Award No. 6159
Docket No. MW-5945

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Paul G. Jasper, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

WESTERN MARYLAND RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the effective agreement when it assigned the work of building up approximately 3500 rail joints on the Hanover Sub-Division to employes of a Welding Contractor;

(2) That Track Welders W. L. Brunner and E. P. Weller, and Track Welder Helpers H. V. Miller and H. L. Rudy be paid at their respective straight time rates of pay for an equal number of hours as was worked by the Contractor's employes during the hours of the claimants' regular daily and weekly assignments, and that they be paid at their respective overtime rates for an equal number of hours as was worked by the Contractor's employes in excess of the claimants' regular daily and weekly assignment; because of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: In some instances, prior to the year 1950, the Employes have permitted the Carrier to contract for the building-up of rail joints on the Hagerstown and Elkins Division of the Carrier's property.

Early in the year of 1950, the General Chairman of the Employes' organization received information indicating that the Carrier was again contemplating the contracting of similar work to a welding contractor. The General Chairman immediately put the Carrier on notice that the work of building up rail ends was work covered by the scope of the effective agreement, and that the Organization would not acquiesce in any further contracting of such work. The Carrier's Chief Engineer, Mr. E. C. Shreve and Supervior of Track, Mr. H. M. Coberly, were specifically advised by General Chairman Himes that any future contracting of the work of building up rail ends would result in the filing of suitable time claims.

The Carrier ignored General Chairman Himes' notice and contracted for the building-up of approximately 3500 rail joints on its Hagerstown Division. The work in dispute was started on October 13, 1950 and completed on December 13, 1950, four contractor's employes working in excess of eight hours daily and in excess of five days weekly.

5. Claimants lost no time during the period this work was being performed by contractor.

6. Awards of the Third Division of the National Railroad Adjustment Board support the position of the Carrier.

The Carrier respectfully submits that it has established that it acted in good faith, relying upon its long established practice extending over a period of 15 years, in engaging an independent contractor to perform this necessary work when it had neither trained personnel nor requisite equipment to do the work in any other manner. The Carrier further submits that to require it to obtain such equipment for use during such a short period, and for such specialized work, and, in addition, to undertake to train its Employes over a period of at least 6 months so that they might be qualified to do the work, would be unreasonable and unjustified, and would be an unwarranted interference with the Carrier's business judgment, which is not supported by the express or implied terms of the Agreement as construed by the parties since its negotiation.

The Railway Company's Answer in this case is made to the best of its ability without knowledge of the contents of the Employes' Submission to the Board and the Carrier hereby reserves the right to file additional data with the Board in rebuttal or reply to the Employes' Submission.

This dispute has been handled by the Carrier in accordance with the provisions of the Railway Labor Act and the rules of the National Railroad Adjustment Board. All data submitted in support of its position by the Carrier have been presented to the Employes and made a part of the particular question in dispute.

OPINION OF BOARD: The claimants are regularly assigned Track Welders and Track Welder Helpers.

The Carrier, for the past fifteen years, has had a contract with an independent contractor to build up rail ends by electric welding.

Early in 1950, the Organization notified the Carrier that it would not agree to any further contracting out of the electric welding for building up rail ends.

From October 13, 1950, to December 13, 1950, the independent contractor was engaged in building up rail ends for the Carrier.

The Claimants contend that the contracting out of the work of building up rail ends by electric welding was a violation of Rules 1, 11, 15, 43 (b), 45, and the Scope Rule.

The contract with the independent contractor was in effect when the Organization and Carrier entered into the Agreement herein involved. The Agreement between the parties became effective September 16, 1945.

The independent contractor had been doing the rail end welding since 1935. This was known to the Organization.

When the new contract was entered into between the Carrier and the Organization, in 1945, the Organization knew certain work was being contracted out, so it attempted to broaden the Scope Rule. This was not agreed to by the Carrier. The present Scope Rule was agreed to, which, in the light of the rail end welding being contracted out, must be held not to cover this work. It was approximately five years after the Agreement was effective that the Organization now asks that electric rail end welding be held to be within the Scope of the Agreement.

The electric rail end welding has not been performed by the Track Welders and Track Welder Helpers.

When the 1945 Agreement was entered into, the contract with the independent contractor had been in existence ten years. The 1945 Agreement did not end the contract with the independent contractors, but, in addition, the Organization acquiesced in the Carrier's contracting out the work for an additional five years before protesting.

If the right to contract out the electric welding of rail ends was to be ended, the 1945 Agreement should have so stated. Since it did not so state, then the work is excluded from the Agreement.

If the work of electric welding rail ends is to be brought within the Agreement, it will have to be negotiated by the parties.

This is a case where working conditions existing prior to the time an Agreement was entered into become a part of the Agreement unless the Agreement provides otherwise.

The Scope Rule embraced all work which Track Welders and Track Welder Helpers usually and customarily performed at the time the Agreement was entered into. Rail end electric welding was not usually and customarily performed by the Claimants. Therefore they are not now entitled to perform it.

The practice of contracting out rail end electric welding is of long standing, and the Agreement was entered into in 1945 in light of this practice. It was not considered a violation then, so we cannot now consider it a violation.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

The Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of March, 1953.