PUBLIC LAW BOARD NO. 6510

Case No. 1

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 (Poole Paving) to perform Maintenance of Way work (paving and general cleanup work) at road crossing locations on the Cleveland to Indianapolis main line beginning on September 27 and continuing through November 5, 1999, instead of Messrs. R.K. Brenner, H.E. Francis, L.H. Peek, N. Bryson and M.R. Cain [Carrier's Files 12(99-1009) and 12-00-0138) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Claimants R.K. Brenner, H.E. Francis, L.H. Peek, N. Bryson and M.R. Cain shall now each be compensated for one hundred eighty (180) 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.

A. BACKGROUND

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. 1-16 and 8.

The parties have stipulated that the currently pending 7 cases, including Case No. 1, 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. 1, the matter currently under discussion, involve the contracting-out of work to third parties despite the Organization's contention that the Claimants, all employees represented by the Organization, had an iron-clad right to perform the disputed work.

On the other hand, it is the position of the Carrier that the plain language of June 1, 1999 System Agreement explicitly contemplates contracting-out without the consent of the Organization. This is so, contends the Carrier, so long as it provided appropriate notice and conferred with the Organization pursuant to its applicable contractual commitments. Specifically, the Carrier maintains that under the 1999 System Agreement, the Carrier retained the long standing right to contract-out when a legitimate business need exists, judged by a test of reasonableness when all the surrounding circumstances are considered.

In analyzing the record, this Public Law Board emphasizes that the April 29, 2002 Agreement between the parties that established this Public Law Board limits its jurisdiction, as follows:

> 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.

Finally, this Public Law Board recognizes that the presentation of the 7 cases to it on April 22, 2004 was the third Public Law Board involving contracting-out under the June 1, 1999 System Agreement and "that scores of other similar disputes remain unresolved by the parties." (BMWE and CSXT, Public Law Board No. 6508, p. 42, Neutral Chair, decided October 7, 2003).

This Public Law Board also notes that the intervening Public Law Board, presumably Public Law Board No. 6509 between these parties dealing with contracting-out under the June 1, 1999 System Agreement, resulted in the amicable resolution of all of the then

pending cases, so that the current Opinion and Award represents the first decision to be issued since the comprehensive opinion offered by Neutral Member Douglas in Public Law Board No. 6508 (hereinafter, the "Douglas Award").

The record further reveals that in the 7 now pending claims before this Board, including Case No. 1, the current matter under consideration, the parties raised several questions of critical importance with respect to the interpretation and application of the Douglas Award to the scores of pending claims between these parties involving issues of contracting-out under the June 1, 1999 Systems Agreement. Basically, the parties recreated the voluminous record presented to Referee Douglas regarding the history of contracting-out in the Railway Industry and between these parties in particular. The Organization vociferously contended that while it concurred in part in the Douglas Award, certain critical holdings made by Referee Douglas were "palpably erroneous" and should be specifically rejected by this Public Law Board Panel.

The Carrier, on the other hand, discerned several areas where it strongly disagreed with the findings of Referee Douglas, but, significantly, it stressed that unless the Douglas Award was "palpably erroneous" in its findings, it constituted binding precedence that should be followed by this Public Law Board in analyzing and determining each of the pending 7 cases, including Case No. 1, the case now being decided.

The Organization however has demanded that this Board revisit the Douglas Award. It is firm in its belief that certain critical findings to be discussed below should be rejected. The Carrier is equally firm in its belief that the Douglas Award is required to be followed in its entirety by this Board in the consideration of the 7 pending cases, and, particularly, Case No. 1, which is currently the subject of discussion.

The parties then proceeded to a discussion on the merits of Case No. 1, and also an analysis of several procedural issues raised by the Organization, the record evidence reveals.

In many respects, then, a primary focus of this Opinion and Award dealing with Case No. 1 must be the validity and precedential value of the Douglas Award. Additionally, all of the other arguments presented by the parties going to Case No. 1 will be discussed in the formulation of this Opinion and Award.

B. PERTINENT PROVISIONS

Agreement between CSX Transportation, Inc. and Its Maintenance of Way Employes 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 and 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:

B & B Department

A. Inspector Roster:

* * * *

B. Bridge and Building Roster:

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C. Plumber Roster:

* * * *

D. Machine Operator Roster:

* * * *

E. Bridge Roster:

* * * *

Track Department

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

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Section 4. Filling Temporary Vacancies

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Section 5. Failure to Qualify-Advertised Position

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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

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Section 5. Seniority Districts

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

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 falling into the category between System Production Gang work and basic point headquartered maintenance work; e.g., on 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 more than one 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.

* * * *

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 involved 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 ten (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 was 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 employes 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/

Cbarles I. Hopkins, Jr.

