PUBLIC LAW BOARD NO. 6510

Case No. 2

PARTIES TO DISPUTE: **BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES vs. CSX TRANSPORTATION, INC.**

STATEMENT OF CLAIM - EMPLOYE:

(1) The Carrier violated the Agreement when it assigned outside forces (Gary D. Peake Excavating, Inc.) to perform Maintenance of Way work (pave road crossings) between Mile Posts 37.52 and 84.5 on the Albany Service Lane beginning on September 30 through December 1, 1999, instead of assigning Messrs. A.J. Tabone, R.J. Downey, Jr., R.M. Sander, F.V. Marchetti and A.A. Tripi [Carrier's File 12(99-1027) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Claimants A.J. Tabone, R.J. Downey, Jr., R.M. Sander, F.V. Marchetti and A.A. Tripi shall now each be compensated for two hundred sixty (260) hours' pay at their respective straight time rates of pay.

FINDINGS:

The Public Law Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employe within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement; that it has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing held. At the hearing of this matter, the parties indicated that the Claimants had waived the rights of appearance and were therefore not present.

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 cases. The National Mediation Board subsequently created Public Law Board No. 6510 as reflected in certain correspondence dated March 23, 2004. 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 Wednesday, April 21, 2004, at which time the representatives of the parties appeared. All concerned were afforded a full opportunity to present such evidence and argument as desired, 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.

This record reflects that after the above-noted hearing was concluded, in correspondence dated June 25, 2004, the parties agreed to the withdrawal of Case No. 7, so that currently pending for decision are Public Law Board No. 6510, Case Nos. 1-6 and 8.

The parties have stipulated that the currently pending 7 cases, including Case No. 2, which is the specific case to be dealt with by this Opinion and Award, all involve the interpretation of the parties' June 1, 1999 System Agreement ("System Agreement"). As such, it is well-settled that the burden of proof must be satisfied by the party bringing the grievance, namely, in this case, the Organization. Accordingly, the Organization must prove by a preponderance of the evidence that its position is correct.

The parties have also stipulated that all 7 pending cases, including Case No. 2, have in common the fact that the events that gave rise to each specific claim involve contracting out of work this Organization claims was exclusively reserved to its members. It firmly believes that it successfully negotiated and expanded the Scope Rule in the current System Agreement which, if properly interpreted, would constitute an iron-clad bar to any contracting-

out of the above-mentioned work reserved to its members by Paragraph 2 of this Scope Rule, absent its express consent. It submits that the work that was contracted out by this Carrier from September 30, 1999 through December 1, 1999, as spelled out in its Statement of Claim, doing hot asphalt paving at specific road crossings, is covered by the current Scope Rule and particularly Paragraph 2 of that rule; was thus reserved to members of this Organization, such as these Claimants; and that the General Chairman never consented that the involved work could be contracted out as this Carrier did in the instant matter.

Thus, the Organization urges that it has a very strong case on the merits and one that requires that this claim be sustained in its entirety, based on the Organization's reading of the Scope Rule and its interpretation of that rule's application to the underlying facts of this case.

The Organization acknowledges that the comprehensive Opinion and Award in Public Law Board No. 6508 involving these parties, Cases 1-8 ("Douglas Award") sets forth a differing interpretation of the meaning and application of the Scope Rule under discussion. To the extent that the Douglas Award does not adopt the Organization's reading that this Scope Rule constitutes an absolute bar to the Carrier's contracting out, the Organization contends that the holding of the Douglas Award is palpably erroneous. The Organization maintains that this Board should therefore follow its reading of the Scope Rule and reject those aspects of the Douglas Award that are inconsistent with this position, it argues.

As a threshold matter, the Organization also contends that this Carrier did not give the required notice that it would subcontract the work set out above, that hot asphalt paving work already mentioned. The basis of this position is that the only notice of that intended subcontracting came from Conrail and not this Carrier and was given under the predecessor Conrail Labor Agreement pursuant to an entirely different Scope Rule and other additional provisions regarding subcontracting that were not in any way in effect when the actual contracting out involved in this claim actually occurred.

Therefore, there is no question that there was a violation of the notice provision under the applicable and current System Agreement and the claim is required to be sustained on that basis, also, the Organization insists. However, it also suggested that it was more desirous of a ruling on the merits rather than a decision in its favor on this procedural point, although it in no way waived its contention that the notice from Conrail was improper and thus required a finding in the Organization's favor wholly apart from the underlying merits of the instant claim.

The Carrier argues that there is no express prohibition against contracting out to third parties contained in the current System Agreement. It also argues that Paragraphs 4 and 5 of the current Scope Rule require merely that this Carrier give notice not less than 15 days before it subcontracts work. Thereafter, according to Paragraph 5, if the Organization feels it is necessary, it can ask for a meeting which shall be granted by the

Carrier to discuss the contemplated contracting out of work, as specified in its notice to the Organization. Paragraph 5 further provides that in the event the parties do not agree whether or not the Carrier is authorized to contract out the work, each party reserves the right it had and the Carrier can go forward with the contracting out of this work. In other words, in the event of no agreement at the conference, the Carrier is free to proceed with the contracting out of the work and the Organization is free to file and process a grievance.

