however, contains persuasive evidence from the Carrier that a compelling reason existed to contract out the disputed work. The Carrier provided compelling evidence that significant time pressures existed to have the work performed. Furthermore, the record indicates that safety and environmental concerns (the redirection to a pollution control facility of oil contaminated water) existed that required expeditious performance of the disputed work. As the Carrier's own employees were engaged in performing other important work, the record provides sufficient evidence to have permitted the Carrier to contract out the

disputed work under the special circumstances reflected in the record. Thus sufficient evidence exists that the Carrier had a compelling need to contract out the scope-covered work. The Award shall indicate that the Claim is denied.

IV. Conclusion

The Organization proved Claim No. 1, Claim No. 2, Claim No. 3, Claim No. 4, and Claim No. 5 by a preponderance of the evidence. The Organization failed to prove Claim No. 6, Claim No. 7, and Claim No. 8 by a preponderance of the evidence. Any issues or arguments not specifically addressed in the preceding analysis are not necessary to discuss to resolve the present disputes. The Award shall so reflect.

AWARD:

With respect to Case No. 1, the Claim is sustained.
With respect to Case No. 2, the Claim is sustained.
With respect to Case No. 3, the Claim is sustained.
With respect to Case No. 4, the Claim is sustained.
With respect to Case No. 5, the Claim is sustained.
With respect to Case No. 6, the Claim is denied.
With respect to Case No. 7, the Claim is denied.
With respect to Case No. 8, the Claim is denied.

Robert L. Douglas
Chairman and Neutral Member

Steven V. Powers
Employee Member
Concurring_____
Dissenting_____

James B. Allred
Carrier Member
Concurring_____
Dissenting_____

Dated: September 3, 2003