

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41165
Docket No. MW-40358
11-3-NRAB-00003-080140**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(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 (Hartford & Associates) to perform Maintenance of Way and Structures work (welding) between Mile Posts 362.047 and 335.736 on the Chicago Division, St. Croix Subdivision on October 10, 11, 12, 13 and 14, 2005 [System File C-06-C100-51/10-06-0079(MW) BNR].**
- (2) The Agreement was violated when the Carrier assigned outside forces (Hartford & Associates) to perform Maintenance of Way and Structures work (welding) between Mile Posts 350.653 and 374 on the Chicago Division, St. Croix Subdivision on November 7 through 11, 2005 [System File C-06-C100-52/10-06-0080(MW)].**
- (3) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of intent to contract out said 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.**

- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants G. Weis, M. Koziara, L. Harmon and M. Kjos shall now each be compensated for thirty-five (35) hours and forty-five (45) minutes at their respective straight time rates of pay.**
- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants G. Weis and M. Koziara shall now each be compensated for forty (40) hours at their respective straight time rates 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.

This is a case in which two different claims have been combined for submission to the Board due to their commonality of issues and facts. It is also a case that brings to the Board an issue that has been a problem since 2003 and remains ongoing at present: inadequate manpower to accomplish necessary thermite welding on the Galesburg Seniority District (previously District 500, now District 400) which includes the greater Chicago metropolitan area.

By letter dated June 3, 2005, the Carrier informed the Organization of its intent to contract out welding work in District 500:

“Once again, as in the past few years, BNSF is faced with the need to use contract welders to fill gaps in and supplement its welding forces for Seniority District 500. The unwillingness of a sufficient number of qualified employees to accept and retain assignments to welding positions in key areas of District 500 has resulted in a mounting backlog of welding work that is not possible to complete without resorting to outside help.”

The Notice went on to cite other reasons for the need to contract the work: upcoming new projects, unfinished old projects, an increased demand for rail service leading to greater demands for welding services on time-sensitive projects such as switch replacements, public safety and endangerment if the work is not done, and “the limited available work season.” The Notice then addressed the crux of the problem:

“As you know, it has been necessary to employ contract welders on District 500 in the Chicago area for several years to supplement our forces. The Carrier has attempted to maintain its welding sub-department forces at strength levels sufficient to handle this work by providing training, but without success as employees cannot be compelled to take the work on a long-term basis. This is evidenced by the numbers of qualified employees who elect to work lower rated positions away from the welding sub-department. And the Carrier has been hiring additional personnel on District 500, but those employees generally avoided assignment to welding positions or were/are not qualified under FRA regulations to perform it. As the Organization knows, the Carrier has in the past, put people through a special welding training course and onto welding positions, but a sufficient number of those employees declined to remain on welding assignments to make a substantial difference.

Existing welding forces on District 500 have been working a significant amount of overtime but continued overtime at this level causes employees to leave the jobs as well. So it is not possible to demand more from the welding forces that are willing to accept the work and expect that they will stay with the work. . . . Likewise, the Carrier has

attempted to force employees under the rules to the vacant positions but many have elected to forfeit their seniority in lieu of reporting to a welding sub-departmental position or alternatively, once reporting they have bid or otherwise exercised seniority away from the positions at first opportunity. Given the overall unwillingness of employees to accept welding sub-department work, the continued forced cannibalization of the welding sub-department work force ends up simply moving the overall problem around. This chronic problem of employees avoiding welding service leaves the Carrier inadequately equipped to perform the work and in a situation where it is not possible to complete the work without resorting to outside help.”

The Notice indicated that the contracting would begin on June 21, 2005, and “continue throughout the remainder of the year, weather permitting.”

The Organization requested a contracting out conference. The parties had discussions on at least two occasions (June 15 and June 20, 2005) in an effort to resolve their differences, but were unable to do so. On June 22, 2005, the Organization sent another letter to the Carrier, indicating its continuing disagreement with the proposed contracting out. In that letter, the Organization attributed the problem of an inadequate number of Thermit Welders to the Carrier’s “incompetent management plan for maintenance practices” and “flawed hiring practices.” The Organization submitted an analysis of all job openings posted on District 500 between 2001 and 2004. According to the Organization’s data, during that time period, a total of 3,313 posted jobs went unfilled. Of that number, 736 of the unfilled positions were for Welders and Grinders. (The Carrier responded that the data overstates the extent of the problem, in that the same vacant position may have been posted multiple times before being filled.)

By letter dated November 30, 2005, the Organization simultaneously submitted these two claims: one for welding performed by the outside contractor between Milepost 362.047 and Milepost 335.736 on October 10, 11, 12, 13 and 14, 2005, and the other for welding performed by the outside contractor between Milepost 350.653 and Milepost 374 on November 8, 9, 10 and 11, 2005. The parties were unable to resolve the disputes during the claims process, and the matter is now properly before the Board.

