Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42506
Docket No. MW-41588
17-3-NRAB-00003-110198

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(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 (Podrazil Blacktop Company) to perform Maintenance of Way work (paving roadway and storage pad) in the Binghamton Yard on October 1, 2008 (Carrier's File 8-00662 DHR).

(2) The Agreement was further violated when the Carrier failed to provide an advance notice of 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 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 G. Hutchings, R. Penzone, S. Hanyon and K. Quinlivan shall now be compensated at their respective and applicable rates of pay for all straight time and overtime hours expended by the outside forces in the performance of the aforesaid work on October 1, 2008."

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.

This claim involves the Carrier's decision to engage a contractor for asphalt paving or "blacktopping" (1) a section of the entrance road way, (2) an area of employee parking and (3) a pad used for storing salt and sand during the winter at the Binghamton Yard Facility.

On November 30, 2008, the Organization filed a claim stating the Carrier did not issue notice and conference prior to the contractor performing the work of roadway paving on October 1, 2008. The Organization claims this is scope-covered work as the force has paved crossings installed by crews. For example, the Central Bridge Section Crew in 2008 rented rollers and performed their own paving in 2008 and this work is being performed on the Susquehanna Subdivision by the force.

On February 10, 2009, the Carrier denied the claim stating "this type of paving work is not typically or historically performed by its forces. Therefore, neither a contracting out notice nor a conference was required."

On May 4, 2009, the Organization filed an appeal with employees' statements in support of its position. The Organization states that "as recently as 2008 the Carrier had an agreement with Casale Rent-All for a Dump Truck, Roller and Trailer to haul the Roller for paving[.]"

On August 10, 2009, the Carrier denied the appeal. The Carrier maintained its position that this is not scope-covered work as the Carrier does not own asphalt paving equipment. Therefore, the force has not performed this work. The Carrier highlights on-property Third Division Award 38150 where the Carrier engaged a contractor for blacktopping walkways and muddy areas adjoining the engine house and the Board concluded that blacktopping was not scope-covered work. The employees' statements refer only to patching potholes and the invoice from Casale Rent-All is for a truck and trailer and not an asphalt roller or paver machine.

Casale Rent-All does not rent asphalt and paving equipment. Even if such equipment could be rented, the force is not qualified to operate it.

The Carrier acknowledges that the force "does maintain the roads in the winter time with snow removal and the application of salt and sand on occasion and on occasion has fill[ed] potholes, however, with regards to potholes the Carrier has in the past used contractors" as the Carrier does not own the equipment required to perform this type of work so it contracts for this work.

On April 28, 2010, a telephone conference convened but resolution was not attained. Since this matter remains deadlocked, it is now before the Board for a final decision.

The Board reviewed the on-property exchanges and submissions with arguments and precedent relied upon. The record shows that the Binghamton Safety and Health Committee determined a portion of the roadway entrance and an area in employee parking required blacktopping and asphalt paving. This area was approximately 16 feet wide by 150 feet in length. The winter storage pad was approximately 20 feet by 30 feet. An asphalt roller and paving machine were required for this work and such equipment is not owned by the Carrier.

Also undisputed is that the Carrier did not issue notice or conference prior to contracting for the claimed work. There is disagreement between the parties over scope coverage of the claimed work and whether notice was required; resolving the disagreement requires the Board to consider two on-property awards that represent opposite views whether the work is subject to Rule 1 and notice.

On-property Third Division Award 38150, issued in 2007, concluded that "blacktop/asphalt work" for "walkways and muddy areas" next to an engine house was not scope-covered work so notice and conference was not required. In that proceeding the Carrier argued "the blacktopping work in question is not blacktopping work that is covered under any rule of the collective agreement, nor is it covered under any past practice" and "blacktopping around a building is not work that is ordinarily and customarily performed by D&H\BMWE employees."

In considering the Carrier's arguments that "the work at issue is not, nor has it ever been work typically performed by BMWE-represented employees," the Board concluded in that Award "the record . . . 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."

In the claim before the Board in this proceeding, the Carrier relies on the same arguments it presented in Third Division Award 38150 as well as points to infirmities with the employees' statements and rental invoice.

The opposite conclusion is set forth in on-property Third Division Award 39490, issued in 2009, where the work of "widen roadway [and] put down asphalt" was deemed scope-covered because "[t]he described work is classic maintenance-of-way work" and requires notice. The Carrier issued notice but it was untimely; The Organization states this undercuts the Carrier's premise that notice was not required.

Well-established precedent is that the burden of proof to establish a rules violation rests with the Organization. The claimed work involves operating equipment suited for grading roadway and asphalt paving. In this claim, paving a Carrier-owned roadway and storage pad involves the "repair and maintenance" of "other structures" under Rule 1.1 and "roller" is referenced as equipment in Rule 28. Also, the Organization stated in its initial claim filing that the "Central Bridge Section Crew in 2008 rented rollers and performed their own paving work" and this work was being performed on the Susquehanna Subdivision by the force. The Organization's statements were not exposed by the Carrier as embellished or otherwise inaccurate. The statements are credited. The Board finds sufficient evidence to conclude the claimed work is scope-covered and, as it is scope-covered, the Carrier was required to issue notice and, if requested, conference where matters of special equipment, its availability and source, as well as availability of skilled and experienced force would be addressed.

In concluding that the claimed work is scope covered, the Board observes that on-property Third Division Award 39490 dated 2009 was issued after Third Division Award 38150 dated 2007. Both involve the same Carrier and collective agreement. The Carrier would have known about the conclusion in Third Division Award 39490 and have anticipated the Organization presenting the more recently issued on-property award favorably construing the claimed work as scope covered. Sustaining the Carrier's asserted defense involves distinguishing the two awards. The Organization distinguished the awards and the Carrier did not. Unlike on-property Third Division Award 38150 which states the Board was presented with a record of no evidence from the Organization to rebut the Carrier's assertion the

work was outside the scope rule, in this claim the Board was presented with a record showing the force performed the claimed work.

Given the Board's finding that the work is scope covered, the Carrier's failure to issue notice violates Rule 1. As stated in Third Division Award 39490, "[t]he claim therefore has merit. As a remedy, the Claimant[s] shall be made whole as requested in the claim for the lost work opportunities."

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 11th day of January 2017.