

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35773
Docket No. MW-34407
01-3-97-3-902**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Grand Trunk Western Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (Holland Company) to perform Maintenance of Way work (welding rail joints) on the Eastbound Main from South Bend, Indiana, Mile Post 97.5 to Kingsbury, Indiana, Mile Post 75.5 beginning March 4 through April 18, 1996 (Carrier's File 8365-1-546).
- (2) As a consequence of the aforesaid violation, Welders J. Rodriguez and D. E. Martens shall each be compensated for ‘ . . . twelve (12) hours per day, four (4) days a week, beginning March 4, 1996 through and including April 18, 1996.’”

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.

The claim challenges the Carrier's use of a contractor to perform rail welding. The Carrier's initial notice pertained to approximately 700 welds. A supplemental notice expended the work to include 2,000 more.

Key evidence is established on this record via the mechanism of unrefuted assertions of material fact. The Carrier did not refute the Organization's assertions that

the work was within the scope of the Agreement or that its M of W employees had performed the work in the past. Nor did the Carrier refute the Organization's assertion that other Carriers, namely Amtrak and the Indiana Harbor Belt, had arranged to lease flash butt welding equipment for operating by their M of W employees from the same contractor.

The Organization also asserted the Carrier violated the December 11, 1981 Berge-Hopkins Letter of Agreement. The Letter obligates the Carrier to undertake good faith efforts to procure necessary equipment and reduce contracting by increasing the use of its own forces to the extent practicable. Although the Carrier joined this issue on the property, it failed to provide any evidence to establish that it had undertaken the requisite good faith efforts. Moreover, though challenged by the Organization, the Carrier failed to produce any evidence to support any of the asserted economies and/or efficiencies it relied upon for justification of its actions. In addition, the Carrier apparently refused to disclose the terms of its contracting transaction to support its contentions. Although the Organization requested a copy of the document, it is not part of the record.

The Carrier did assert that the Organization had abandoned an identical claim previously and accepted the Carrier's position. It is well settled that the disposition of one claim does not establish a precedent for other claims. See Third Division Awards 14903, 28047 and 32217. Moreover, examination of the relevant documents, which were made part of the instant record, reveals significant differences between the two claims. For example, the Organization apparently failed to request a conference on the prior claim after the Carrier served notice.

Given the state of the instant record, we are compelled to find that the Carrier violated the Agreement when it contracted the disputed work in the manner it did.

Regarding remedy, it is noted that the Carrier asserted the claim to be excessive. However, it provided no explanation for this assertion other than the contention that the Claimants were fully employed during the claim period, which the Organization did not refute. The Carrier did not take exception to the dates of the claim, the number of contractor employees involved or their hours worked.

The full employment defense is not effective where the Carrier has failed to fulfill its good faith efforts commitments to perform scope covered work with its own forces. If the required good faith efforts had been undertaken, any number of manpower deployment alternatives may have been developed. Given the Carrier's substantial control over the scheduling and capabilities of its forces, the Carrier's failure to undertake such good faith efforts creates the adverse inference that the employees did, indeed, suffer a lost work opportunity.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 24th day of October, 2001.