SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 150
CASE NO. 150

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Consolidated Rail Corporation

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained in accordance with the Findings.

DATE: July 29, 2001

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Jefferies Construction) to perform paving and clean-up work on the Fort Wayne Line, Canton, Ohio at the Cleveland Avenue crossing on September 5, 1996, at the Clarendon Avenue crossing on September 5, 1996 and at the Raff Road crossing on September 5 and 11, 1996; on the Fort Wayne Line, Salem, Ohio at the Wilson Street crossing on September 13, 1996; and at Columbiana, Ohio at the Washington Street crossing on September 19, 1996, at the Lisbon Road crossing on September 23, 1996, at the Pittsburgh Street crossing on September 25, 1996 and at the Chestnut Street crossing on September 26, 1996 (System Docket MW-4559).

(2) The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with advance written notice of its intent to contract out the work described in Part (1) above as required by the Scope Rule.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants H. Miller, G. Cline, E. Smith, D. Wallace, T. Mulligan and D. Ganster shall be allowed compensation as follows:

"'The work was performed on the Fort Wayne Line at the following locations: Columbiana, Ohio crossings Pittsburgh Street 9/25/96 (5) men & (4) trucks, Chestnut St. 9/26/96 (5) men & (4) trucks, Washington St. 9/19/96 (5) men & (4) trucks, Lisbon Rd. 9/23/96 (5) men & (4) trucks. Each of the above claimants are claiming (8) hours for each date and for each claimant at their prescribed rate. Additional claimants that are vehicle operators claiming their respective rate for (8) hours on the same specified dates are: V. Paul #250443, R. Koteles #239687 and L. Knepp, Jr. #200452.

Canton, Ohio on the Fort Wayne Line 9/5/96 (4) trucks & (6) men at Cleveland Avenue crossing, Raff Road 9/5/96 and 9/11/96 (5) trucks & (8) men, Clarendon Avenue on 9/5/96 (5) trucks & (8) men, Salem, Ohio Fort Wayne Line Wilson St. on 9/13/96 (3) trucks & (4)

men. Claimants for 9/5/96 are: the same previous claimants as mentioned on page 1 of this claim, claiming their applicable rate, (8) hours for each date.

Additional claimants for 9/5/96 are G. Slates #678680 (frmn.) For (8) hours, M. Lane #217399 (veh. Op) for (8) hours, W. Sutton #234230 (Cl-2). These additional claimants are claiming (8) hours for 9/11/96 at their applicable rate. For 9/13/96 claimants are H. Miller, R. Koteles, L. Knepp, G. Cline, D. Wallace and E. Smith.'"

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

The instant dispute is the latest in a long series of claims dealing with the asphalt paving of rehabilitated grade crossings and associated clean-up work. The decisions have gone both ways. Three of them have particularly good descriptions of the ten-year history which eliminates the need for us to again attempt a restatement: See Third Division Award Nos. 30540 (Marx) and 32505 (Eischen) as well as Award No. 1 of Public Law Board No. 5938 (Malin).

For our purposes, the following brief summary is offered. Award 10 of this Special Board of Adjustment, issued in 1991 by Chairman Blackwell, found that the "... disputed work of paving (blacktop) and related clean-up work at grade crossings ..." was scope covered. Award 10 also found the Carrier to have violated the notice provisions of the Scope Rule. As the Addendum to Award 10 shows, those findings were upheld upon reconsideration. It is noteworthy that Award 10 did not limit its findings only to the use of cold asphalt material; it drew no distinction between hot and cold asphalt mixes. Award 82 and several later awards of this Board adhered to the same findings regarding scope coverage.

In 1994, the Third Division denied a series of claims. The lead case, Award No. 30540, said, "There is no support, however, for the view that Maintenance of Way forces have been used for 'hot asphalt' with any frequency or regularity. This was a point stressed in the on-property handling of this dispute. * * * The voluminous record provided by the parties does not offer persuasive evidence in contradiction to this statement." The Third Division also made a finding, on the record before it, that was adverse to the Organization regarding the availability of leased paving equipment.

In February and March of 1998, Public Law Board No. 5938 and the Third Division, respectively, issued apparently divergent awards. Board No. 5938 wrote denial Award 1 that attempted to reconcile the prior awards. The Third Division, on the other hand, authored sustaining Award Nos. 32505 and 32508.

