

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38150
Docket No. MW-37500
07-3-02-3-584

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(CP Rail System (former Delaware and Hudson
(Railway 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 Maintenance of Way work (blacktop/asphalt work) at the Saratoga Engine Shop in the Saratoga Yard on July 16, 2001, instead of furloughed System Equipment Operator K. Sweatt and furloughed Trackmen A. Martelle, B. Kent, M. Gorski and E. Pratt (Carrier’s File 8-00209 DHR).**
- (2) The Agreement was further violated when the Carrier failed to comply with the advance notice requirements regarding its intent to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 1 and Appendix H.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. Sweatt, A. Martelle, B. Kent, M. Gorski and E. Pratt shall now be compensated for eight (8) hours’ pay at their respective straight time rates of pay.”**

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.

On February 2, 2001, the Carrier sent the Organization's General Chairman a memorandum notifying him that "should the roster of available employees be exhausted . . . rail contractors [might] be sought to assist in the project work normally and customarily performed by BMW employees." Among the projects listed in that memorandum were "Asphalting Road Crossings (asphalt and prep)."

The instant claim was originally filed on July 28, 2001. The Organization alleged that the Carrier violated the Scope Rule of the Agreement when it assigned an outside contractor to perform blacktop work at the shop located in Saratoga Yard in Saratoga, New York.

In its October 3, 2001 denial of the claim, the Carrier contended that it had, in fact, notified the Organization of its intention contract out the work at issue, and it had, therefore, complied with the Parties' Agreement. The Carrier's denial was appealed on November 29, 2001. In that letter, the Organization noted:

"The Organization wishes to reiterate that Asphalting Road Crossings has been work done by BMW people in the past. However, in this Claim, issue is taken against the Contractor for blacktop work done in areas which were adjacent to the Saratoga Engine House. These areas were walkways and muddy areas which the Carrier wanted to repair. The Contracting Out reference listed

in the aforementioned letter had no bearing on this particular Contracting Transaction. The nearest Road Crossing is over one quarter (1/4) of a mile away.”

In its December 20, 2001 denial of the appeal, the Carrier conceded that the February 2, 2001 notice did not cover the work at issue in the Organization’s July 28, 2001 claim. The Carrier went on to state:

“However . . . the blacktopping work in question is not blacktopping work that is covered under any rule of the collective agreement, nor its it covered under any past practice, and accordingly, no contracting out notice was required.

The blacktopping around a building is not work that is ordinarily and customarily performed by D&H/BMWE employees.”

As with similar cases, the burden of persuasion in this case resides with the Organization. It made a credible argument that, notwithstanding the Carrier’s original response to the claim, the February 2, 2001 notice to the General Chairman did not cover the work at issue here. Furthermore, the Carrier conceded that fact. However, the Carrier contended that the work at issue is not, nor has it ever been work typically performed by BMWE-represented employees. A thorough review of the record before the Board does not reveal any evidence presented by the Organization to contradict the Carrier’s affirmative defense on this point. Accordingly, we find that the Organization has not met its burden of persuasion, and the claim must be denied.

AWARD

Claim denied.

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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 23rd day of April 2007.