Award No. 13224
Docket No. MW-13096

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, 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 effective Agreement when it assigned the work of welding rails into continuous lengths to the Linde Air Products Company whose employes hold no seniority rights under the provisions of this Agreement.

(2) Each of the hereinafter named employes be allowed eight hours' pay at his respective straight time rate for each work day beginning with June 29, 1960 and for each day subsequent thereto on which the rail welding work referred to in Part (1) of this claim was performed by the Linde Air Products Company's forces:

Welder Foreman W. A. Bell
Welder J. C. King
Welder R. Garrett
Welder H. A. Adams
Welder E. J. Morrow
Helper A. N. Hartsfield
Helper B. Wynn
Laborer J. S. Peters
Laborer W. E. Cooper
Laborer A. L. Bales
Laborer G. H. Eason
Helper H. G. Huggins
Helper E. D. Calloway
Helper E. K. Lee
Helper J. H. Minton
Helper J. McInvale
Helper F. F. Bartlett
Laborer V. R. Adams
Laborer L. L. Burns
Laborer E. Fry
Laborer C. O. Thomas

EMPLOYES' STATEMENT OF FACTS: Commencing on June 29, 1960, the Carrier assigned the work of welding rails into continuous lengths to the Linde Air Products Company, whose employes hold no seniority rights under the provisions of this Agreement.

This welding work was performed at Ensley, Alabama and consisted of the welding together of twenty seven rails, each thirty-nine feet in length, to form a single rail section of 1,053 feet in length. The welding operations were

We respectfully request that the claim be allowed.

(Exhibits not reproduced).

CARRIER'S STATEMENT OF FACTS: During 1960, carrier purchased rail in 39 foot lengths and then had the Linde Air Products Company weld it into lengths of 1053 feet. This welding was consummated prior to the time rail reached carrier's property.

POSITION OF CARRIER: Carrier insists that it has the right to purchase equipment, including rail in whatever style, qualities, or lengths that may be desirable. Whether it is purchased at one or two, or more, locations, we feel is immaterial. Rule 41 (a) dealing with Bridge and Building work reads, in part, as follows:

> "All work which is done by Company forces in the construction, maintenance, repair, or dismantling of bridges, buildings . . ."

This is a rule in the same agreement that it involved here and clearly recognizes that not all work even on the carrier's property will be done by Company forces.

Rule 2 (f) of the current agreement with its maintenance of way employes, dated May 1, 1960, provides—

> "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."

In this instance carrier did not have the necessary equipment laid up with which to do this work. As a matter of fact, carrier has never owned such equipment.

OPINION OF BOARD: The essential facts presented to the Board in this case are not in dispute. In 1960, the Carrier chose to purchase ribbon rail (1053 feet long) rather than the standard 39 foot rail for installation in its main tracks. The Carrier first purchased this new rail from the TCI's Birmingham plant in the standard 39 foot lengths and had it shipped to the Linde Company's ribbon plant at Ensley, Alabama, where it was fused into ribbon rail of 1,053 feet lengths by means of high voltage flash butt welding. This rail was loaded on cars and transported to pre-designated points of use on the Carrier's line where it then was unloaded and installed by the Maintenance of Way Track Department employes. On August 1, 1960, a claim was filed on behalf of one welder foreman, four welders, eight helpers, eight laborers, for eight hours pay at their respective time rates for each day beginning with June 29, 1960 and for each day subsequent thereto on which the work of welding rails into continuous lengths was performed by the Linde Company's forces at its Ensley plant.

The applicable rules of the Agreement with which we are concerned are Rule 1. Scope, Rule 2. Exceptions to Rule 1, and Rule 38. Welders' Special Rule and specifically sub-paragraph 38 (b) of the latter, all of which are quoted below:

"RULE 1. SCOPE

> 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 Main-

tenance 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. EXCEPTIONS TO RULE 1

These provisions shall not apply to the following, except as to the retention and exercise of seniority by the individual as outlined in the seniority rules:

* * * * *

2 (f) 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."