I concur:

/s/

[O.M. Berge]

C. CONTENTIONS OF THE PARTIES

1. The Organization

The Organization believes that the Scope Rule of the June 1, 1999 Systems Agreement, quoted above, expressly reserves the disputed work, which, in Case No. 1, consisted of asphalt paving and general cleanup work at road crossings on the Cleveland to Indianapolis main line beginning on September 27th and continuing through November 5, 1999. Such work was exclusively reserved to its members who were employees of the Carrier at that time and specifically to the named Claimants. It further submits that this case should be decided in Claimant's favor, based on the clear and

unambiguous language of the Scope Rule in the applicable Systems Agreement, as quoted above.

In what is the Organization's core contention, it maintains that the current Scope Rule set out in the System Agreement unambiguously reserves certain enumerated work to members of the Organization and constitutes an ironclad commitment by the Carrier that such work may only be contracted out to third parties upon the express consent of the Organization's General Chairmen. Such consent may come only after proper notice to the appropriate General Chairmen and the opportunity for the General Chairmen to request a conference for the parties to meet and confer over any Management proposal to contract out such reserved work to members of the Organization such as these named Claimants.

During or after such a meeting, upon proper explanation and discussion, the General Chairman of the Organization may give his/her consent for the specific contracting out proposed by the Carrier and discussed at that meeting but, in the absence of such consent, the Carrier has absolutely no right or authority to contract out any of this work, the Organization argues. That is the only possible reading of the current Scope Rule contained in the Systems Agreement, quoted above, the Organization avers.

The basis for the Organization's conclusion that the Scope Rule of the June 1, 1999 System Agreement represents an unequivocal and absolute prohibition on any contracting out by this Carrier is the unambiguous language negotiated by these parties, the Organization maintains. It reiterates that the current Scope Rule

clearly and unambiguously stipulates that all work in connection with road crossing renewal work, asphalting of road crossings and cleaning and removal work is reserved to the Organization's members, absent specific consent by the appropriate and responsible General Chairmen to the contracting out of such reserved work to non-employees of this Carrier.

Moreover, as the Organization sees it, even if the work in question was not specifically identified in the Scope Rule, which the Organization emphatically insists it is, the paving work at issue would nevertheless be reserved to the Organization's members because it is "work customarily or traditionally performed by BMWE represented employees" as contemplated by the Scope Rule. In this connection, it is the position of the Organization that, on the property, the Carrier never disputed the General Chairman's statement that work of the type in question has historically been performed by BMWE employees.

Turning to the historical background that preceded the Systems Agreement of June 1, 1999, which the Organization represents is critically significant for a proper analysis of the merits of the current dispute, the Organization notes that the Carrier, as it exists today, is the product of numerous mergers and acquisition transactions which, over a period of several decades, allowed this Carrier to consolidate numerous formerly independent railroads in the Eastern half of the United States into a single, extremely large railway enterprise. The Organization affirms that, while these formerly independent railroads were consolidated for

operating purposes, the collective bargaining agreements these separate Carriers had with this Organization remains in place.

Hence, says the Organization, by the 1990s there were some 13 labor contracts in place between the Organization and Carrier, each covering the territory and employees of a formerly independent railroad. To the Organization, there was a common thread that ran through all 13 collective bargaining agreements, namely, in each, there was a Scope Rule which described work reserved to the Organization's members with varying degrees of specificity, but in each of those collective bargaining agreements, there were provisions that went on to explicitly state numerous exceptions, including exceptions under which that work could be contracted out by this Carrier.

It is the further position of this Organization that, in addition to rules that defined scope-covered work reserved to its members who were employees of the Carrier and delineated specific exceptions, including expressed exceptions under which said work could be contracted out, all the labor contracts in effect on the Carrier prior to June 1, 1999 also included some type of provision which required the Carrier to notify and confer with the appropriate General Chairmen when it intended to contract out work within the scope of the Labor Agreement. Some of these notice and meet and confer provisions were contained in local rules, the Organization notes.

On those former Carriers where there were no local notice and conference rules, the parties adopted the notice and conference

provisions of Article IV of the May 17, 1968 National Agreement, quoted above.

The key point about the advance notice and conference provisions of Article IV of the May 17, 1968 National Agreement is that, according to the Organization, those specific provisions had absolutely no effect on the substantive rights of either party in connection with contracting out, as those rights were embodied in their then-existing local agreements. Rather, the Organization emphasizes, the purpose of Article IV has always been perceived to be to require "good-faith discussions to promote understanding and limit disputes." As a practical matter, the Organization suggests, Article IV was a "no strike" clause with respect to individual contracting transactions. That is, the Organization asserts, in exchange for advance notice and a contractual obligation on the Carriers to engage in good-faith discussions, this Organization agreed that it would enforce work reservation rules in its local agreements through claims and arbitration, rather than by striking.