We shall not attempt to reconcile the foregoing awards. Given the nature of railroad dispute

resolution, while it may be a laudable effort, it is futile to do so. It is well settled that each case must be decided upon its unique evidentiary record, which is developed by the parties during their handling of the matter on the property. With the passage of time, different people become involved in that development and investigative techniques and expertise improve. It is entirely likely, therefore, that evidentiary records will vary case by case. Indeed, a careful reading of the prior awards suggests strongly that the submissions that confronted the neutrals, all of whom had substantial railroad arbitration experience, varied considerably from those of the previous cases. It is for this reason that contentions based on so-called *prior precedent* must be considered with extreme caution. Absent specific agreement by the parties to the contrary, the reality is that the findings in a given award are limited to the record upon which they were made despite the desire by railroad neutrals to provide consistency between decisions.

Given the foregoing discussion, we emphasize that our analysis has been limited to a careful review of the record developed by the parties on the property. We have considered only the information and arguments that were made in that development. Accordingly, we have disregarded new information that was included for the first time in the parties' submissions to us. For example, the Organization included a 1966 magazine article that described in detail how the Erie-Lackawanna, now a component of the Carrier, used small mechanized division gangs instead of section forces to pave grade crossings using hot mix blacktop material. The on-property handling does not show the article to be a proper part of the record. Similarly, the Carrier included substantial material and argument pertaining to Presidential Emergency Board No. 229. This material was not a part of the on-property record and may not be considered.

In disputes of this kind, the threshold question for our analysis is that of scope coverage. There are generally two means of establishing scope coverage. The first is by citing language in the applicable scope rule that reserves the work in dispute to Organization represented employees. The second method is required when the language of the scope rule is general. In that event, the Organization must shoulder the burden of proof to show that the employees it represents have customarily, traditionally and historically performed the disputed work. It is well settled that exclusivity of past performance is not required to establish scope coverage *vis-a-vis* an outside contractor.

The instant parties have negotiated yet a third means of establishing scope coverage. In addition to the types of work listed, the Scope Rule also covers "... work which, as of the effective date of this Agreement, was being performed by these employees, ..." The applicable effective date here is February 1, 1982.

Repeated review of the on-property correspondence reveals only five defenses to the merits of the instant Claim made by the Carrier. Its initial December 5, 1996 denial simply contained the one-sentence statement that the work was outside the scope of the current Agreement. It did not refute any of the other assertions contained in the October 8, 1996 Claim, such as the availability of

rental equipment, the staffing used by the contractor on the eight disputed grade crossings, or the dates upon which the work was performed. In its March 14, 1997 denial of the Organization's appeal, the Carrier also added the defense that "... the issue of paving was settled on this property by Third Division Award 30540 ..." For a third defense, Carrier asserted the Claim was excessive in that it claimed compensation for more employees than the contractor used on each date. In response, the Organization provided a signed employee statement attesting to the number of contractor employees who worked at four of the disputed crossings.

In its final reply on the property, dated July 21, 1997, the Carrier added the fourth defense of significantly higher costs associated with doing the work with its own forces. For its fifth defense, Carrier said that in past cases it "... has conclusively proven that the paving of crossings historically has been contracted virtually across the system."

The Carrier's evidence in the on-property record consists of the aforementioned three letters. None of the assertions contained therein were supported with probative evidence. No evidence of past instances of contracting paving work was provided except, perhaps, indirectly via reference to Third Division Award No. 30540 and Award 1 of Public Law Board No. 5938.

The Organization, however, provided over one hundred signed statements of current and former employees that described the asphalt paving work they had done. While 70 described paving work without distinguishing between hot and cold mix, 24 specifically referenced the use of hot mix, and 2 described both hot and cold mix. Regarding the applicable time frame, 20 statements did not specify when the work was done, 39 were pre-1982, 17 were post-1982, and 19 described paving work both before and after the effective date of the 1982 Agreement.

In the final analysis, we find the Organization has established scope coverage, on this record, by all three means. First, the literal language of the Scope Rule shows that the parties agreed that "... construction, repair and maintenance of ... tracks ..." was generally recognized as Maintenance of Way work. There is no doubt that crossing rehabilitation is a form of track maintenance and/or repair. Second, the Organization has supported its assertions of historical, customary and traditional performance of both hot and cold asphalt paving at grade crossings with substantial evidence. Finally, the employee statements attesting to the performance of paving work both before and after February 1, 1982 is substantial evidence that such work was performed as of the effective date of the Agreement.

On this record, therefore, we are compelled to find that grade crossing paving work, using hot mix asphalt, was within the scope of the Agreement. Moreover, Carrier never refuted that its Maintenance of Way forces had the necessary skills to perform the work. Carrier also never refuted that necessary equipment was available for rent from Columbus Equipment Company at its eight outlets in Ohio. Finally, Carrier never refuted that Claimants lost a work opportunity and it never contended that the Claimants were unavailable during the Claim periods. It follows, therefore, that the Carrier violated the Agreement when it contracted for the performance of the disputed work by

outsiders.