"RULE 38. WELDERS' SPECIAL RULE

* * * * *

38 (b) Maintenance of way welders will be used to do all welding that is done on materials or parts of tracks, bridges, or buildings. It is intended that this rule will apply only to welding that can be performed on line of road or in maintenance of way shops, and is not applicable to welding requiring the service of other departments."

The Organization contends that Rule 38 (b), is a special rules and as such supersedes Rule 2 (f) and the Scope Rule, both of which they allege are general rules. They cite a long series of cases which hold as a fundamental concept of contrast construction that special rules control given situations when read in conjunction with general rules. They further allege that if the contracting parties had intended for Rule 2, a general rule, to extend to Rule 38 (b), a special rule, it would have been a relatively simple matter to have incorporated into the contract, a statement to the effect that Rule 2 was an exception to Rule 1 and to Rule 38; further that the parties failure to do so is convincing proof that the provisions of 38 (b) are not nullified by Rule 2 or in any way modified by it. They introduce into evidence a Memorandum Agreement for the establishment of a Welding Gang at Birmingham, Alabama, for the purpose of welding rail into continuous lengths effective March 3, 1959, and a letter from the Chief Engineer of Carrier to the General Chairman, dated June 12, 1959, outlining the procedures for bulletining, filling and abolishment of welder positions. They further maintain that despite the fact that the basic Agreement was revised effective May 1, 1960, the aforementioned letter and memorandum remain in full force and effect under the provisions of Item 6 of another Memorandum Agreement, dated February 18, 1960. While they admit that the formation of the Welding Gang, etc., was a mutually agreed experiment in 1959, they nevertheless allege that the Carrier has violated and continues to violate the March 3, 1959 Memorandum of Agreement, the Schedule Agreement of May 1, 1960 and the Memorandum Agreement of February 18, 1960 when it contracted to have the butt welding done by Linde Company, whose employes hold no seniority under the collective Bargaining Agreement.

The Carrier basically relies on Rule 2 (f) quoted infra. They submit for our consideration the fact that not only did they not have adequate equipment laid up, they did not in the first place own such equipment. They contend that they would have had either to purchase the equipment or lease it, but

that the decision to proceed in the manner in which they did, was a proper exercise of managerial prerogatives, which is not violative of any of the provisions of the Contract.

By way of background information, we feel compelled to outline in detail two other factual situations similar in nature to the one with which we are now concerned, involving the same two parties. Basically, there are three separate occasions that must be considered by us, all involving the fusion of rail. The first situation that comes to our attention occurred in 1958 and is the subject of a sustaining award contained in Award Number 12632 (Seff). In that case, the Carrier experimented with the welding of rail by a high voltage electric welding process. This was accomplished by an independent contractor, the National Cylinder Gas Company of Chicago, whose employes were outside the Scope of the basic Collective Bargaining Agreement. Claims were instituted on behalf of two welders and two welders' helpers for eight hours pay at their respective straight time rates for each day on which welding was done by the Contractor's employes. Several rules including the Scope Rule were invoked by the Claimants' but special emphasis was placed on Rule 38 (b) of the Agreement, captioned Welders' Special Rule which read 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."

The Carrier contended first that this case was essentially a Scope Rule case and that absent a violation, none of the other rules were germane or applicable; second, that Rule 2 entitled Exceptions to Rule 1, specifically subparagraph (h) thereof, reading as follows:

> "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."

justified their action. They argued that not only did they not have the necessary equipment laid up nor forces laid off in sufficient number and skill to operate the equipment, but in the first instance did not possess the required equipment. The record in this case indicated that the Carrier did use certain of its employes in connection with the work involved, and that the Carrier had first expressed a desire to use its own employe, but the Contractor took the position that the Carrier's employes were not qualified to operate the equipment. The majority held that Rule 38 (b), being a Special Rule, was controlling in that case. They found that the evidence presented did not support the exception contained in the latter part of that rule. They further found that if Rule 2 (h) was intended in any way to limit the meaning of Rule 38 (b), it should have so stated. They concluded that Special Rule 38 (b), when read in conjunction with other pertinent rules of the Agreement, reserved the right to the work to the employes, and, because of 38 (b), distinguished this case from the numerous awards holding it justifiable action for the Carrier to engage an independent Contractor, when special equipment was needed. A sustaining award was given for this work done in 1958.

