

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44408  
Docket No. MW-43276  
21-3-NRAB-00003-200362**

**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 (Franz Construction) to perform Maintenance of Way and Structures Department work (cut and remove asphalt from grade crossings) at Mile Posts 48.3, 49.4, 51.4, 53.2, 53.8, 54.04, 54.4, 55.5 and 58.8 on the Sidney Subdivision on May 8, 21 and 28, 2014 (System File B-M-2745-E/11-14-0282 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notification 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 its Maintenance of Way forces as required by Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. Mitchell and B. Eissinger shall now each be allowed ‘... eleven (11) hours of straight time and four (4) hours at over time, at the respective rate 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 May 8, 21 and 28, 2014, the Carrier used an outside contractor, Franz Construction, to cut and remove old asphalt from grade crossings at a number of crossings between Mile Posts 48.3 and 58.8 on the Sidney Subdivision of the Montana Division. The contractor's employees used a skid steer and an asphalt cutter to perform the work. The Organization filed this claim, alleging that the work of cutting and removing asphalt as part of crossing renewals is within the scope of the parties' Agreement, which brings it within the Note to Rule 55, the Carrier failed to provide adequate notice, and it did not establish an acknowledged basis for contracting out the work.

The Carrier argues that it did provide notice, by letter dated December 17, 2013: "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." Moreover, the Carrier continued, replacing the grade crossings included pouring hot-mix asphalt, which has long been recognized by the Board as outside the scope of the Agreement. Finally, the Carrier contends, Board precedent has established that the Carrier is not required to piecemeal parts of larger projects that have been properly contracted out.

The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out of bargaining unit work. If the disputed work is work that is "customarily performed" by bargaining unit employees, the Carrier may only contract out the work under certain exceptional circumstances:

**[S]uch work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces.**

**In addition, if the Carrier plans to contract out work on one of these bases, the Note requires the Carrier to notify the Organization "as far in advance of the date on the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases."**

**The Board has previously held that work involving hot-mix asphalt falls outside the scope of the parties' Agreement, which means that the Note to Rule 55 does not constrain the Carrier from contracting out such work. But Maintenance of Way employees have performed cold asphalt work in the past, such as patching and repairs. This case requires the Board to examine the lines between the two types of asphalt work.**

**The record includes an e-mail dated June 27, 2014, from the Carrier's Engineering Support Claims Analyst, Dave Harness, which indicates that this is one of several claims for contracted crossing work between MP 48 and 70 on the Sidney Subdivision. Mr. Harness stated that the work was part of a larger project, "Capital tie associated grade crossing plan MP 28-28.6 on Sidney Subdivision." In response to a question asking for an explanation of the "circumstances surrounding this claim/work," Harness replied: "Capital improvement work on Sidney subdivision in conjunction with tie gang to upgrade all road crossings. Crossing were [sic] deteriorated beyond repair." Regarding the use of "any specialized equipment, and or skills and or materials." Harness stated, "Yes, asphalt cutter."**

**In the claim, the Organization stated:**

**In this case the claimants possess the skills and the Company has or could rent the equipment, used by the contractors to perform the claimed work. See attached statements on this work being done by BNSF forces as well as Attached pictures of cutter head owned by NSF and used by crews in Dickinson, Glendive, Mandan and more, for the same purpose. None of the equipment used by the contractor was specialized beyond**

**normal production equipment for sale or lease. Attached with this claim is information showing equipment was available in the absence of carrier owned equipment.**

**The record also includes a statement from a BNSF employee who worked flagging for the contractors on May 8, 2014, in which he wrote: “We were cutting asphalt approaches on road x-ings for panel projects that were going to be done in future weeks.” A statement from one of the claimants asserted:**

**Past practice has been that we cut the asphalt using either an asphalt cutting tool for (illegible) excavators or we’d rent a wet saw with an asphalt blade. Crossings in the past that we used the cutting tool for the excavator was MP 64.7 Interstate Avenue in Fairview, MT. Sidney Sub locations where we used the wet saw MP 54.04 (4 track) MP 53.9 (1 track) MP 64.4 in Fairview.**

