Award No. 12632
Docket No. MW-11751

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it assigned rail welding work at Mobile, Alabama, to a contractor whose forces hold no seniority rights within the scope of the Agreement between the two parties to this dispute.

(2) Welders W. A. Hartsfield and E. D. Calloway and Welder Helpers E. E. O'Neal and J. H. Minton each be allowed eight hours' pay at their respective straight time rate for each day beginning with September 24, 1958, through November 14, 1958, and for each day subsequent thereto on which rail welding work at Mobile, Alabama, was performed by contractor's forces.

EMPLOYES' STATEMENT OF FACTS: In 1958, the Carrier decided to use what is commonly referred to as "ribbon rail" or "continuous welded rail". This consisted of welding 38 standard lengths of rail together so as to form a single rail section which would be 38 standard rail lengths long. This welding work was performed at Mobile, Alabama.

Commencing on September 24, 1958, the Carrier assigned a General Contractor, whose employes hold no seniority rights under the provisions of this Agreement, to perform the rail welding work, and used its employes to perform the other work, such as grinding and testing of welds, handling rail, etc., in connection with the rail welding operations at the aforementioned location.

In performing the rail welding work, the Contractor used two shifts, one from 6:00 A. M. to 2:30 P. M., the other from 2:30 P. M. to 11:00 P. M., with thirty minutes out for lunch on each shift and the Contractor's employes averaged approximately 43 welds on each eight hour shift for a total of approximately 4,000 welds.

In performing the other work, exclusive of rail welding, the Carrier used 1 Burro Crane Operator, 2 Section Laborers, 1 Electric Welder, 1 Electric Welder Helper and 1 Web Base Magniflux Operator on each shift, except

OPINION OF BOARD: In order to improve rail conditions by having fewer rail joints, the Carrier decided to experiment with the welding of rail through the use of a high voltage electric welding process. Accordingly, on or about September 24, 1958, and continuing until about November 26, 1958, the Carrier assigned this work to a contractor, the National Cylinder Gas Company of Chicago, whose employes held no seniority under the effective Agreement between the parties here concerned. Claim was instituted on behalf of two named welders and two named welder helpers on November 24, 1958, that they be allowed eight hours' pay at their respective straight time rates for each day beginning September 24, 1958, and for each day thereafter on which rail welding work was performed at Mobile, Alabama, by forces employed by the contractor.

It is contended by the Organization that under Rules 1, 3, 4(f) and 38(b) of the current Agreement, the said work is reserved by the above rules to employes holding seniority in any and all Subdepartments of the Maintenance of Way and Structures Department; the same is specifically reserved to the employes of Welding Subdepartment (Rules 1 and 3(d)) and our particular attention is called to Welders Special Rule 38 (b) which reads as follows:

> "Maintenance of way welders will be used to do all welding that is done on materials or parts of tracks, bridges or buildings, except for materials or parts shipped into shops or other departments and work belonging to the mechanical or signal department employes." (Emphasis ours.)

The Carrier argues that the case is primarily a Scope Rule case and takes the position that "If there was no violation of the Scope Rule, then the other Rules of the Agreement are neither applicable nor involved in the dispute". In support of the quoted proposition, Carrier cites Award 6269, the pertinent language of which is as follows:

> "It is, therefore, the opinion of the Board that Carrier has in no way violated the provisions of the current agreement. There being no violation of the Scope Rule, it follows there was no violation of other rules, as alleged by the Organization."

In our opinion, Award 6269 is limited to its facts, is distinguishable from the case at bar, and does not stand for the broad proposition advanced by the Carrier.

Specifically, the Carrier places reliance on paragraph (h) of Rule 2, which reads:

"Exceptions to Rule 1:

> The railroad company may contract work when it does not have adequate equipment laid up and forces laid off, sufficient both in number and skill, with which the work may be done."

Carrier reasons that 2(h) supports the Carrier's action because it alleges it did not have the equipment with which to perform the electrical welding work here involved; it did not have such equipment laid up; nor did it have forces laid off "sufficient in number and skill to operate the equipment."

It is interesting to note in connection with the argument advanced by the Carrier that it did not have forces "sufficient in number and skill"; that the record does contain information that the Carrier did use certain of its own employes (1 Electric Welder, 1 Electric Welder Helper, 1 Web base Magnaflux operator, and others) in connection with the performance of the work now in dispute. In making its decision to experiment with the welding of rail through the high voltage electric process, Carrier advised the contractor of its desire to use its own employes. The contractor, not the Carrier, took the position that Carrier's employes were not qualified to operate the equipment.