To the Organization, it is also of some significance that the parties, including Carriers merged into or controlled by CSXT, once again addressed contracting out on a national basis in a national Letter of Agreement dated December 11, 1981, also quoted above. The Organization argues that this national Letter of Agreement was an express reaffirmation of the obligation of the Organization and this Carrier, among others, that advance notice requirements be strictly adhered to and that the parties were committed to taking full advantage of the good-faith, meet and confer obligations

contained in the applicable agreements to reconcile differences over specific subcontracting issues.

The Organization asserts that the local scope and work reservation rules and the local and national notice and conference rules just mentioned led to hundreds of claims and many arbitrations involving the various predecessor properties of the current Carrier. It also argues that these above-quoted notice and conference rules did not specifically authorize the Carriers to contract out, given the general agreement that no substantive rights were conveyed by the notice and conference provisions. That fact affirms, in the Organization's view, the gross error made by Arbitrator Douglas in finding the virtually identical notice and conference provisions of unnumbered Paragraphs 4 and 5 of the Scope Rule in the June 1, 1999 Systems Agreement, quoted above, as having created an ambiguity in the rule itself and also as having somehow granted affirmative rights to the Carrier to contract out without the express consent of the Organization.

At any rate, the Organization once again stresses that in the arbitrations involving the parties' labor agreements prior to the June 1, 1999 Systems Agreement, if the Carrier showed that it complied with the applicable notice and conference rules, the burden shifted to 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 that burden, it reports, the burden of proof then shifted to the particular Carrier to prove that an exception permitted the

contracting out. The Organization cites Award 35377 (2001) (Wallin, Referee) as containing a concise summary of the applicable principles relating to Scope Rules and contracting out.

The Organization believes that the final step in the evolution that led to the single June 1, 1999 Systems Agreement occurred in 1998, when the Surface Transportation Board approved the acquisition and division of the Consolidated Rail Corporation ("Conrail") by this Carrier and the Norfolk Southern Railway in a transaction commonly referred to as the "Conrail Carve-Up". Pursuant to the conditions of that transaction, the Carrier took control of a significant portion of Conrail trackage and employees, the Organization notes. The parties were further required to negotiate an agreement to implement integration of the work and employees on that trackage into the Carrier's then-current rail system.

Negotiations over and implementing agreement stalled and an arbitrator issued a decision creating terms of the implementing agreement, the record shows. In part of the response to that arbitrator's decision, but also to resolve several problems that the parties had grappled with for decades, as the Organization sees it, the parties began to negotiate such issues as a single systems-wide labor agreement between this Carrier and Organization; larger regional operating territories for mobile gangs; contracting out of Maintenance of Way work; and other work rules the Carrier desired to change in order to enhance productivity.

The Organization describes that the difficult issues led the parties to use the 1996 Agreement between it and the Indiana Harbor Belt Railroad (a Conrail subsidiary) as a model for the parties. However, the Organization concedes that the parties also agreed that the existing national rules would prevail over the Indiana Harbor Belt Railroad agreement's local rules.

The Organization is specifically asking this Public Law Board to find that, as a result of the negotiations that led to the June 1, 1999 Systems Agreement, there currently exists in Paragraph 2 of the Scope Rule of this Agreement an absolute bar to contracting out by the Carrier the work that has been reserved to BMWE members, namely, all the work enumerated in this Scope Rule, absent specific consent by the appropriate General Chairman. The negotiated language of Paragraph 2 of this Scope Rule represents a "sea change" as regards the ability to contract out by this Carrier, the Organization submits. This claim is premised on what the Organization characterizes as both the acts of omission and commission of the parties in negotiating the current Scope Rule. Specifically, the Organization argues as follows:

(1) The introductory statement of unnumbered Paragraph 2 of the Scope Rule is absolutely unambiguous in stating "[T]he following work is reserved to BMWE members ... " This is an act of commission by the parties' negotiators;

(2) Although this Scope Rule unambiguously reserves the disputed work for its members who have customarily, traditionally and historically performed such work, there were certain negotiated exceptions in the Scope Rule. Contracting out is not included as such exception. This is an act of omission, the Organization opines;

(3) The fact that the Scope Rule in the June 1, 1999 Systems Agreement contains no exception for a lack of adequate equipment, adequate manpower or adequate employees having special skills or special qualifications, as did the prior 13 agreements involving this Carrier and the predecessor Conrail Labor Agreement. This is another act of omission, the Organization emphasizes; and

(4) The last act of omission was that there is no language in the current Scope Rule maintaining the prior practices or local customs with reference to contracting out throughout the CSXT Rail System.

As a result of all the foregoing, the Organization urges that a plain reading of the Scope Rule precludes the Carrier from contracting out the disputed work in Case No. 1 and eliminates the need to consider extrinsic evidence such as objective and/or subjective bargaining history to decide that claim, even though the bargaining history of this Scope Rule supports the Organization's position.

