

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 40244  
Docket No. MW-39355  
10-3-NRAB-00003-060209  
(06-3-209)

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

**PARTIES TO DISPUTE:** ( (Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
(Union Pacific Railroad Company (former Southern  
( Pacific Transportation Company [Western Lines])

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (rail welding and related work) between Mile Posts 214.4 and 211.9 on the Coast Subdivision beginning on February 14, 2005 and continuing (Carrier’s File 1422608 SPW).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance written notice of its intent to contract out the work referenced in Part (1) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with the provisions of Rule 59, Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants A. Castillo, J. Samaniego, D. Graham, A. Madriz, P. Herrera, M. Gomez, A. Pippen, A. Vasquez, G.**

**Ortiz, J. Tornero, D. Miller, J. Hernandez, R. Chavez and J. Goodluck shall now each ‘. . . be paid ten (10) hours a day straight time for each day worked since February 14, 2005, including overtime and overtime for any Saturday and Sunday worked at their respective rate of pay because of the Agreement violations cited herein. Payment shall be in addition to any compensation they may have already received.’”**

**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 Organization’s April 7, 2005 claim maintains that the Carrier violated the Agreement when it used Holland Welding on a rail welding project that began on February 14, 2005 and continued. According to the Organization this work is historically, customarily and traditionally performed by BMW-employees. Further, the Organization claims that it was not given proper notice of the Carrier’s intent to contract the welding work because the notice was sent by email to the General Chairman. Absent proper notice, the Organization could not respond.**

**The Carrier asserts that notice was proper as evidenced by attachment of the notice to correspondence during handling on the property. Further, there is a long-**

standing mixed practice on the property of using Carrier forces and outside contractors to weld rail. Because there is a mixed practice, the Organization cannot show that the work belongs to BMW-employees.

The burden is on the Organization to establish the basis for its claim. Following a careful review of the record evidence, the Board concludes that the Carrier's notice of intent to contract satisfied the requirements of the Agreement. The Carrier defends its use of contractors based on a long-established "mixed practice" on the property wherein both Carrier forces and contractors perform the disputed work. The Board finds the Carrier's citation to Third Division Award 36901 to be both instructive and compelling. There, as here, the record evidence revealed an historic mixed practice of using a contractor for rail welding. Given that historic "mixed practice," the Organization cannot establish a violation of the Agreement when the Carrier used Holland Welding forces to work on a rail welding project.

**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 15th day of January 2010.