Award No. 12690
Docket No. MW-11994

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Lee R. West, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that: (1) The Carrier violated the effective Agreement when, beginning on or about May 4, 1959, it assigned or otherwise permitted employes of Teleweld Inc., to perform the work of welding rail ends between Milepost 50.54 and Milepost 54.84; on one mile of the Ore Dock Approach; and at various other locations.

(2) Maintenance of Way Welder Norbert Peano and Henry Croschere each be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by the Contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On May 4, 5 and 6, 1959 and on dates subsequent thereto, the work of welding rail ends on one mile of the Ore Dock approach; between Mileposts 50.54 and 54.84; and at various other locations was assigned to and performed by Teleweld Inc. (General Contractor), without negotiations with or approval of the employes' authorized representatives.

Heretofore, all work of welding rail ends, together with all welding work on frogs, switches, diamond crossings and structures as well as the butt welding of rails for highway crossings has been assigned to and performed by the Carrier's Maintenance of Way Welders.

The Agreement violation was protested and the subject claim filed in behalf of the claimants. The claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated January 18, 1951, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 1 reads:

"Scope

RULE 1. The rules contained herein shall govern the hours of

of a specific character under conditions where the Carrier does not possess the skilled force and other things such as equipment it could not provide or would not be justified in maintaining for rare occasions on which they would be required, the Carrier should be, and is, permitted to go outside and contract for their construction."

In Award No. 4920, Third Division of the National Railroad Adjustment Board, Robert O. Boyd acting as referee, said:

"It has been often said in the awards of this Division that a Carrier may not contract out work of a type intended to be covered by an agreement with its employes. Exceptions to this general rule have been when the work contracted was a new project and when the work required specialized skills not available among its normal complement of workers."

A portion of Referee Edward F. Carter's Findings in Third Division Award No. 2338 follows:

"Employes contend, on the other hand, that the equipment could have been found somewhere on the railroad system and that employes sufficiently skilled to have done the work were available. Such assertions however, unsupported by factual data, are not sufficient to overcome the managerial judgment of the Carrier in contracting the work, when such judgment was exercised after consideration of facts such as are shown above by this record.

"It must be borne in mind that the Carrier is charged with the safety of its men as well as that of the public in using its transportation facilities. Its managerial judgment ought not to be lightly disregarded in matters of this kind. While it is generally the rule that a Carrier is not permitted to farm out work which can be performed by its employes, yet, **where the evidence, as here, is sufficient to warrant the exercise of managerial judgment as to whether the Carrier has the men, equipment and facilities to perform the work, the contracting of the work by the Carrier cannot be said to constitute a violation of the agreement.** The proof is insufficient to sustain an affirmative award."

CONCLUSION

The Carrier therefore has shown and submits that it did not violate the contract between itself and the Brotherhood of Maintenance of Way Employes as the claim states, since the Claimants were employed by the Railroad during the entire life of the contract, since the work complained of is not outlined in the Agreement as belonging to this classification of employes, since it is not economically feasible for a railroad the size of the Lake Superior & Ishpeming to acquire and maintain this type of specialized equipment for incidental use, and since the railroad does not have skilled personnel to perform this type of specialized work.

OPINION OF BOARD: This claim arises by reason of Carrier's contracting out work of welding rail ends of various segments of its main track and siding to Teleweld Incorporated. The Organization contends that this work belongs to it by reason of its agreement with Carrier and by virtue of past practice and tradition. A total of 11.12 miles of track are involved in the welding, together with slotting on 18.53 miles of track.

The Carrier argues that the welding involved is electrical welding as compared to oxyacetylene welding which has been previously performed by its own employes. It therefore denies any past practice with regard to the work involved herein.

Although the method and process used in welding is different, the work of welding has admittedly been performed by employes in the past. We believe that this does constitute the past practice and tradition which indicates intent that the welding work belongs to the employes. It was pointed out in Award 864 that the Agreement applies to a certain character of work and not merely to the method of performing the work.

However, Carrier offers a further defense which compels us to deny the claim involved herein. Carrier argues that it has no equipment with which electric welding may be performed. Further it contends that it would be extremely impractical and unfair to require it to purchase such equipment at a cost of $28,000 to be used on only approximately 45 miles of line. It also points out that it lacks trained or qualified employes necessary to operate the equipment involved. It cites several awards whereby Carrier has been authorized to contract out work, otherwise encompassed within the agreement, for these reasons. Among this is Award 10715 which held:

Award 10715

"With reference to the Carrier not having special tools or equipment necessary to pave road and street crossings properly with an approved type of hot asphalt mixture— for example, the asphalt materials mixing and heating plant or plants, specially designed highway trucks, spreaders, rakes, furnaces, iron, etc.—we may again note Award 5304, involving the same parties and the same Agreement as here, where this Division said:

> 'It is equally well settled that work may be contracted out when special skills (Awards 3206 and 4712; compare Awards 4158, 4701, and 4920), special equipment (Award 5151; compare Awards 4671 and 5227) or special materials (Awards 757, 3839 and 5044; compare 4921) are required; or when the work is novel (Awards 2465 and 3206; compare Award 4671) or of great magnitude (Award 5151; compare Award 4760); or when emergency time requirements exist (Award 5152; compare Award 4888), which present undertakings not contemplated by the agreement and beyond the capacity of the Carrier's forces.
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> 'The work contracted out is to be considered as a whole and may not be subdivided for the purpose of determining whether some parts were within the capacity of the Carrier's forces (Awards 3206, 4776 and 4954). * * * '"

Whether or not Carrier should be allowed to contract out work covered by the Agreement depends upon the circumstances of each case. In this case, it appears that it would be impractical to require Carrier to purchase such expensive equipment, not heretofore used by Carrier, for the amount of work involved or likely to be involved. We have held, and we reiterate, that Carrier cannot avoid the obligation of its Agreement by the simple expedient of failing to furnish tools and equipment reasonably necessary to perform work covered by the Agreement. However, it does not seem reasonable to

require the purchase of this special equipment, under these circumstances presented here.

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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1964.