Turning specifically to the Douglas Award, the Organization submits that there is absolutely no basis for Referee Douglas's conclusion that the Scope Rule of the current Systems Agreement is at all ambiguous as regards contracting out. Any fair reading of the actual terms of these two paragraphs must result in a finding that they do not convey any substantive rights, the Organization notes. That is what is expressly said in the paragraph, it submits.

Additionally, in response to Referee Douglas's reasoning that the principles of contract interpretation demand a purpose or reason for the inclusion of the final two paragraphs of this Scope Rule, the Organization urges that these provisions historically developed, as a practical matter, as a "no strike" covenant by the

Organization and its members with reference to contracting out disputes. Consequently, Neutral Douglas was simply wrong when he found these two paragraphs somehow conveyed the substantive right to contract out to this Carrier by their inclusion in this Scope Rule. That is the fatal flaw in the logic and reasoning of the Douglas Award, the Organization strenuously argues.

Because of this crucial gap in reasoning in the Douglas Award, the Organization submits, the Douglas Award's finding that the Scope Rule of this System Agreement does not clearly and unambiguously reserve the disputed work to BMWE members and is not an ironclad bar to contracting out by this Carrier, absent consent of the Organization, is palpably erroneous, this Organization contends. Thus, the Douglas Award should not be followed in Case No. 1 currently before this Public Law Board, or in the other six cases pending before the Board, the Organization urges. Instead, 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. Therefore, this Board should apply that principle in its analysis and holding as to the claim in Case No. 1, the Organization maintains.

Finally, the Organization urges that, in Case No. 1, as well as in the other six pending cases, the affirmative defenses offered by the Employer, namely, lack of adequate equipment, lack of available and qualified employees, and the fact that all Claimants were fully employed, should be rejected by this Board. These

specific affirmative defenses were argued on the property as merely "boilerplate" assertions and were never substantiated by specific evidence, the Organization avers. Consequently, the Carrier has not shouldered its burden of proof as to any of these affirmative defenses, the Organization maintains. It also asserts that a monetary remedy for these Claimants is fully supported by applicable precedent and should be granted in Case No. 1, as well as the remaining six cases before this Board.

Based on all of the above, the claim in Case No. 1 should be sustained in full, the Organization concludes.

2. The Carrier

The Carrier maintains that it (1) did not violate the terms of the System Agreement by contracting out the asphalt paving work as claimed by this Organization in Case No. 1 nor deviate from past practice by subcontracting this work to a third party on the dates set forth in the Organization's claim. Additionally, the Carrier submits that it lacked adequate equipment, sufficient manpower, including available qualified operators for the equipment, as was shown by the evidence proffered to the Organization during the handling of this claim on the property.

Perhaps more important, the Carrier argues, the Douglas Award is not palpably erroneous and its reasoning should be accorded binding effect in this current case, as well as the six other pending cases before this Public Law Board, the Carrier avers. Consistent with the Douglas Award, the Carrier maintains that the Organization has the burden of proving by a preponderance of the

evidence that a specific provision of the System Agreement was violated by its contracting the disputed work, here, asphalt paving. To the Carrier, the Douglas Award represents a clear rejection of the core Organization contention that the Scope Rule of the June 1, 1999 System Agreement somehow constitutes 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 Scope Rule of this System Agreement specifically contemplates contracting out. This Board should reaffirm that clear finding and follow the Douglas Award as binding precedent on that point, the Board is told.

Indeed, says the Carrier, the Organization focuses on and completely relied on the single word "reserved" to supply such an expressed prohibition against contracting out. Yet, comments the Carrier, the history of the relationship of these parties surely discloses that the Carrier had originally relied on the silence of the early collective bargaining agreements between these parties on the topic of contracting out to reflect that Management of this Carrier had retained its inherent right to contract out when a legitimate business need existed.

The Carrier adds that the purpose of scope rules in this industry has not traditionally been to exclusively define the rights of a carrier to subcontract. Numerous purposes are served by scope rules, including the dealing with the inter and intra craft lines, work assignments and jurisdictional disputes, this Carrier notes.

Turning to the specific Scope Rule at issue, the Carrier emphasizes that Paragraphs 4 and 5 provide a procedure to enable contracting out by the Carrier, as well as a structure for the Organization to file a claim and seek arbitration over such subcontracting on a case-by-case basis. Paragraphs 4 and 5 expressly create the notice and meet and confer obligations when contracting out is contemplated by this Carrier. The Douglas Award fully analyzed the meaning and intent of the parties in including these paragraphs and found that their inclusion meant that the current System Agreement had to have contemplated the authorizing of contracting out of work covered by this Scope Rule, despite the use of the word "reserved" in Paragraph 2. Not to follow this clear finding in the Douglas Award would require the rejection of the rules of contract construction that demand that a contract be read as a whole and that all words, phrases and clauses be given effect in interpreting a contract, the Carrier submits.