The matter of contract construction finds the parties far apart: the Carrier and Organization each construe the instant contract differently, and each advances concepts of contractual construction, studded with citations in support of their conflicting positions, as follows: The Organization argues in effect on two levels, viz: —

A) It is a well accepted rule of contract construction that the intention of the parties must be determined from the four corners of the contract.

B) It is equally accepted, as a universal rule of contract construction, that special rules prevail over general rules. (See Awards 6382, 4496, 5942, 6003, 6137, 6278, 6374, 6567, 6651, 6654 and 7857.)

Applying these principles to the facts at bar, we agree that the Organization correctly reads its general Scope Rule together with Rules 3(d), 4(f) and 38(b) since all these provisions deal with the same subject matter, i.e.: —employes in the welding subdepartment. The language of 38(b) explicitly states that "Maintenance of way welders will be used to do all welding on materials or parts of tracks * * *" and the record does not seem to support the exception contained in the balance of this rule. It should be further noted that the word "will" is mandatory and not permissive; the word "all" needs no definition; the exception in 2(h) nowhere states that Rule 2 is an exception to Rule 38(b) which could have been done if it was intended by the parties to further limit Rule 38(b). It seems clear that the Carrier, by the explicit terms of Special Rule 38(b), when read together with the other rules dealing with welding employes, had reserved the work in question to the said employes.

The Claimants, therefore, had the contractual right to either perform the work in question or they were entitled to be paid for not being permitted to perform work reserved to them by the Agreement of the parties.

Carrier points to numerous rulings of the Third Division which hold that, even in the absence of rules such as 2(h), work may be contracted out when special equipment is required. We make no comment with respect to these rulings because no cases have been cited to us which are on all fours with the case at bar. Our decision is bottomed on the fact that the current Agreement between the parties contains Special Rule 38(b), which, in our view, distinguishes the instant case from those cited by the Carrier.

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

That the Carrier violated its Agreement.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of June 1964.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 12632, DOCKET NO. MW-11751

Award 12632 is palpably erroneous, misconstrues the Agreement involved, and we must register our dissent thereto.

Rule 1 is the Scope Rule of the Agreement, and reads:

> "Subject to the exceptions in Rule 2, the rules contained herein shall govern the hours of service, working conditions, and rates of pay for all employes in any and all subdepartments of the Maintenance of Way and Structures Department, represented by the Brotherhood of Maintenance of Way Employes, and such employes shall perform all work in the maintenance of way and structures department."

Rule 2 specifies the exceptions to Rule 1, and is actually an integral part of Rule 1, having been made so by the clause "Subject to the exceptions in Rule 2" at the very beginning of Rule 1. Rule 2(h) is specific in providing when the Carrier may contract work. It reads:

> "2(h). The railroad company may contract work when it does not have adequate equipment laid up and forces laid off, sufficient both in number and skill, with which the work may be done."

The subject of the dispute was the contracting of work. All the conditions outlined in Rule 2(h) under which the Carrier may contract work were present. The Carrier did not have any equipment with which to perform the electrical welding work involved, much less have such equipment laid up. There was no dispute between the parties as to the lack of equipment. Neither did the Carrier have forces laid off sufficient in skill to operate the equipment that was used. The Petitioner did not even contend that the employes laid off were qualified to operate the equipment that was contracted for. The employes who were used in connection with the work, and as referred to by the Referee, were not used to operate the high voltage electric welding equipment, but were used to perform work incidental to the actual welding.

There is nothing irregular about the owner of equipment determining the qualifications of those who are to operate it, but, as stated, there was actually no dispute as to the employes laid off not being so qualified.

Rule 2(h) being a specific rule, covering the contracting of work — the subject matter of the dispute — which, under the conditions therein specified is excluded from the scope of the Agreement, positively supported the Carrier's action. Rule 38(b) does not expand the scope of the Agreement as defined in Rules 1 and 2, and does not bring under the Agreement work that is specifically excluded under Rules 1 and 2. If the majority had properly applied the announced rule of contract construction that "the intention of the parties must be determined from the four corners of the contract" the claim herein would have been denied.

For the reasons stated herein, we dissent.

P. C. Carter
D. S. Dugan
W. H. Castle
T. F. Strunck
G. C. White