The Carrier also maintains that the required notice was given to the Organization on April 5, 1999 by its predecessor, Conrail, and the required conference occurred on April 7, 1999, a fact not disputed by this Organization, the Carrier is quick to add. Consequently, all requirements for contracting out, from the Carrier's point of view, were fully satisfied in the instant case; moreover, since there are no further contractual provisions limiting the Carrier's right to subcontract, there is no merit to any of the procedural or substantive contentions proffered by this Organization in this matter.

However, it is also the position of this Carrier that the holdings of the Douglas Award constitute binding precedent in this case, as well as in the other 6 pending cases before the Board. It is the firm position of the Carrier that the findings of the Douglas Award are not palpably erroneous, which is the proper standard to be used by this Board in analyzing whether the Douglas

Award's findings must be considered to be binding precedent on each pending claim presently before this Board, as the Carrier sees it.

The Carrier goes on to reason that applying the holdings of the Douglas Award to the instant claim, there cannot be considered to be any basis for any of the procedural or substantive arguments presented by the Organization. Thus, the instant claim should be denied in its entirety, the Carrier urges.

Applying the teachings of the Douglas Award, the Carrier presented several affirmative defenses which it asserts demand a finding that there was no violation of the System Agreement in this instant dispute. First, it argues that the binding past practice between these Organization and Conrail on this property was to contract out hot asphalt paving work, a fair reading of the evidence of record should demonstrate.

Second, the Carrier asserts that there was insufficient manpower available among the employees represented by the Organization to draw upon to do the required work at all times in question.

Third, the Carrier contends that there was not the proper equipment available to it to perform the work within the time required for road crossing paving and, for such repairs, time is of the essence.

Finally, asserts the Carrier, with respect to the Claimants, all were fully employed and, in fact, several of the above-named Claimants were working substantial overtime during the time period set forth in this specific claim.

The Board has carefully reviewed the record in this case. It is the opinion of the majority of the Board that the Douglas Award was not palpably erroneous and constitutes a binding precedent for this case, as well as the other 6 pending matters, as was discussed in great detail in the lead case issued by this Board, Case No. 1. To the extent applicable, all findings of fact and the holdings in Case No. 1 are expressly incorporated in the instant Award as if fully rewritten and are expressly adopted by this Board, we rule.

Accordingly, we find that Paragraph 2 of the expanded Scope Rule covers the work in question but that the Organization's contention that this paragraph also constitutes an iron-clad bar against contracting out by the Carrier, absent the Organization's express consent, is not a correct interpretation of the meaning of that paragraph or the reach of the Scope Rule. Contracting out is permitted to the Carrier under certain circumstances under the System Agreement, we rule, but the Carrier is required to shoulder the burden of presenting persuasive and overwhelming evidence of the business justifications that require it to contract out in each specific case. Strict scrutiny of the reasons presented by the Carrier is the required standard of analysis. Prior practices on the property under predecessor agreements cannot properly be deemed to be binding past practices under the expanded Scope Rule, the majority of the Board also holds.

However, it is unnecessary to apply these specific holdings of the Douglas Award to the facts of the instant dispute, the majority also finds. This is so because the facts of record illustrate that

the current Carrier did not give the required notice that it would subcontract the work at issue, namely, the hot asphalt paving set forth in this current claim. This is so because, on property, the specific notice presented to the Organization on April 5, 1999 was issued by Conrail in the context of the predecessor agreement between that Carrier and the Organization. The conference that was held as a result took place on April 7, 1999, also well before this current System Agreement went into effect. This meeting was thus held in the context of what is now an inapplicable past practice for contracting out hot asphalt work. The meeting could not concern the requirements of this Scope Rule, or of the entire System Agreement, which although not in effect at that point were the governing agreements at the time of the performance of the work in question. Notice by this Carrier to discuss the contemplated contracting out of this work in these circumstances and under the now applicable Scope Rule was required but never issued and no such conference happened, the majority rules. Therefore, there is no question that there was a violation of the System Agreement as regards the required notice, the majority holds.

The question, of course, is what to do about this violation. The Organization relies on numerous awards in which full damages were awarded. The Carrier argues strongly to the contrary that in the event there is no showing of loss of work opportunity - even though there might be a showing of violation of the System Agreement - no damages should properly be awarded.

In considering this question, the holding of the Douglas Award expressly adopted by the majority of this Board is extremely relevant. The Douglas Award specifically holds that the loss of work opportunity and the need to enforce the System Agreement when it is violated permits compensation of Claimants such as those in the instant case. The conclusion of the majority of this Board is that the named Claimants shall receive compensatory damages in the amounts claimed, in accordance with the findings of the Douglas Award. See also Third Division Award 35337 (Wallin, Referee).

AWARD:

Claim sustained in accordance with the Findings incorporated herein as if fully rewritten.

Elliott H. Goldstein
Chairman and Neutral Member

Steven V. Powers
Employee Member

Jim H. Wilson
Carrier Member

Dated: 1/18/05