**In its August 19, 2014, declination the Carrier responded first, that it had provided notice, by letter dated December 17, 2013. In addition:**

**Contrary to what is alleged in this claim, a notice of intent to contract this work was sent to the General Chairman of the BMWF on December 17, 2013. Whereupon the Organization was informed of BNSF’s plans to continue its ongoing program of placing asphalt at grade crossings to restore the running surface of the roadway approaching the tracks. This proposed grade crossing asphalt work, as in the past, is to be performed by contracted forces properly equipped to handle the removal, placement and rolling of the asphalt including hot mix asphalt...**

**In addition, the asphalt work performed at crossings on the Sidney Sub during the claim dates by the contractor required a paving machine for the application of heated bituminous (hot mix) asphalt. BNSF does not have the specialized paving equipment necessary or the expertise required for paving using hot mix asphalt....**

**The Carrier’s December 17, 2013, letter to the Organization 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 asphalt.

The parties held a conference but did not reach agreement.

In its October 16, 2014, appeal, the Organization reiterated its assertion that “the claimed work here is some of the most fundamental, basic maintenance work we perform... The employees have asphalt cutting equipment and skidsteer loaders (as used by the contractor) which also accommodate a rented asphalt cutting attachment.” The Organization further fleshed out its claim that the Carrier already owned the equipment used by the contractor:

In support of our position that the Carrier has the skidsteer loader as used by the contractor in this case, we reviewed the June, 2014 Master Name List for District 200 (District of the claimed work).... What that review reveals is that in Montana District 200, during the claim period, the Carrier had three (3) skidsteer loaders assigned to Maintenance of Way employees. In addition the Carrier had ten (10) loaders and four (4) speed swings that are also used with attachments for this work.

The Organization also detailed various equipment rental options that were available.

In its December 5, 2014, declination of the appeal, the Carrier stated:

As indicated in the attached contracting notice, the complained of work was part of a much larger project that included hot-mix asphalt pavement—work that the Organization does not customarily or exclusively perform. Thus, the Company’s actions were not a violation of the parties’ Agreement.

The Carrier is not required to piecemeal various portions of a project in order to ensure the involvement of Carrier forces, even if it could be shown that such piecemealing could occur without adversely affecting the overall integrity of the project. [Citations omitted.]

The Organization here distinguishes between removing existing asphalt and pouring new (hot-mix) asphalt. At the arbitration hearing, the parties explained the order of work involved in the crossing grade work at issue here: First, the existing asphalt is removed; second, the old crossing is removed; third, a new crossing is installed; and finally, hot-mix asphalt is poured up to make it possible for cars to drive

over the crossing. The various steps are not necessarily completed at once but may take place over a period of time.

It is clear to the Board that MoW forces are capable of renewing grade crossing track structures, including cutting out old asphalt at crossings, and that they have done so in the past. But it is also clear that the work in dispute was part of a larger, ongoing project throughout the Carrier's properties of renovating a large number of grade crossings. In association with the December 17, 2013, notice, the Carrier published a 59-page list of "Crossing Locations Where Asphalt Will Be Placed in 2014." Moreover, as the Notice indicated, the Carrier had previously embarked upon these upgrades and the schedule for 2014 was a continuation of the project ("... the Carrier plans to continue the ongoing program of placing asphalt at grade crossings...") Accordingly, the Organization should not have been surprised when it received the December 2013 notice, and any deficiencies in the notice should be viewed in the context of a large, continuing project.

Completing the grade crossing renewals ultimately involves using hot-mix asphalt, which the Board has recognized as outside the scope of the parties' Agreement, so at least part of the renewal project could be contracted out. The Organization would have the Board distinguish the various steps involved in renewing grade crossings, and find that the first step of cutting out the old asphalt belongs to MoW forces. But the Board has held previously that the Carrier need not piecemeal projects that are otherwise properly contracted out. The grade crossing renewals require installing hot-mix asphalt and may be contracted out. While the Carrier could certainly assign cutting out the old asphalt to its own forces and limit the contractor to the hot-mix work, the Board's longstanding recognition that contracted work need not be piecemealed requires a finding here in favor of the Carrier.

**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 13th day of April 2021.