According to the Organization, there is no real dispute that the work at issue is ordinary thermite welding work of the sort routinely performed by the Claimants and thus covered under the Note to Rule 55. The work was done using ordinary equipment and no special skills. The Claimants were available and fully qualified to perform the welding work at issue in these two claims during regular work hours, daily overtime, or on weekends, and should have been assigned to perform it. The Carrier stubbornly refused to acknowledge its contractual obligation to hire, train and maintain sufficient forces with which to accomplish its routine maintenance needs. In addition, it has practiced deferred maintenance that is now catching up with it. The Note to Rule 55 was clearly intended to address exceptions to normal maintenance, and this is nothing unusual. The Carrier's position that it decided to contract out the work because BMW-represented employees will not do it is untrue. Prior Awards have upheld the Carrier's responsibility to hire, equip and train sufficient forces to maintain the railroad, and the Board should follow their reasoning.

The Carrier's position is that this situation exists because qualified Maintenance of Way employees on District 500 refuse to fill bulletined Welder vacancies, leaving the Carrier inadequately equipped to complete the thermite welding work required in the District. Because the Carrier lacked sufficient forces to perform the welding, it did not violate the Agreement when it contracted for Thermite Welders to augment Carrier forces on District 500. The Carrier properly notified the Organization of its intent to contract the work and the contracting was permitted under the "not adequately equipped to handle the work" exception. The Carrier has been contracting out this same work since 2003, and the Organization did not progress any claims to the Board until November 2005. Contracting out this work commenced in June 2005, but the Organization waited until the end of November to file these claims. The Carrier has acted in good faith: it bulletined welding positions throughout the entire year in an effort to get BMW-represented employees to take the positions and perform this work. Nor has the Carrier reduced its workforce in order to contract work out. The problem is not a lack of hiring; it is a shortage induced by District 500 employees who choose lower-paying positions rather than work in the area that is the subject of these claims. There are adequate qualified Welders, who choose not to bid on the open positions. Borrowing Welders from other districts is not a practicable solution – it would just move the problem around. Nor can the Carrier postpone the work until later in the year due to the nature of thermite welding. Finally, the Claimants are not entitled to any compensation, because they were all fully employed during the claim periods.

The Carrier based its defense in this case on the exception to the Note to Rule 55 for “when work is such that the Company is not adequately equipped to handle the work.” The evidence in the record establishes that the problem of thermite welding pre-dates these claims. The Carrier made good faith efforts to have BMW-represented employees perform thermite welding in District 500, but without success. The Organization’s data¹ shows that the Carrier has regularly bulletined welding positions on District 500 many, many times, with no takers, despite the fact that the Carrier employs hundreds of qualified Welders in District 500. The Carrier has trained employees as Welders, only to have them bid onto other positions and leave welding. A number of employees, when directed to fill the positions, have elected to forfeit their seniority and take lower-paying jobs instead. The reality is that there are not enough qualified Welders already on the payroll who are willing to perform the work that needs to be done, at least at the pay rate and conditions at which it is offered.

Under such circumstances, the Carrier is “not adequately equipped to handle the work” and may, under that exception to the Note to Rule 55, augment its own forces with those of an outside contractor. That is what happened in this case. The Carrier regularly posted welding openings and was unable to fill enough positions to complete the work that it needed to get done on time. If qualified employees are not willing to fill the vacant positions that the Carrier needs filled to meet its maintenance needs, the Carrier is “not adequately equipped to handle the work” and may bring in an outside contractor to meet those needs. It really has no alternative. This is not “unavailability of forces” due to the Carrier’s failure to maintain an adequate work force. To the contrary, the record establishes that the Carrier made numerous efforts, starting in 2001, to fill welding positions, but without success.

It is important to understand these claims in context. The Claimants contend that they were available and willing to do the work performed by the contractor on the dates in question. Even if that were true – the evidence is that they were fully employed on those dates – the Carrier’s thermite welding needs were such that it had found it necessary to use a contractor on a regular basis since the preceding June, some five months before. The two instances represented by these claims are only a small part of the

¹ The Carrier subsequently submitted its own analysis of the data, but the Organization did not receive it until after it had progressed the claim to arbitration. However, the Organization’s data is sufficient for the Board’s analysis.

work that needed to be done and should be viewed as part of the larger picture. When the Carrier's efforts to fill its welding needs with its own qualified employees failed, the Agreement permitted the Carrier to turn to an outside contractor to fill those needs – and not just on an individual job-by-job stopgap basis. The Carrier had projected welding needs sufficient to bulletin positions internally – but they went unfilled. Its right to contract out the work would have to cover those projected needs, in order for the Carrier to meet its responsibilities adequately to provide and maintain safe tracks for its trains to run on.

The situation presented in these claims is clearly frustrating for both the Organization and the Carrier. But it is not something that can be resolved by the Board, which is limited to deciding whether the parties' Agreement has been violated. The fundamental problem is one that requires a negotiated solution. In the end, the Board concludes here that, because of insufficient interested qualified Welders, the Carrier was not adequately equipped to perform the work that needed to be done, and it did not violate the Agreement when it contracted out the thermite welding at issue in these two claims.

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 November 2011.