Although the Carrier interprets the word "reserved" in the second paragraph of the Scope Rule as indicating that the employees represented by the Organization will perform the enumerated work set out thereafter, rather than members of other class, it acknowledges that the Douglas Award gives that word a more expansive reading. Although the Carrier quibbles, it accepts the conclusion in the Douglas Award that Paragraph 2 represents a swing in the pendulum in favor of a presumption that the work set forth in Paragraph 2 should not be contracted out, absent significant and substantiated business reasons or justifications. The Carrier

argues that reference to a pendulum swinging really relates to issues concerning damages and not the critical management rights to subcontract. However, it accedes to the Douglas Award's reasoning that there is represented by Paragraph 2 of this current Scope Rule a decision by these parties to look with "strict scrutiny" at each individual dispute over contracting out, on a case-by-case basis.

Additionally, the Carrier notes that the Douglas Award rejected all the "subjective" evidence concerning bargaining history in a single paragraph. Also, it urges that this Board not consider any evidence of what occurred at the bargaining table or other examples of subjective bargaining history in this Opinion and Award, a suggestion with which the Organization apparently concurs.

In sum, then, the Carrier stresses that the Douglas Award should be followed in its recognition that the System Agreement permits contracting out by it, without the consent of the Organization. The clear purpose of Paragraphs 4 and 5 is not to provide notice of contemplated situations for subcontracting, but also to provide a procedure for handling disputes over whether contracting out is specifically permitted, on a case-by-case basis, the Douglas Award has found. In order to give meaning to these paragraphs and to resolve the inherent ambiguity of the current Scope Rule, the Douglas Award held that contracting out is permitted, and that Management may present specific justifications for contracting out scope-covered work.

The Carrier underscores that the General Chairman lacks the right to veto the contracting out, but retains the right to file a claim and progress that claim to arbitration for final and binding decision. The Employer submits that their justification such as lack of adequate equipment, lack of available and qualified operators, lack of sufficient manpower, and the fact that all employees in a seniority district may be working were expressly recognized by the Douglas Award as valid defenses to any such claim presented by the Organization. That reasoning and those findings clearly not palpably erroneous in their reasoning should be fully adopted by this Board, the Employer directly contends.

With regard to the specifics of Case No. 1, the Employer points out that any issues concerning the lack of proper notice presented in the hearing on this matter were not raised on the property and thus should not be considered by this Board. It specifically stresses that objections that the notices in Case No. 1 went to Conrail was not argued on the property and, in fact, the General Chairman handling this dispute recognized there is no valid issue of notice in this case.

It is also the strong position of this Carrier that the past practice has always been that "hot asphalt paving", such as that concededly involved in this case, has been contracted out to third parties. That is so, the Carrier maintains, because of the lack of adequate equipment and a similar adequate lack of qualified operators but also because such hot asphalting occurs after BMWE employees have torn up a crossing to replace tracks. The need to

follow a BMWE gang to return the crossing to usable condition, results in time being significant, the Carrier also asserts. This precluded leasing equipment by the Carrier so as to permit BMWE employees of the Carrier to do the scope-covered work, the Carrier also claims. This was certainly so after the carve-up of Conrail when all BMWE employees were working at full capacity, including overtime, the Carrier also urges.

Specifically, the Carrier points out that all the Claimants involved in Case No. 1 were fully employed and, in fact, were working overtime at the time in question. There is no contradiction of that fact presented by the Organization on the property, as the Carrier sees it. Moreover, there was no effective rebuttal to the Carrier's defenses that it lacked adequate equipment or available, qualified operators to do the scope-covered work of hot asphalt paving at the railroad crossing named in this claim on the date set out in the Organization's proffered proofs, the Carrier also contends.

Consequently, applying the principles of the Douglas Award to these current facts, the Carrier concludes that the defenses presented by it on the property were not merely boilerplate. The Organization has not presented anything more than conjecture or argument to rebut the business justifications nor has it established that a monetary remedy would be proper, based on these specific factual circumstances. The claim should therefore be denied in its entirety, as the Carrier sees it.

D. DISCUSSION AND FINDINGS

Four significant issues are raised by the parties concerning the seven cases currently pending before this Public Law Board which generally apply to all these claims, this voluminous record establishes.

The first concerns whether the Douglas Award is or is not palpably erroneous and whether its detailed findings and conclusions as to the meaning of the Scope Rule of the June 1, 1999 System Agreement confines this current Board.

The second issue concerns the level of proof the Organization must present, to validate its claim that a particular contracting out is of work covered by paragraph 2 of the current scope rule. Must the Organization prove more than whether or not the work at issue is mentioned in paragraph 2 as being reserved to its members?

