

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44404  
Docket No. MW-43220  
21-3-NRAB-00003-200317**

**The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.**

**(Brotherhood of Maintenance of Way Employes Division  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(BNSF Railway Company (Former 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 (Buel/Pavers) to perform routine Maintenance of Way repair work (install cold mix asphalt) on approaches to road crossings located at Southwest 40th Street in Lincoln, Nebraska on May 21 and 22, 2014 (System File C-14-C100-156/10-14-0302 BNR).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto regarding 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 the Note to Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Brennan, J. Francke, M. Sailors, J. Butcher, A. Ewoldt, L. Miller, M. Hammond and M. Lane shall each ‘... be paid sixteen (16) hours straight time and four (4) hours overtime at the appropriate rate of pay as settlement of this claim.’”**

**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 May 21 and 22, 2014, the Carrier used an outside contractor, Buel Pavers, to replace approaches to crossings at 40<sup>th</sup> Street, Lincoln, Nebraska. Buel's employees used rakes and shovels to perform the work. The Organization filed this claim on behalf of a number of Claimants, many of whom submitted statements into the record regarding the work that was done. According to the Organization, the work of patching asphalt is within the scope of the parties' Agreement, which brings it within the Note to Rule 55. The Organization contends that the Carrier failed to give adequate notice as required by Rule 55 and that it failed to establish a basis under Rule 55 for contracting out the work. The Carrier argues that it did provide notice and that hot-mix asphalt work, such as that performed here, has long been recognized by the Board as outside the scope of the Agreement.

The Carrier is correct that hot-mix asphalt work is not reserved to or performed by Maintenance of Way forces; numerous Board awards have recognized that fact. However, the fact that hot-mix asphalt is not reserved to MoW forces does not necessarily mean that they have not historically performed any asphalt work; indeed the Organization argues that cold-mix asphalt work *has* been traditionally and customarily performed by MoW employees. In Public Law Board 4768, Award No. 17 (Marx, 1991), the Board wrote:

The Carrier makes particular reference to the application of "hot-mix asphalt paving compound" performed by outside forces with specialized equipment. In the claim handling procedure on the property, the Carrier presented evidence of 250 instances in which the Carrier had contracted out various types of asphalt work. This was not effectively contradicted.

The conclusion must be reached 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.

This finding is limited to the facts as present in this claim. It does not suggest, of course, that there is no crossing repair work and/or use of asphalt which is “customarily performed” by Carrier forces. The Organization has recounted examples where such is the case, unlike the particular situation here under review. (Emphasis in original.)

The Board here finds that there are some types of asphalt work—specifically cold-mix asphalt work—that MoW forces have done in the past. The issue in this case boils down to what type of asphalt work was done by Buel Pavers on May 21 and 22, 2014, at the crossing approaches at 40<sup>th</sup> Street in Lincoln, Nebraska. The Board has reviewed the record in detail. The claim as filed referenced the “hot-mix/cold-mix” distinction. The statements in the record from various Claimants indicate that Buel’s employees were observed “using rakes and shovels repairing approaches at Southwest 40<sup>th</sup> Street”. . . . “The work performed in this claim was in no way out of the scope of what our craft does”. . . . “BNSF has trained employees that have the knowledge to do this work. I have supervised this work many times in my career. We are the workers that put in the new crossings at this site and could have done the approaches also... I have witnessed this work done by BNSF equipment and employees in the past”. . . . “I have worked for BNSF for 38 years. I have done asphalt on street crossings for the public crossings let alone the railroad’s own private ones”. . . . “Maintenance of Way employees are all capable of performing the same duties, which occurred at these crossings. Maintenance of Way department has previously days before installed the crossing materials without the approaches....” The record also includes an e-mail dated July 8, 2014, from the Supervisor, Engineering Support, Structures Department on the Nebraska Division, James Matthews: “Consider this as rebuttal to claim—per letter of intent to contract submitted to Organization Chairpersons on 17 December 2013 ... the attachment of the potential scheduled crossings were clearly marked and work was clarified to not be all inclusive list. However, multiple crossings were identified as required work to be performed by outside vendors capable of completing entire project...” The attached list is titled “Crossing Locations Where Asphalt Will Be Placed in 2014.”

The Carrier’s initial letter of declination did not reference hot-mix asphalt. Its second letter of declination, dated October 24, 2014, stated: “As evidenced by the enclosed e-mail from Jim Matthews, the work involved application of hot-mix asphalt.

Mr. Matthews goes on to explain that BNSF employees do not possess the necessary skills and equipment to perform hot-mix asphalt work. Furthermore, BNSF has an extensive history of contracting hot-mix asphalt work.” Contrary to the Carrier’s representation, the e-mail from Structures Engineer Matthews, quoted above, does not, in fact, mention hot-mix asphalt work.

The December 17, 2013, notification stated:

As information the Carrier plans to continue the ongoing program of placing asphalt at grade crossings to restore the running surface of the roadway approaching the tracks. As in the past this work will be accomplished by outside forces that are properly equipped to handle the placement and rolling of the asphalt.

The notification does not reference hot-mix asphalt work, except obliquely, when it states that the work “will be accomplished by outside forces that are properly equipped to handle the placement and rolling of the asphalt.”

Such is the state of the record before the Board. The Organization contends that the work in dispute was cold-mix asphalt work of the sort routinely performed by MoW forces. The Carrier contends that the work involved hot-mix asphalt. Regrettably, the Board is not in a position to make a determination between these disputed facts. In cases where there is a dispute in facts that cannot be resolved, the Board will dismiss the claim. This is such a case, and the claim is dismissed.

### **AWARD**

Claim dismissed.

### **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 13th day of April 2021.