

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37319
Docket No. MW-37133
04-3-02-3-88

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc.)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to properly compensate Mr. H. D. Fitzer for performing welder's work (cutting H-beam with a torch) at North Mountain, Buffalo Gap, Virginia on July 3, 4 and 5, 2000 and continuing and when it failed and refused to bulletin and assign a welder position on the Central East Service Lane to perform such work [System File G31704200/12(00-0782)CSX].
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. D. Fitzer shall now be compensated for the difference between a B & B mechanic's rate of pay and a welder's rate of pay for all hours worked beginning July 3, 2000 and continuing until this violation is stopped, the Carrier shall advertise and assign a welder position for the aforesaid work and the senior welder on the Central East Service Lane should be paid for all hours worked by B & B mechanics cutting H-beams on the Central East Service Lane.”

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 Claimant holds seniority as a B & B Mechanic. The instant claim alleges that on July 3, 4 and 5, 2000, the Carrier assigned the Claimant to perform welding work cutting H-beams with a torch. The Organization claims that the work was performed continuously on the dates in question in violation of Rule 1 of the Agreement. According to the Organization, a Welder should have been assigned to perform the welding work based on the seniority and class restrictions of the Agreement.

In denying the claim, the Carrier contended that B & B Mechanics have historically used cutting torches and that no violation of the Agreement had occurred in this instance.

In its appeal, the Organization acknowledged that B & B Mechanics used torches and performed structural welding work prior to the implementation of the June 1, 1999 Agreement. It submits, however, that under the terms of the June 1, 1999 Agreement, the parties specifically negotiated a separate sub-department within the BMWWE craft for Welders, thereby evincing the parties' intent to restrict the performance of such work to that seniority classification. The Organization argues that the Carrier's reliance upon historical practice is misplaced and cannot be used to supercede the clear language negotiated by the parties.

Rule 1 provides in pertinent part:

"RULE 1 – SENIORITY CLASSES

The seniority classes and primary duties of each class are:

B & B Department

* * *

B. Bridge and Building Roster:

1. B & B Foreman – In charge of Plumbers and B & B Mechanics
Direct employees assigned under his jurisdiction.

2. B & B Assistant Foreman

Direct and work with employees assigned to him under the supervision of a Foreman.

3. B & B Mechanic-Carpenters, Painters, Masons

Construct, repair and maintain bridges, buildings and other structures.

* * *

Welding Department

A. Welder Roster:

1. Welder Foreman – Includes Track and Structural Welder Foremen

Direct employees assigned under his jurisdiction.

2. Welder – Includes Track and Structural Welders

Perform welding of track and appurtenances.

3. Welder Helper – Includes Track Helpers and Structural Helpers

Assist Welders.”

As the moving party in this dispute, it was incumbent upon the Organization to substantiate its claim. Based on the Board’s review of the record, we find that it failed to do so in this instance.

The June 1, 1999 Agreement was negotiated by the parties following the Carrier’s acquisition of portions of Conrail. Although the 1999 Agreement includes a Welding Department as one of the seniority classes listed in Rule 1, it must be noted that Rule 1 refers to the “primary duties,” not the exclusive duties, of each classification. Had the parties intended to secure work exclusively for the Welder classification, or for any other classification, they would necessarily have had to expressly state their intent.

Notwithstanding the negotiated language providing for a Welding Department, the reference to “primary duties” in the first sentence of Rule 1 suggests that there is some latitude among classifications that allows employees in one classification to perform work of another classification. Absent evidence that the disputed work was intended to be performed only by Welders based on clear contract language or past practice, the Organization’s reliance on Rule 1 is not sufficient to meet its evidentiary burden.

The Organization also argued before the Board that the Claimant should be paid the difference between the Welder’s rate of pay and that of a B & B Mechanic for the hours he performed the welding work. True, Rule 19 recognizes that employees in lower paid classifications may be temporarily assigned to perform higher rated work so long as they are properly compensated for the difference in pay. However, this is new argument. It is well settled that the Board may not consider evidence or contentions not properly raised during the on-property

handling of a claim. The Awards recognizing this fundamental principle are too numerous to list.

For all these reasons, the claim must be denied.

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 21st day of December 2004.