The third concerns the level and specificity of proof necessary for Management to provide when it invokes affirmative defenses to a specific claim by this Organization under the Scope Rule that the Carrier's contracting out violated the System Agreement. In other words, whether the Carrier may present its specific defenses in what the Union has characterized as "boilerplate" fashion or whether the Douglas Award's "strict scrutiny" requirement is binding, so that, as a result, only specific reasons going to the actual given circumstances, as opposed to general conditions across a district or the entire Carrier, will suffice.

The fourth concerns whether the existence of a past practice, namely, whether contracting out of scope-covered work may occur under this Scope Rule based on the fact that it was commonly done by the Carrier before the subject Scope Rule came into effect.

The Organization asserts that contracting out is not permitted under the current Scope Rule for scope-covered work, absent consent of a General Chairman, because that is the plain and unambiguous meaning of the language negotiated by these parties in Paragraph 2 of this current Scope Rule. To the extent that the Douglas Award does not uphold that interpretation of the Scope Rule, it is palpably erroneous, the Organization also urges.

The Carrier insists that the Scope Rule is essentially ambiguous in nature, as was found to be true by the Douglas Award. It also argues that the core finding of the Douglas Award is that the Carrier has a right to contract out when a legitimate need exists to do so. The parties' intent, when the current Scope Rule is properly read, the Carrier insists, is that the ultimate review of the Carrier's right to contract out must occur in arbitration on a case-by-case basis.

The Carrier also strongly suggests that general proofs presented by it of the lack of sufficient manpower after the transfer of the Conrail assets, the special needs and equipment required in a specific contracting out situation or the failure of the Organization to prove that any Claimants had performed the disputed work in the past should require the denial of a claim, even under a strict application of the Douglas Award.

First, the majority of this Board finds that the Douglas Award is not palpably erroneous in its finding that the current Scope Rule is ambiguous on its face as to the critically important issue of whether or not contracting out of scope-covered work is permitted, absent consent by the Organization. The current Scope Rule establishes a comprehensive system to delineate the work that is to be performed by the BMWE craft. The first paragraph identified, generally speaking, the basic work to be done by the craft.

As the Douglas Award notes, Section 2 then states, in the critically important clause in its first sentence:

> "[t]he following work is reserved to BMWE members ..."

As the Douglas Award also states, the term "reserved" has "a long history in the railroad industry as reflected in its presence in many prior collective bargaining agreements and by the special attention that it has received in many prior arbitration decisions." Douglas Award, at p. 43. Thus, it was not palpably erroneous nor even anything like a stretch in logic for the Douglas Award to conclude that the decision of the parties to include the term "reserved" reflected a "calculated and knowing decision to enhance the pre-existing strong presumption that bargaining unit members must perform the subsequently enumerated work." Id. at p. 44.

We hold as a consequence that the inclusion of the term "reserved" in Paragraph 2 of the Scope Rule represented the informed decision by the negotiators of the current System

Agreement to strengthen the current Scope Rule as to its application and meaning. The majority of this Board agrees that, among the possible range of variations and the wording of scope rules, the one chosen by Paragraph 2 of the current Scope Rule provides that only BMWE members have a right to perform the enumerated work.

The parties do not dispute that Paragraph 3 contemplates covering situations of work assignments both intra and inter craft in nature. The intent of the parties is to deal with potential jurisdictional disputes by the reach of Paragraph 3, as the Douglas Award has indicated.

It is, of course, the potential and meaning of Paragraphs 4 and 5 that form the focus of this current dispute. As the Douglas Award interprets these paragraphs, with the exception of the emergency situations exclusion, the notice requirements in the fourth paragraph and the conference opportunity in the fifth paragraph of this Scope Rule provide "a rather clear, plain and well-established structure for the parties to follow when the possibility of contracting out may occur." Id. at p. 44.

The presence of these provisions, of course, is the logical foundation for the finding in the Douglas Award that an inherent ambiguity as regards contracting out exists between these two paragraphs and paragraph 2, the majority of this Board further finds.

Given the provisions of Paragraphs 4 and 5, the conclusion contained in the Douglas Award that subcontracting out was

contemplated cannot be found to be palpably erroneous, the majority reiterates. If the parties had intended to totally prohibit contracting out by the Carrier, absent consent by this Organization, they could have said so. No such disclaimer is found, given the incorporation of Paragraphs 4 and 5 into the current Scope Rule. Nowhere did the parties state that the inclusion of Paragraphs 4 and 5 providing a notice requirement in the fourth paragraph, if contracting out was contemplated, and the offering to the Organization in that circumstance a conference opportunity by way of the fifth paragraph's terms, was to be considered "mere surplusage", we rule.

The claim of the Organization that these two paragraphs merely represented, effectively, a "no strike clause" is also insufficient to explain the inclusion of these paragraphs, as drafted, the majority further holds. Had it been the wish of the parties to merely provide for a "no strike" provision when improper contracting out occurred, it would have been a simple matter to write those words into this procedure, the majority of the Board rules.