In 1959, both the Organization and Carrier entered into an Agreement, which both admitted was to be experimental in nature. It was understood by both parties that if the procedure as outlined was successful, it would be continued. This too involved the fusion of Rail. The required equipment was

leased from the Linde Air Products Company. The process of welding standard rail into ribbon rail was accomplished by the Carrier's own welders on the property. Upon completion of the project, the leased equipment was returned to the Linde Company. No disputes were involved in the 1959 incident, the work proceeding without substantial difficulty.

In 1960, the subject of this dispute, the rail was purchased in standard lengths from the TCI Company, fused by the Linde Company at their plant, shipped to the Carrier and installed by the Carrier's forces. The Claimants maintain that the fusion done by the Linde Company's employes, was per contract rightfully within their orbit of work.

On May 1, 1960, the basic Agreement was revised. Rule 38 (b) was revised only insofar as the exception contained therein was concerned. The remainder of the language was untouched and as such was identical to the language considered in Award Number 12632. The exception contained in the former Rule 38 (b) was not considered applicable to the facts of that case. We direct our attention now to the exception contained in the current Rule 38 (b). It reads as follows:

"RULE 38. WELDERS' SPECIAL RULE

* * * * *

38 (b) It is intended that this rule will apply only to welding that can be performed on line of road or in maintenance of way shops and is not applicable to welding requiring the service of other departments."

This modification was adopted on May 1, 1960 and the work in dispute began in June 1960. Our attention, in view of the above modification, is focused on that part of the exception contained in the former Rule 38 (b):

"except for materials or parts shipped into shops or other departments" etc.

If the above exception was contained in the present rule, the factual situation in this case would compel us to make a denial award because the 1,053 foot ribbon rail was in fact shipped to Carrier and accordingly would have come within the exception as outlined above.

We are aware of the many cases decided by this Board, which hold that work may be contracted out when special equipment has been required. We are also cognizant of the many awards sustaining the Carrier's position, that it is permissible to engage the services of an independent contractor as a proper exercise of managerial prerogatives, especially in the face of a broad general Scope Rule. We agree fundamentally with these decisions. However, when the Carrier by negotiation agrees to and adopts language in their contract which has the effect of bargaining away certain of its functions, a different result is dictated. It is our judgement that the modified exception contained in 38 (b) has precisely that effect. The language simply states that the rule will apply to welding that **can be (emphasis ours)** performed on line of road, etc. In view of the 1959 situation where the equipment was leased and the work performed by Carrier's welders, there is no question that the work can be done or could have been done in 1960. There is no evidence that the Claimants were in any way unqualified to perform this work. True, it would have required either the purchase or leasing of the necessary equipment. The

language in 38 (b) however provides for no such exceptions. Language could have been provided limiting employes to the general run of the mill welding done on the railroad continuously, and specifically excluded them from work when new equipment would be required either on a purchase or lease basis. This would then enable the Carrier, in the exercise of their managerial functions to enter into arrangements with independent contractors. The language adopted militates against this however. Super-imposed on this is the fact that 38 (b) is a special rule and supersedes the general rules upon which the Carrier relies. The awards of this Board sustaining this position are legion.

We agree fundamentally with the reasoning and the decision of Award 12632, involving the same parties, fundamentally the same issues, and a modified special rule. For the foregoing reasons, we will sustain the claim.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1965.

Carrier Members' Dissent to Award 13224—Docket MW-13096

Referee John J. McGovern

In the concluding paragraph of the Opinion the Referee asserts:

> "We agree fundamentally with the reasoning and the decision of Award 12632, involving the same parties, fundamentally the same issues, and a modified special rule. For the foregoing reasons, we will sustain the claim."

To the extent that this Award 13224 misconstrues the plain terms of the agreement and holds that Rule 38 (Welders Special Rule) supersedes or expands the provisions of Rule 1 (Scope) and Rule 2 (Exceptions to Rule 1), we dissent for the reasons set forth in our dissent to Award 12632.

