

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36901
Docket No. MW-36330
04-3-00-3-526**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Holland Welding Company) to perform routine Track Welding Sub-Department work (making on-track welds) behind Production Steel Gang 8501 commencing in the vicinity of Mile Post 673.40 on the Calxico Branch on March 20, 1999 and continuing (Carrier File 1197693).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance written notice of its intent to contract out the work referenced in Part (1) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants F. M. Robles, D. H. Vanderpool, M. H. Johnson, E. C. Bourgeois, G. D. Holleman and R. A. Powers shall now ‘... receive compensation for the total number of hours that have and continue to be worked, (at their respective rates of pay as of this date) by the outside contractor until said**

contractor is removed from the property, the hours of which can no doubt be determined by a joint review of the service contract between the Holland Company and the Union Pacific Railroad. The above compensation will be in addition to any compensation Claimants may have already received.”

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.

By Notice dated February 2, 1999, the Carrier indicated its intent to contract out the work of, “Providing fully operated and maintained track mounted equipment to perform electric flash butt rail welding” at various locations during the calendar year. The Organization responded on February 9, 1999 maintaining that the work was reserved and that the notice was inadequate due to its vague information on the dates (beginning and ending) locations (cities, mile posts, etc.) and specific description (number of contractor employees used, hours of time to perform, reasons for use, exact work to be performed, etc). A telephone conference was held on March 15, 1999 and the Carrier responded thereto by indicating:

“This notice concerns track mounted equipment to perform electric flash butt rail welding. The Organization contends that the former SP owned this equipment and had its employees perform this work. However, the Carrier asserts that any equipment still owned will not be enough to provide service to all areas that will need this welding

work and contract employees and equipment are being used to supplement any Carrier equipment and employees.”

The claim of the Organization is that the work performed belonged exclusively to BMW-represented employees and was “regular System Track Welding work” as specified in the Scope of the Agreement. Further, the exact work performed by outsiders to the Agreement, was the exact work the employees were doing prior to March 20, 1999. The Organization alleges that the employees were utilizing a Carrier owned Holland Welder to make track welds on Production Steel Gang 8501 until it broke down on February 1, 1999 and was sent for repair. On March 20, 1999, the outside contractor’s forces began utilizing the Holland Welder behind Gang 8501 doing the Claimants’ work. The Organization further argues that the Carrier’s Holland Welder was repaired and provided a picture which it alleged “shows the truck sitting idle during the time frame in question.” The Organization maintains that the Carrier did not act in good faith and that the Claimants were denied work opportunity.

The Carrier argued on the property that the work did not accrue exclusively to its employees under the Scope of the Agreement. It further argued that contracting out track welding was an ongoing action on this property. It maintained that its actions were in full compliance with the notice provisions and the Carrier’s rights. As the Carrier stated:

“... the Carrier finds that in your claim you fail to recognize the fact that proper notice was given, the Carrier does not own enough equipment to provide service to all areas in need of welding work, there is a mixed practice of using both contract and M/W employees to perform this work, and all of your Claimants were fully employed during this time.”

The Carrier notes that it lacked the equipment and skilled manpower to complete the projects. It argues that its actions did not violate the scope of the Agreement. It maintains that it fully complied with all of its obligations prior to the date it contracted out the work.

The Board notes that the Carrier included for the first time in its Submission copies of welding service contracts. Such materials were not a part of the record on the property and therefore have been removed from consideration by the Board. By long established precedent, only material raised and contested on the property has standing before the Board.

On the merits, inasmuch as the Organization is the moving party it must establish the basis for its claim. There is a clear notice provided to the Organization which was conferenced and no evidence was established that any Carrier obligation was lacking. There is no doubt in this record that the Claimants performed the same work as the outside forces but this is not similar to the Awards cited. In the instant claim notice was given prior to the contracting out of the work (unlike Third Division Awards 31997, 36514 and 36516).

Additionally, the record indicates that making on-track welds was a "mixed practice" on this property as stated by the Carrier without rebuttal from the Organization. The Board notes that the Carrier argued that it lacked equipment. The Organization, without further Carrier comment argued that the equipment was idle. This evidence does not sufficiently preclude the Carrier's actions or establish bad faith. The Carrier denied the Organization's exclusivity argument maintaining that the "Carrier has a practice of contracting this type of work." We also note that the Organization alleged that some Claimants were given Track Laborer work while the outside contractor's employees did the welding. However, that is not a part of the claim at bar. While not refuted, this allegation does not prove Carrier violation of the Agreement, Article IV of the National Agreement, or a failure to act in good faith. Nor is it clear from this record exactly what, if any, violation was alluded to in this fact. Also without rebuttal, the Carrier stated about the use of the Holland Company owned welder that, "This welder and several others have been secured by the Carrier this year, as well as in years past, in order to complete the program work." The Board is persuaded from the record that there exists no probative evidence demonstrating that the contracted work was not a long standing mixed practice.

The record clearly demonstrates that all Claimants were fully employed. Absent a showing under these instant facts that the disputed work was scope protected work performed by BMW-represented employees to the exclusion of all

others or that the Carrier failed to provide timely notice, hold any requested conference, or to act in good faith to reach an understanding on subcontracting, there is no violation. In this claim, the Organization failed to provide sufficient proof to uphold its burden. The claim therefore must fail.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

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

Dated at Chicago, Illinois, this 25th day of February 2004.