

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35566
Docket No. MW-32789
01-3-96-3-106**

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

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Atchison, Topeka and Santa Fe Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to properly compensate Eastern Lines Class ‘A’ Welders, Western Lines Class ‘A’ Welders, Western Lines (former Gulf Lines) Class ‘A’ Welders, and Coast Lines Class ‘A’ Welders at the lead welder’s rate of pay pursuant to Rule 39 commencing January 1, 1995 and continuing (System files 40-39-951/95-11-110, 40-39-952/95-11-113, 40-39-953/95-11-114 and 40-39-954/95-11-115).**
- (2) As a consequence of the violations referred to in Part (1) above, the Class ‘A’ Welders on each of the lines listed in Part (1) above shall now be compensated for the difference in pay between the Class ‘A’ Welder and lead welder rates commencing January 1, 1995 and continuing until the violation ceases.”**

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 23, 1995, the Organization filed four identically worded claims, on behalf of employees who established and held seniority as Class A Welders and who held assignments as Class A Welders on each individual welding gang in which two or more Welders (usually a Class A Welder and one or more Class B Welders) were employed on the Carrier's Eastern Lines, Western Lines, former Gulf Lines and Coast Lines, beginning January 1, 1995 and continuing. Following handling to impasse on the property, the four claims were consolidated on appeal to the Board for final determination.

These claims posit a contract violation each time, beginning January 1, 1995 and continuing, when the Carrier failed or refused to designate the Claimant(s) as "lead Welder" and pay him/her the "lead Welder rate," in accordance with Rule 39(c) as follows:

"RULE 39 - LEAD WORKMEN

39(b) - Welder Gang Foreman. A gang foreman shall be assigned to supervise welding gangs composed of more than six (6) men and may be used as workmen.

39(c) - Lead Welder. In welding gangs composed of six (6) men or less, in which two (2) or more welders are employed, one of the welders shall be designated as 'lead welder,' who will direct the work and make necessary reports, etc., for which service he will be paid the lead welder's rate."

In late 1994, at the Carrier's initiative, these parties consummated a Letter of Understanding to allow the Carrier to eliminate the positions of "Welder Helpers," as part of phasing in its ultimate objective of staffing its welding crews solely with qualified Welders. Among other things, the parties therein agreed to immediately change the job titles of the former Group 6, Class 2 Welders and Heat Treaters to "Welders Class A," and the job titles of the former Group 6, Class 3 Welder Helpers to "Welders Class B"

and to provide incentives for Class B Welders to become Class A Welders, including a two-tier wage structure for the Class B Welders, depending on their welding proficiency.

The record shows that those negotiations consisted of an exchange of proposals by fax machine, culminating in the acceptance by General Chairman Hemphill of the final language drafted by Labor Relations Director Broxterman, in the Letter of Understanding, dated and signed by the negotiators on December 27, 1994, to be effective January 1, 1995:

"December 27, 1994

11-520

**Mr. M. E. Hemphill, General Chairman
Brotherhood of Maintenance of Way Employees
521 S.E. 10th Street, P.O. Box 746
Newton, Kansas 67114-0746**

Dear Sir:

Referring to our discussion in Kansas City on November 21, 1994, and our subsequent discussions regarding the Carrier's intent to man welding gangs with welders rather than welders and helpers.

As we discussed, it was our intentions to provide all current welder helpers a genuine opportunity to qualify as welders. Except as set forth herein, welder (Class A) and welder Class B positions are subject to the provisions of the rules of the current Maintenance of Way Agreement.

It was agreed that, effective January 1, 1995, Group 6 will be amended as follows:

- 1. All references to welder helpers within the current agreement will be eliminated. Group 6, Class 3 will be referred to as welder Class B. All employees holding seniority as welder helper will be placed on the Welder Class B seniority roster in the order of their current welder helper seniority dates. Group 6, Class 2 will be referred to as welder (Class A).**

2. (a). All employees on the Group 6, Class 3 Welder Class B seniority rosters who are qualified to perform welds and occupy a welder Class B position will be advanced to a higher rate of pay - \$14.70 per hour, effective January 1, 1995. Those who are not qualified to perform welds, will remain at the former welder helper rate - \$13.89 per hour. If such an employee subsequently becomes qualified to perform welds, he will be advanced to the higher rate beginning on the first day of the next pay period following the date they are qualified to perform welds.

(b). All employees holding seniority as welder Class B who do not have welder's (Class A) seniority but who desire to obtain welder (Class A) seniority will be given a date of December 31, 1994, on the welder's (Class A) seniority roster provided they qualify as a welder (Class A) within one year from the effective date of this agreement. They will be placed on the bottom of the welder (Class A) seniority roster with a December 31, 1994 seniority date and ranked thereon in the order of their welder Class B seniority dates. Employees who qualify as welder (Class A) after one year will be given a welder (Class A) seniority date on the date they qualify.
3. (a). All welding gangs, when advertised for bids, will consist of at least one welder (Class A) position and one welder Class B position. In the event that no bids are received for a welder Class B position, and it cannot be filled in accordance with the provisions of Rule 9-(g), the position will be advertised as a welder (Class A) position.