The factual situation in the 1958 case covered by Award 12632 was materially different from the factual situation involved in this dispute. The 1958

work was performed by carrier on its property at Mobile, Alabama, with high-voltage welding equipment owned by an outside concern, in the welding of rail which was initially procured by and shipped to carrier in standard 39-ft. lengths. That dispute related only to the actual operation and control of the contractor's high-voltage welding equipment, all other work in the operation being done by Maintenance of Way forces. The Board held in **Award 12632** that Rule 38 (b) governed; that the work there involved belonged to claimants under the first part of Rule 38 (b), reading "Maintenance of way welders will be used to do **all welding that is done** on materials or parts of tracks * * *," and that the record did not support **the exception** contained in the balance of this rule reading "except for materials or parts shipped into shops."

In the 1960 case covered by **Award 13224**, the Referee has completely misconstrued the plain terms of modified Rule 38 (b), effective May 1, 1960, which reads:

> "Maintenance of way welders will be used to do all welding that is done on materials or parts of tracks, bridges, or buildings. It is intended that this rule will apply only to welding that can be performed on line of road or in maintenance of way shops, and is not applicable to welding requiring the service of other departments."

Other than barely mentioning it, the Referee gave no consideration to the first sentence of modified Rule 38 (b) which is word for word the same as the first part of the former rule. Instead, he dealt only with the second sentence. He then compared the second sentence with the exception in the former rule, and said:

> "If the above exception was contained in the present rule, the factual situation in this case would compel us to make a denial award because the 1,053 foot ribbon rail was in fact shipped to Carrier and accordingly would have come within the exception as outlined above."

Under the basic principles of contract construction, it should be evident that the second sentence of modified Rule 38 (b) does not refer to additional work but only to the work encompassed within the phrase "all welding **that is done** on materials or parts of tracks" in the first sentence. It is in fact a limitation on the terms of the first sentence. Reading the two sentences together in their proper order and context, modified Rule 38 (b) provides (as to "rail") that maintenance of way welders will be used to do all rail-welding work that is done by the carrier on its property, either on line of road (rail in tracks) or in maintenance of way shops, subject, of course, to the provisions of Rule 2 (f).

The Referee has also misconstrued the second sentence of Rule 38 (b) even when read alone, which should not be done. He has also indulged in assumptions and inconsistencies in order to reach the conclusion that the agreement was violated.

Speaking of the second sentence of Rule 38 (b), he said: "The language simply states that the rule will apply to welding that **can be (emphasis ours)** performed on line of road, etc." Then in an attempt to dispose of the very obvious exception, i.e., that the rule does not apply to welding that cannot be performed on line of road or in maintenance of way shops, he added the assumption: "In view of the 1959 situation where the equipment was leased and the work performed by Carrier's welders, there is no question that the work can be done or could have been done in 1960." He then conceded that to have

done the work in 1960, qualified employes and necessary equipment would have been required. Thus, he recognized the presence of exceptions without which the words "can be performed," which he has emphasized, would be without meaning. But he surprisingly and inconsistently concluded: "The language in 38 (b) however provides for no such exceptions."

In this case, it is an admitted and unquestioned fact that the claim does not involve any rail-welding work that was performed or necessary to be performed on carrier's property, either on line of road or in its shops. The claim relates to new rail, procured from the manufacturer, which was shipped to carrier in 1,053-ft. lengths for direct installation into tracks by maintenance of way track forces. No rule in the agreement prohibits the acquisition from outside concerns of rail in such quantities and lengths that carrier deems necessary. This is fundamentally carrier's managerial prerogative, not subject to negotiation with its employes.

It is difficult to understand the Referee's assertion that, if the exception in the former rule was contained in the present rule, "the factual situation in this case would compel us to make a denial award because the 1,053-foot ribbon rail was in fact shipped to Carrier and accordingly would have come within the exception as outlined above." Since the rail was originally received by the carrier in continuous lengths, it was ready for installation on line of road and no work in maintenance of way shops was necessary.

For the reasons stated, **Award 13224** is clearly erroneous and we dissent.

/s/ R. A. DeRossett
R. A. DeRossett

/s/ W. F. Euker
W. F. Euker

/s/ C. H. Manoogian
C. H. Manoogian

/s/ G. L. Naylor
G. L. Naylor

/s/ W. M. Roberts
W. M. Roberts