Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36425
Docket No. MW-35492
03-3-99-3-394

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Soo Line 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 (Holland Industries) to perform Maintenance of Way subdepartment work (weld rail) on main line track between Lake, Wisconsin and Caledonia, Wisconsin on October 20, 21, 22, 23, 27, 28, 29, 30, November 3, 4, 5, 6, 10, 11 and 12, 1997 to the exclusion of Welding Foreman R. Fisher, Grinder E. Witcraft, Welder D. Randall and Welder Helpers D. Cooper, G. Kupferschmidt and D. Marin (System File C-64-97-C080-17/8-00228-029 CMP).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract said work as required by Rule 1 and failed to enter good-faith discussions to reduce the use of contractors and increase the use of Maintenance of Way forces as set forth in Appendix I.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Fisher, E. Witcraft, D. Randall, D. Cooper, G. Kupferschmidt and D. Marin shall be compensated '. . . for a total of 499.5 hours in the aggregate, [or] in the proportionate at 83.25 hours EACH at the applicable time and one-half (1 ½) 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.

The Carrier served notice on the Organization of its intent to subcontract by date of October 15, 1997. The Organization responded two days later, requesting a conference date of October 22, 1997. The outside contractor, Holland Industries began "flash butt" welding work utilizing one In-Track Railwelding Mobile Welder on October 20, 1997, or two days prior to the conference.

The Organization argues that the work performed was Maintenance of Way work, that could have been performed by Foreman Fisher's welding crew which was actually doing this very same work by thermite method before and after Holland came and left the property. It maintains that the Carrier violated the Agreement in its blatant failure to properly notify the Organization of its intent to contract out, and its use of the outside contractor to do scope protected work.

The Carrier denies that it violated the Agreement, in that the work performed was welding work that had never been and could not be performed by the employees. The Carrier maintains that flash butt welding and thermite welding are not the same, with flash butt of better quality. The Carrier argues that the late notice was due to operating pressures, but moreover, flash butt welding is not within the Scope of the Agreement.

The Agreement and record before the Board demonstrates that thermite welding is scope protected and Notice is required. However, the question at bar revolves around the issue of flash butt welding. The Carrier argued that these "two processes are

completely different" and more importantly that "this is not work you have traditionally, historically, customarily or exclusively performed."

The Note to Appendix I, reads in pertinent part:

> "NOTE: In the event Carrier plans to contract out work within the scope of this agreement, the Carrier shall 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 15 days prior thereto."

It is incumbent for the Organization to establish a factual base to demonstrate that the work herein disputed is within the Scope of the Agreement for the NOTE to have relevance. Certainly, if welding is welding, then the Organization can demonstrate that its employees have performed flash butt welding. If they have performed the work, then it is covered by the Scope of the Agreement and the Note to Appendix I was violated.

In this record there is no probative evidence for the Board to conclude that the notice was necessary. The Carrier consistently held that the Claimants do not do this type of work and never have. The Carrier noted that the "Claimants do not perform similar work." In the full record, the Carrier argues without rebuttal that the employees have never performed this type of work, do not know how to operate the equipment and that the Carrier does not own the equipment.

The Board notes that even the signed statements of the employees do not indicate that they have or can perform the work. Foreman Welder Fisher states that the Carrier should "purchase an in Track Mobile Welder and train someone to run it." The other employee responses indicate no history or knowledge of flash butt welding with Claimant Randall stating that "from what I understand thermite is just as good."

Ignoring or late complying with the Notice requirements is at the peril of the Carrier. In this instance, where the record demonstrates no evidence that the work belongs under the Scope of the Agreement, the Board cannot find a violation. Notice is required when work is contracted out that is "within the scope of this agreement" and not when it is work that cannot be proven to be traditionally, historically or customarily performed by the employees. As there was no proof of employee past performance, the Carrier was under no Notice obligation and the claim must fail.

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 17th day of March 2003.

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LABOR MEMBER'S DISSENT
TO
AWARD 36425, DOCKET MW-35492
(Referee Zusman)

This award is palpably erroneous and a dissent is required. The Majority's finding in this case can only be described as moving from the sublime to the absurd. The record that was developed during the on-property handling of this case reveals that the Carrier issued notice of its intent to contract out welding work dated October 15, 1997. The General Chairman requested a conference concerning the proposed contracting. The problem here is that the work began on October 20, 1997 only five (5) days after notice was issued and two (2) days before the conference. Such is hardly in keeping with the "good faith" requirements of the notice provisions and the December 11, 1981 Letter of Agreement.

As it was pointed out on the property and to the Board, this Carrier has such an abysmal record when it comes to complying with the notice provisions of the Agreement that it has nearly taken on the quality of bad theater. Indeed, this Carrier was the first to have a dispute decided by this Board involving a violation of the provisions of Article IV of the 1968 National Agreement, i.e. **Award 18305**. Since then no fewer than seventeen (17) awards have been decided citing this Carrier with a failure to comply with the notice and conference provisions of the Agreement. Because the Carrier has been in violation of the notice and conference provision myriad times the only defense it can raise is that the work is not Scope covered, thereby relieving it of notice requirements. The problem here is that defense was never raised by the Carrier during the on-property handling of this case. By virtue of this award the Majority has become an enabler for this Carrier who has been shown to be a serial violator of the notice and conference provisions of the Agreement.

In any event, the Organization presented ample and conclusive evidence during the handling of this dispute on the property that welding of rail ends is work reserved to the Maintenance of Way employes in the past and, indeed, such work was being performed by them at this location prior to the assignment of the outside contractor. Even after the contractor left the property the Maintenance of Way welders returned to the location to perform the welding of rail ends. Hence, the work is clearly Scope covered and the assignment of outside forces was in violation of the Agreement. The Carrier's argument that the contractor's method was superior is invalid on its face because the Carrier continues to assign its employes to perform welding of rail ends as of this date. Moreover, this Board has consistently held that the Agreement protects the work, not the tools or the method by which it is performed. Hence, the Majority's reasoning in this award represents an anomaly which the Organization fervently hopes will not be repeated.

Respectfully submitted,

Roy C. Robinson
Labor Member