(b). In gangs where there are two (2) or more welder (Class A) positions assigned and there is a lesser number of welder Class B positions assigned, a welder Class B having lost his positions through force reduction or displacement may elect to displace on a welder (Class A) position providing the position is occupied by an employee junior in welder Class B seniority. Subsequent to the displacement, the welder (Class A) position will automatically become a welder Class B position and the welder (Class A) will have full displacement rights under the Agreement. The rate of pay of

welder Class B position will depend on whether the employee making the displacement is qualified to weld.

(c). When a welder Class B position is advertised as a temporary vacancy, the regularly assigned holder of that position will have the right to return to that position unless he is displaced by a senior welder Class B in the exercise of seniority.

(d). All welder Class B positions, when advertised for bulletin, will be advertised with the higher welder Class B rate. If an employee who is not qualified to weld bids on and is assigned to the position, he will assume the lower rate. The same situation will apply when such employee displaces an employee who is qualified to weld and getting the higher rate, he will assume the position at the lower rate.

(e). When a welder (Class A) uses his welder (Class A) seniority to displace on a welder (Class A) position, he will be paid the welder (Class A) rate. A welder (Class A) can displace a welder Class B using his welder's Class B seniority in which event he will be considered as occupying a welder Class B position and paid the welder Class B rate (higher rate).

4. All new employees entering service in Group 6 after December 31, 1994, will establish seniority as welder on the appropriate welder (Class A) seniority roster on the first day their pay starts in Group 6. However, they will not be placed on a welder (Class A) position until such time as they are deemed qualified. They will be paid \$14.70 per hour until such time as they are considered qualified and placed on a welder position in the applicable welder (Class A) rate, without prejudice to any other agreement, rule or practice, particularly Rule 8 of the current Agreement, in the event such employee fails to qualify as a welder within 120 days, he will be required to exercise seniority in accordance with the applicable rules of the agreement. Such employees will not establish welder Class B seniority. Through attrition, welder Class B seniority will be eliminated.

If the above correctly reflects our understanding, please affix your signature on the line provided below, returning one signed copy to this office.

Yours truly,

s/ L. L. Broxterman
Director - Labor Relations
I concur:
s/ M E Hemphill
General Chairman - BMW
Approved:
s/ P C Wolfersberger
s/ T A Wheeler
Approved:
s/ C F Foose
Vice President" (Emphasis added)

The instant claims arose because, on and after January 1, 1995, on welder gangs consisting of a Class A Welder and one or more Class B Welders, the Carrier declined to designate the Class A Welder as a "Lead Welder" and pay him/her the "Lead Welder rate," as specified in Rule 39(c), supra. In defending its denial of the claims, the Carrier asserts that such a literal application of the words of Rule 39(c) was never intended by the Parties when they negotiated the title changes from former Group 6, Class 2 Welders and Heat Treaters to "Welders Class A" and former Group 6, Class 3 Welder Helpers to "Welders Class B." According to the Carrier, under the Letter of Understanding, the word "Welders" in Rule 39(c) means only Class A Welders (former Group 6, Class 2 Welders and Heat Treaters) and has no application whatsoever to Welders Class B (former Group 6, Class 3 Welder Helpers). In aid of that interpretation of the cited contract provisions, the Carrier alleges a long-standing "past practice" by which Rule 39(c) was so applied to former Group 6, Class 2 Welders and Heat Treaters as compared to former Group 6, Class 3 Welder Helpers, prior to January 1, 1995.

In our considered judgement the Carrier's so-called "past practice" defense is a non sequitur because, by plain language not by "past practice," Rule 39(c) has always applied to "Welders" but has never applied to "Welder Helpers." Stated another way, the language of Rule 39(c) is not ambiguous but rather crystal clear in its application to

“Welders” without further qualification. Thus, the Carrier’s attempt to read into the word “Welders” in Rule 39(c), after January 1, 1995, a distinction between “Class A Welders” and “Class B Welders” simply has no support in contract language or past practice. Nothing in the language of Rule 39(c) or in the December 27, 1994 Letter of Understanding supports a conclusion that the Parties to the latter document intended that, for purposes of Rule 39(c), Class B Welders would not be counted as “Welders” on welding gangs composed of six men or less, in which two or more Welders are employed, but rather would be treated as Group 6, Class 3 Welder Helpers.

The revisionist interpretation of the plain contract language of Rule 39(c), which the Carrier now seeks in arbitration but did not achieve in negotiations, would be contradictory to the second sentence of the second paragraph of the December 27, 1994 Letter of Understanding: “Except as set forth herein, welder (Class A) and welder Class B positions are subject to the provisions of the rules of the current Maintenance of Way Agreement.” Moreover, it is not at all uncommon that subsequently disputed language is construed against the Party which drafted the language, in this case the Carrier.

Finally, we note that the Carrier’s procedural defense on the property that these claims were fatally nonspecific was not pursued in its Submission to the Board. In any event, we find that the claims are not deficient under Rule 14-(a)(1). The class to which the Claimants belong is identified with sufficient particularity that the identity of each individual Claimant entitled to recompense under this Award should be readily ascertainable by a check of personnel and payroll records. The claims are sustained and the matter is remanded to the property for resolution of the remedial damages issue, with a retention of jurisdiction by the Board for the sole purpose of resolving any disputes that may arise between the Parties regarding the meaning, application or implementation of this Award, including the calculation and payment of the awarded remedial damages.

AWARD

Claim sustained in accordance with the Findings.

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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 24th day of July, 2001.