The point is that paragraphs 4 and 5 cannot reasonably be read as merely doing that, as the Organization insists, because the comprehensive procedures contained in paragraphs 4 and 5 have a much broader and at the same time more precise reach. The critical factor, in the majority's opinion, is that management was given the right to subcontract in at least some instances by the provision for a procedure when that happens, as the Douglas Award states.

What intervenes between the contemplation of the possibility of a decision to contract out and the act itself is the required procedure of notice and a "meet and confer" conference. The very purpose of the conference is to discuss and develop the options and issues surrounding the contracting out. If there is then no amicable agreement on the contemplated contracting out, one way or the other, then paragraphs 4 and 5 say arbitration of the Organization's claim is the path open to it, while the Carrier may proceed to contract out the work pending the adjudication of the parties' dispute.

Thus despite the seeming limitation of these paragraphs to conveying merely a procedure for dealing with sub-contracting disputes, and not substantive rights, that statement cannot reasonably be taken as an absolute. From the standpoint of the entire application of the broadened scope rule in this System Agreement must be found permission for contracting out by the Carrier, without regard to the Organization's consent. The language of paragraphs 2 and 4 and 5, by necessary implication, means precisely that, the majority holds, as did the majority in the Douglas Award. Reading the Scope Rule as a whole, and to give all its provisions meaning, requires that conclusion, the majority again states.

Consequently, there is present in this strengthened Scope Rule a defined procedure which may be triggered by Management's contracting out. At the very same time, the second paragraph of the Scope Rule clearly indicates that only BMWE members have a

right to perform the enumerated work, as already mentioned above. For the Douglas Award to conclude that the tension between these provisions resulted in an "intended ambiguity" certainly cannot reasonably be deemed palpably erroneous, the majority of this Board specifically holds.

Based on the foregoing findings, it is difficult to understand the Organization's view that the current Scope Rule represents an absolute ironclad bar on contracting out. The impact of the inclusion of Paragraphs 2, 4 and 5 is therefore, as the Douglas Award holds, that contracting out is still permitted for scope-covered work under this Scope Rule. The "strict scrutiny standards" articulated by the Douglas Award however are proper and intended by the incorporation of the language of the second paragraph, including the word "reserved", the majority of the Board further reasons. From these determinations, it follows that the majority of this Board finds the Douglas Award a persuasive precedent as to the cases currently before it.

The second issue is what is the initial burden placed upon the Organization to establish a prima facie claim for a violation of the Scope Rule when scope-covered work is contracted out? What the Douglas Award makes plain is that all that is necessary is proof that the specific work falls within the categories enumerated under Paragraph 2 as reserved to members of this Organization. That is what the term "reserved" suggests, the majority emphasizes. The Carrier then must show that it has complied in all respects with the notice and conference provisions of the Scope Rule, namely,

Paragraphs 4 and 5, as supplemented by the applicable National Agreements, we further find.

These findings, however, do not fully resolve the dispute. The fact that the Organization may not strike but must proceed to arbitrate claims over contracting out does not mean that management merely has an obligation for giving timely notice and then affording the Organization an opportunity to meet and confer in a conference format over the contemplated contracting out. Fulfillment of the Carrier's obligation under the current scope rule requires substantially more of the Carrier, the majority holds, as was clearly indicated by the teaching of the Douglas Award.

The Organization and those claimants affected by the contracting out decision of the Carrier have a right to grieve the subcontracting. The Organization and these claimants cannot effectively grieve unless they are made aware of the business justifications for contracting out, the reasons why management has invoked its ability to contract out in the specific instance, the majority further finds. And, as the Douglas Award also holds, the reasons presented by the Carrier at the conference on the property must not be merely boilerplate or generalized reasons.

Persuasive specific evidence must be presented from the Carrier that "a compelling reason exists to contract out the disputed work". To deny the Organization such reasons is to deny it and claimants their right under the grievance procedure to maintain a credible challenge against management's actions. That

is the nub of this case, the majority of the Board is convinced. A review of the history of the current Scope Rule and analysis of its overall structure requires such a construction, which a majority of this Board finds fully consistent with the Douglas Award. Fundamental fairness required no less, we stress.

On that basis, then, as the Douglas Award indicates, the Carrier is now obligated to present its affirmative defenses at the conference and in the handling of the dispute on the property. By its terms, the Douglas Award represents a recognition that situations do occur where contracting out of scope-covered work is fully consistent with the Scope Rule of the current System Agreement. However, as the Douglas Award states, when presenting business justifications as an affirmative defense, "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." Id. at p. 46.

