

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONSOLIDATED RAIL CORP. : CIVIL ACTION
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NEW ENGLAND CENTRAL :
RAILROAD, INC. : NO. 98-CV-1343

MEMORANDUM AND ORDER

J. M. KELLY, J.

MARCH , 1998

The court has now considered the testimony that has been presented in this case and is prepared to make its Findings of Fact and Conclusions of Law and decision.

FINDINGS OF FACT

1. Consolidated Rail Corporation ("Conrail") and the Central Vermont Railway ("CV") are railroads which operate cross-tracks at all times material to this issue.
2. On September 1, 1983 the parties entered into an agreement ("Agreement") which by its provisions sets forth the financial responsibility for each railroad with respect to maintenance expenses incurred at a crossing located in Palmer, Massachusetts.
3. Section 1(c) of the Agreement provides that CV will be responsible for "100 percent of the cost of track work at the crossing."
4. Section 1(d) of the Agreement provides that either railroad may initiate "capital improvements" at the crossing,

- however, no party is obligated to participate in such expenditures without prior consent.
5. Capital improvements as it appears in Section 1(d) of the Agreement is intended to refer to a capital betterment, or a major change in the nature of an improvement.
 6. In 1990, Conrail replaced the diamond crossing. In accordance with the terms of the Agreement Conrail invoiced CV for \$81,811.78 on November 2, 1990.
 7. The project description of the November 2, 1990, invoice was "maintenance of crossing."
 8. CV paid Conrail's invoice of November 2, 1990, on November 27, 1990.
 9. In 1995, the New England Central Railroad, Inc. ("NECR") purchased the CV's assets and assumed CV's obligations under the Agreement.
 10. After Conrail personnel inspected the crossing diamond at Palmer, Massachusetts, they replaced the crossing diamond in April 1995.
 11. Conrail, on May 30, 1995, invoiced NECR for \$87,155.22 pursuant to the terms of the Agreement entered into between Conrail and CV.
 12. In the 1995 maintenance, Conrail purchased azobe timbers, which is an improvement over the ordinary oak timbers usually used in this type of construction. There were no other azobe timbers in place anywhere on the CV railway system. Azobe timbers were billed at \$6,634.66. This is

approximately six times what ordinary timbers previously used at the crossing cost.

CONCLUSIONS OF LAW

1. The issue between the parties is whether the work performed by Conrail at the Palmer Crossing and billed to NERC on May 30, 1995, as "maintenance of crossing" is a capital improvement or an ordinary expense.
2. In a prior instance between the parties to the Agreement, a similar expenditure in November 1990 was treated as an ordinary expense.
3. Prior dealings between the parties over a similar issue can be construed by the Court for purposes of the parties' understanding as to the meaning of terms in the Agreement. Atlantic Richfield Co. v. Razumic, 390 A.2d 736, 741 n.6 (1978) (adopting rule that course of performance is always relevant to interpretation of a contract).
4. The 1990 invoice contained both an ordinary expense and a capital improvement.
5. The use of azobe timbers is a capital improvement of \$5,500 and not allowed by the agreement between the parties without prior consent of NERC.
6. The capital improvement is limited to the

additional expense of using azobe timbers which increased the cost of the invoice by approximately \$5,500.

7. The parties' course of performance as evidenced by CV's payment for the 1990 replacement of the crossing demonstrates that the 1995 replacement of the crossing was a maintenance expense as contemplated by the Agreement.
8. The Court concludes that NERC is indebted to Conrail for all work evidenced in the 1995 invoice less \$5,500 for the azobe timbers, which represents a capital improvement. NERC owes Conrail \$81,655.22 plus interest.

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JAMES MCGIRR KELLY, J.