AWARD NO. 14
NMB CASE NO. MW-32721
UNION CASE NO.
COMPANY CASE NO.

PUBLIC LAW BOARD NO. 6086

PARTIES TO THE DISPUTE:

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS

- and -

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES

STATEMENT OF CLAIM:

(1) The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way and Structures Department work (asphalt paving) at six (6) roadway crossings in St. Louis, Missouri beginning October 31 through November 11, 1994 (System File 1994-44/013-293-14).

(2) As a consequence of the violation referred to in Part (1) above, Messrs. S. Millard, A. Ramirez, J. King, D. Bean, W. Wiley, R. Hoffman, J. Gatlin, M. Mitchell, M. Kayser, S. Wolf, C. Lovett and W. Vickers shall each be allowed eight (8) hours' pay at their respective straight time rates for each day the outside forces performed the work in question during the period of October 31 through November 11, 1994.

OPINION OF BOARD: Pursuant to Article IV, on September 21, 1994 Carrier's Chief Engineer advised the General Chairman of its intent to contract out the work of asphalt paving at six (6) different railroad crossings in St. Louis Missouri. In his reply to Carrier's notice, requesting a conference, the General Chairman asserted that it "had never been Carrier's desire in the past to contract out road crossings such as these". The General Chairman further asserted that the "same

crossings had been maintained by Carrier B&B forces for years", and that on each of those occassions, Carrier had the necessary personnel and rented any equipment it did not own necessary to perform the crossing paving work at issue. At the September 30, 1994 conference, the General Chairman renewed his objections regarding Carrier's proposed asphalt contracting project, asserting that the very crossings at issue had been maintained and rebuilt by Carrier forces "several times" in prior years."

For its part, Carrier stated that its supervisors, employees and equipment were "fully committed to other work for the rest of the construction season"and further contended that:

> Also, Carrier does not have some of the specialized equipment, such as a spreader box to properly perform this work. I relayed our recent experience at the Market Street grade crossing in Venice, Illinois, where Carrier forces applied 197 tons of asphalt to this three-track crossing and its approaches. Without the spreader box, this job took nearly one week to complete and was 'wavy and uneven' according to Illinois Department of Transportation (IDOT) engineer who made the final inspection. The City of Venice, who shared in the costs of this crossing improvement project with IDOT, rejected the paving work and still owes the Carrier $8,300, until a solution is reached.
>
> I also advised you that the majority of the asphalt work performed at the six proposed grade crossing is roadway owned and maintained by the local/state highway agency - not the railroad. The Carrier is financially responsible to restore the roadway approaches to the rail crossing when the railroad alters the roadway due to track changes.
>
> Logistically, the railroad usually arranges for the paving work in such cases, either by its own forces or by outside contractor. Once the railroad restores the roadway approaches to the approved profile, maintenance of the highway approaches up to the railroad crossing, reverts to the local or state road agency. A small, local railroad like TRRA is not in the business of asphalt paving.

On November 21, 1994 the Organization submitted a claim on behalf of those individuals noted *supra*, in which it alleged that Carrier had violated the Schedule Agreement, in addition to the 1981 Letter of Understanding, when it contracted out the asphalting work in dispute. The General Chairman reiterated that the asphalt paving of crossings listed in the contracted project was work identical to that which had previously been performed by B&B employees, that any past contracting out of larger paving projects like parking lots had been pursuant to agreement with the

Organization after Article IV notice, that the crossing paving aspect of the projects at issue required no "spreader box" or other specialized equipment and that the crossing paving was readily severable from the roadway approach aspect, which the Organization did not claim. In further processing, the General Chairman also asserted that he personally had performed the work of asphalt paving on these very crossings in years past, offered written statements from Agreement-covered employees describing their performance of this work regularly, customarily and primarily, if not but "exclusively", for more than thirty (30) years and presented detailed evidence dating back to 1963 to rebut Carrier's bare assertions concerning "hot asphalt" vs. "cold patching" in the prior performance of that work by Agreement-covered employees. Finally, the General Chairman stated:

> I also advised you that the crossings and the road were two different jobs and that they would be performed at different times, and this indeed the fact, on November 1, 1994 I went to these locations and found out that the contractors were digging out the crossings not the road and had started performing the crossings as we have for years without a spreader box, one crossing at a time also with a similar roller as the carrier had rented for the B&B employees in the past, on November 11, 1994, I went back to this location to find out that all off the crossings had been done but the street had not been asphalted.

Aside from characterizing the Organization's evidence as "self-serving", Carrier did not effectively refute any of that evidence in its final denial of the claim. For reasons explained fully in Awards 3,4,6,10, 11 12 and 13 of this Board, the Organization presented persuasive detailed record evidence of a *prima facie* violation of the Scope Rule in the contracting out of the work which is the subject of this particular claim, which Carrier's generic and completely unsupported counter-assertions failed to effectively rebut. As this Board held in Awards 3, 6, 11, 12 and 13, citing NRAB Third Division Awards 28998,31756 and 32748, between these same Parties, there is ample precedent for requiring Carrier to make the named Claimants whole for the proven violation of the Scope Rule in this case.

There is a divergence of authority on this property concerning payment of monetary damages to "fully employed Claimants", but for reasons articulated by the Third Division in Awards 31756 and 32748, we find such damages appropriate in this case. *Cf.*, Third Division Awards 29938 and 30829. As in Third Division Award 31756, we will remand the matter to the property for the Parties to determine the number of hours outside contractor forces spent between October 31 and November 11, 1994, performing the work of asphalt paving the crossings (but not the roadway work) at the six (6) locations described in Carrier's Article IV the notice letter of September 21, 1995. Once the final determination is made as the number of such hours and damages have been calculated at the applicable wage rates, we further order that the liquidated damages be divided equally among the employees named as Claimants in the instant case (not including Claimant R. Hoffman but including Claimant Ramirez, unless Carrier can show that he released or waived this claim).

AWARD

1) Claim sustained to the extent indicated in the Opinion.

2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.

Dana Edward Eischen, Chairman
Signed at Spencer, NY on August 26, 2000

Roy C. Robinson
Union Member 8/31/00

Company Member