CORRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32105
Docket No. MW-31898
97-3-94-3-236

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to perform grade crossing repair and maintenance work (remove and repave grade crossing) at the highway grade crossing serving the Edmonds Ferry Terminal at Edmonds, Washington on November 11 and 12, 1992 (System File S-P-484-W/MWB 93-01-21A).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to contract out said work as required in the Note to Rule 55.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman D. L. Walser, Truck Driver G. F. Refuerzo, Group 5 Machine Operator A. W. Stanfield and Sectionmen P. P. Papanastasiou and G. K. Hikida shall each be allowed eight (8) hours' pay at their respective time and one-half rates."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Organization argues that the Carrier violated the Agreement when it failed to provide advance notice of intent to contract out asphalt repair work to a road crossing at Edmonds, Washington. The work performed by a contractor on November 11 and 12, 1992 was without the use of special equipment. The Organization maintains that the employees have customarily performed the blacktop work; that the "Blacktop Roller" normally utilized is contained within the Agreement; and that on nearly 100 occasions the Carrier has previously notified the Organization of its intent to contract out blacktop work. The employees were skilled; the work was performed with simple equipment that the Carrier has; and the Agreement was violated when the Carrier failed to notify the Organization of its intent to contract out.

The Carrier's position in large part is that it was under no obligation to provide the Organization with notice of intent in this instance. The Carrier rejects the Organization's assertions and centers its argument upon the lack of a Scope Rule right to the disputed work. In essence, the Carrier maintains that since the work did not belong to the employees, it was not obligated to give a notice of intent. The Carrier's arguments on the merits were expressed in part as follows:

> "The application of hot-mix asphalt is not within the Scope of the Maintenance of Way Agreement. In this respect, see Award 17 of PLB 4768. I am advised that contrary to the contention of the Organization... a self-propelled asphalt laying machine was indeed used on the project."

This Board has paid particular attention to the Awards cited by the parties to this dispute, as well as the Note to Rule 55. The Organization must prove its contention that the Carrier violated the Agreement. The Awards cited by the Organization are not on point with these on-property Awards (Public Law Board No. 4768, Award 1; Public Law Board No. 4402, Award 20; Public Law Board No. 2206, Award 34; Third Division

Awards 19924, 21534, 20633, 26784, 26793). Public Law Board No. 4768, Award 1 made a clear distinction between work "exclusively" performed and "customarily" performed as required by the Note to Rule 55 holding that:

> "work as described... which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' force. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material... are required,..."

The Board has studied the probative evidence to determine if the Organization has herein provided proof that "hot-mix asphalt" has customarily been performed by the employees and that a self-propelled asphalt laying machine is owned or within the special skills of the employees. While the written statements refute the use of special equipment, the Organization has not met its burden with the relevant documentation to adequately dispute the lack of hot-mix utilization as a special type of work. The Carrier on-property pointed directly to "Award 17 of PLB 4768." That Award references Award 1, but denied the claim due to the application of "hot-mix asphalt paving compound" in which it finds:

> "that the Organization cannot claim that this particular type of work is 'customarily performed' by Carrier forces, a basic prerequisite to the implementation of the Note to Rule 55."

We have studied the Note to Rule 55, past Awards (including the Carrier's Concurring Opinion to Award 1 of Public Law Board No. 4768), and the record on property. We are well aware of prior Awards holding that notice of intent must be made prior to contracting out (Public Law Board No. 2960, Award 136; Third Division Awards 27185, 24236, 20158, 13318). Nevertheless, Public Law Board No. 4768, Award 1 is not identical herein, as the focus must be the on-property record. This record relates to "hot-mix" which was denied by Public Law Board No. 4768, Award 17, the more applicable Award. In these circumstances, no advance notice was required. The Agreement was not violated and the claim must be denied as the Organization fails to provide proof that the Note to Rule 55 applies wherein the employees have not customarily performed "hot-mix" application.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 9th day of July 1997.