Although the Statement of Claim alleges a notice violation, the record makes it clear that Carrier did comply with the notice requirements.

On the question of remedy, however, the Carrier did challenge the Claim as being excessive. In response, the Organization provided evidence to support the Claim only as to four of the grade crossings: Cleveland Avenue, Raff Road, Clarendon Avenue and Wilson Street. The Claim, therefore, is sustained only as to these four crossings. The staffing used at the remaining four crossings has not been proven on this record.

AWARD:

The Claim is sustained in accordance with the Findings.

Gerald E. Wallin, Chairman
and Neutral Member

R. C. Robinson,
Organization Member

See attached response

D. L. Kerby,
Carrier Member

See attached

Carrier's Concurrence and Dissent
To Award No. 150 of SBA No. 1016

Referee Wallin

Carrier concurs with the finding that each case rises or falls on the unique evidentiary record developed in the handling on the property. As the Board noted, the Organization's "evidence" only consisted of at best 36 statements of performing paving work after 1982, and none of these statements addressed any performance after 1985. This may arguably have been sufficient to place the work within the scope of the agreement; but, the lack of past practice evidence post 1985 represents that such work was being accomplished virtually in toto by contractors and was not reserved to BMWE, as recognized in Award 1 of Public Law Board 5938 and Third Division Award 30540.

The work in question is applying asphalt surface for vehicular traffic over the crossing; it does not concern maintaining rail, ties, ballast in the track structure, or any other track rehabilitation. In this case the Carrier must respectfully accept its shortcomings concerning submittal of documentation of past practice or lack of skill and equipment as described in the Award. However, inclusion in this case of the two Awards referenced above is submittal of evidence refuting BMWE's mere allegations of a reservation of this work, as opposed to scope coverage for the purpose of the notice procedures.

The Carrier understands and accepts this decision to be non-precedential in that it is confined to the particular circumstances presented in the handling on the property and that resolution of any subsequent dispute remains dependent on the state of the record. However, considering proper notice was issued, the BMWE's burden to substantiate its claim, and the lack of evidence of performance by Company forces since the early 1980's, the "indirect" evidence of the two Awards referenced above substantiate a denial. Accordingly, I dissent.

D. L. Kerby
Carrier Member
SBA 1016

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' CONCURRENCE AND DISSENT
TO
AWARD 150 of SBA NO. 1016
(Referee Wallin)

The Majority was correct in its ruling in Award No. 150 of SBA No. 1016, and nothing present in the Carrier's dissent distracts from the correctness and precedential value of this award.

Throughout the handling of this case, the Carrier never once challenged the evidence of the long standing past practice of its Maintenance of Way employes performing crossing paving work. Moreover, not once during the handling of this dispute did the Carrier ever assert, much less prove that it had a practice of contracting out such work in the past. Now, more than five (5) years after this case was initially raised on the property, it attempts to make its defense. The Carrier takes issue with the written statements and attempts to point out that none of the statements post date 1985. The reason why there is no written evidence of the Carrier's employes performing such work after 1985 is because that is when the Carrier began its campaign to remove such work from Scope coverage. The truth is that such actions of the Carrier did not go unchallenged by the Organization. Evidence of such challenge is manifest by reviewing Awards 10, 11, 82, 83, 84, 85, 86, 87 and 88 of this Board and Third Division Awards 32505 and 32508. The aforementioned awards concerned claims that arose between 1985 and 1991. Apparently, the Carrier is now attempting to offer up multiple and sustained violations of the Agreement as evidence of a past practice. Since those awards were rendered, the Organization has been claiming an Agreement violation every time the Carrier contracted out such work.

The Carrier attempts to assert that Award 1 of Public Law Board No. 5938 and Third Division Award 30540 are the only awards on this subject between these parties. The problem here is that the issues before the capable neutral in this case are the same issues and evidence that was before Referee Blackwell in Awards 10, 11, 82, 84, 85, 86, 87, 88 of this Board and Referee Eischen in Awards 32505 and 32508 of the Third Division of the NRAB. The undeniable fact is that the awards of SBA No. 1016 set the precedent on grade crossing paving in a series of well-reasoned awards and it was only through forum shopping and confusion that the course was temporarily altered by Award 30540 and Award No. 1 of PLB No. 5938. As is evident from the reasoning in Award 150 of this Board, the neutral in this case reviewed all of the evidence presented on the property, correctly analyzed the record and then astutely set the parties back on the course initially charted by SBA No. 1016. As we suspect future neutrals will divine from the clear reasoning in Award 150, this is the correct course.

Finally, the Carrier attempts to declare this award to be non-precedential in its eyes. Of course it is precedential as a review of the record of the award will verify.

Respectfully submitted,

Roy C. Robinson
Labor Member