The conclusion of the majority of this Board with reference to the last issue posed, that is the applicability of past practice evidence as an affirmative defense available to the Employer, of necessity must also relate to the history of the bargaining of this provision and the circumstances which gave rise to the negotiations for the current System Agreement. The majority emphasizes that the fact that the second paragraph of the Scope Rule provides that only BMWE members have a right to perform the enumerated work, as was found by the Douglas Award, suggests that prior practices to the

contrary do not constitute proper proof for the legitimacy of a decision to contract out by this Carrier. Past practices may not trump the right of claimants to do the enumerated work "reserved to members of the BMWE" by paragraph 2, after the negotiation of the current Scope Rule. That is the critical conclusion as to the issue of the applicability of past practice to Case No. 1, we further hold.

Turning then to a specific discussion of the facts and contentions regarding Case No. 1, the Board has carefully reviewed the record evidence and the submissions of the parties. From the parties' submissions, it is evident that the Organization is arguing that there is a defect in the required notice, as per paragraph 4 of the Scope Rule currently under review, that is, that rule as contained in the June 1, 1999 System Agreement. The basis for this contention is that the two notices sent to the Organization relevant to this dispute were issued by Conrail, and not by this Carrier, the Organization emphasizes. However, the majority of the Board finds no defects in the form of the notice given, since that specific argument was not raised on the property, this Board's review of the evidence reveals. Additionally, the Organization's General Chairman indicated in his handling of the matter on the property that the notice presented was satisfactory and appropriate, the majority notes. Thus, if there were a defect in notice, that argument was either waived or at least is not properly preserved for consideration by this Board, the majority concludes.

In reviewing the merits of the claim, the majority of the Board also specifically finds that the Organization's should be sustained, based on the Carrier's violation of this Scope Rule under these facts, for the following reasons.

Initially, the majority notes that the primary focus of the Carrier's reasons for contracting out the hot asphalt work at road crossings which is what was involved in Case No. 1 is the "past practice of the parties" under the former Conrail agreements. The Carrier presented specific and detailed evidence concerning this practice as its primary justification for contracting out in this instance both at the conference prior to the actual contracting out of the work and throughout the handling of this dispute on the property.

The Carrier argued that the specific work of hot asphalt paving, as a matter of practice, was not commonly done by members of the Organization or these claimants and, therefore, the work could be unilaterally subcontracted as long as the notice and conference requirements of the Scope Rule were complied with by the Carrier, as was, as a matter of fact, the situation in this specific claims, the Carrier says.

However, as mentioned in detail above, the justification by the Carrier that past practice permitted the disputed contracting out is not considered by the majority of this Board as valid in this instance. There is no dispute on the record and in the submissions that the specific work at issue was covered by paragraph 2 of the expanded Scope Rule and is therefore included in

the work "reserved to BMWE members" by this expanded rule. Past practice as a justification to contract out scope-covered work is not a valid defense or permitted reason, either under the rubric of this particular Scope Rule or the holding of the Douglas Award, the majority finds.

Other than the rejected "past practice" justification, the reasons presented by the Carrier on the property were generalized justifications, as the Organization has argued. First, the Carrier urged that it had complied with the notice and conference requirements of this Scope Rule and, the Carrier has suggested, that fact, in and of itself, should be sufficient to constitute a complete defense of its contracting out decision. The majority of this Board has, however, rejected the Carrier's basic position to that effect in great detail above and specifically, the majority holds, in this case that particular justification cannot be considered persuasive evidence from this Carrier equivalent to a "compelling reason" being in existence to contract out the disputed work.

The remaining reasons the Carrier presented on the property were that it lacked appropriate equipment; its own employees were engaged in performing other work; and perhaps there was a lack of available qualified operators or time was insufficient to cure all these problems. The record omits any 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, we however find. To

that extent, we reject the Carrier's "boilerplate" contentions as mere conjecture.

Consequently, the majority of this Board concludes that the Carrier has failed to satisfy the requirement of the Douglas Award that compelling evidence of an affirmative defense or business justification for contracting out scope-covered work was presented on the property. The "boilerplate" justifications, other than the Carrier's rejected contentions that compliance with the notice and conference requirements of the Scope Rule by it or past practices permit the Carrier to make a unilateral decision to contract out, are simply insufficient to satisfy the requirement for persuasive proof of a compelling reason to contract out scope-covered work.

Having found that the Carrier improperly contracted out the hot asphalt paving work at road crossings on the dates and times set forth in the parties' submissions, the issue is what is a proper make whole remedy. The Carrier emphasizes that the individual claimants have not lost work time or wages as a result of this specific contracting out of scope-covered work. It argues that, in similar circumstances, many neutrals, including the neutral member of this Board, have refused to issue a monetary remedy to named claimants. However, it is also common and well-accepted to award compensatory damages for the loss of the opportunity to perform contracted-out work as an appropriate method to preserve the integrity of the System Agreement. On balance, and considering the precedent of the Douglas Award, a majority of this Board finds that the claimants shall receive compensatory damages

in accordance with the findings of the Douglas Award. See 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 1/5/05
Jim H. Wilson
Carrier Member

Dated: