Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37435
Docket No. MW-36422
05-3-00-3-674

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former Burlington
(Northern 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 (Chemtron Welding) to perform maintenance of way work (in-track rail end welding) on Line Segment 2001 between Mile Posts 535 and 543 on the Dakota Division beginning November 16, 1998 and continuing through November 26, 1998.

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with proper notice of its intent to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimants* listed below shall each '...receive an equal and proportionate amount of pay for 192 straight time hours and 24 hours overtime pay. Pay is to be computed at the current Head Welders rate of pay.'

M. J. Kastel	T. L. Thrush	M. P. Jorland
L. J. Wilke	J. K. Adkins	J. M. Flaherty
T. R. Even	J. P. Deschepper	M. J. Almgren
M. L. Ahnberg	L. J. Danielson	J. R. Dolge
R. R. Miller	R. L. Semple	H. J. Hayenga
M. A. Bowatz	G. L. Forbord	M. A. Stevens
M. E. Henning	G. R. Eliason	W. R. Kurtz
R. P. Brandt	P. A. Ness	M. W. Koepp
T. J. Shereck	W. O. Johnson	P. D. Anderson
G. D. Montague	C. J. Burgel	W. K Kluver
L. H. Fryer	A. K. Larned	T. J. Swanberg
P. R. Peters	G. G. Skogen	N.J. Hommerding
C. J. Przybilla	J. T. Haggerty	J. W. Johnson
G. G. Maracellus	R. M. Rooney"	

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.

On January 5, 1999, the Organization filed the instant claim on behalf of 41 Seniority District 11 Welding Subdepartment Rank A Head Welders after the Carrier used an outside contractor (Chemtron) to perform in-track electric flash butt welding on Line Segment 2001 between MP 535 and MP 543 from November 16 through November 26, 1998. The claim asserts that the contractor forces performed work that had previously been performed by Maintenance of Way Welders. According to the Organization, the Carrier has not successfully invoked

any exceptional circumstances to justify contracting out work that accrues to its forces by Rule and practice.

In addition, the claim asserts that the Carrier violated the Note to Rule 55 by failing to give the General Chairman 15 days advance written notice of the contracting transaction. It asserts that this omission denied the Organization the opportunity to meet and attempt to reach an understanding relative to the performance of the work.

In support of its position, the Organization relies on the following contractual provisions. The Note to Rule 55 states in pertinent part:

> "The following is agreed to with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employes in the Maintenance of Way and Structures Department:
>
> Employes included within the scope of this Agreement -- in the Maintenance of Way and Structures Department, including employes in former GN and SP&S Roadway Equipment Repair Shops and welding employes -- perform work in connection with the construction and maintenance or repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service, and work performed by employes of named Repair Shops.
>
> By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or

when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith...."

Also pertinent to this dispute is Appendix Y, the December 11, 1981 Letter of Understanding, which states in relevant part:

"The carriers assure you that they will assert good faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."

The Carrier submits that it did not violate the Agreement in the instant case. It argues, first, that notice was given to the Organization prior to contracting out the work to Chemtron. In addition, the parties conferenced the work in question. The Organization is in error when it states that those prerequisites were not met, the Carrier asserts.

Based on our review of the record, the Board agrees that the Organization did not successfully establish that there was a notice violation. In its March 29, 1999 letter of appeal, the Organization stated: "The Note to Rule 55 requires the Carrier to notify the General Chairman of pending subcontracting transactions. That notification as cited in the claim letter did occur." In addition, the Organization never refuted on the property the Carrier's statement that the parties met in conference regarding the instant matter. On the contrary, the Organization's June 22, 2000 letter to the Carrier specifically confirms that a conference was held on June 6, 2000, during which time the claim was discussed.

In its Submission, the Organization shifted its position by objecting to the "blanket" nature of the notice, but that new argument is not properly before the Board and has not been considered. Overall, we find that the Organization failed to show that the Carrier violated the notification requirements of the Note to Rule 55 and the December 11, 1981 Letter of Understanding (Appendix Y).

There is one other preliminary matter that must be addressed before proceeding to the merits of the case. Relying on a line of cases exemplified by Third Division Award 33468, the Carrier contended that the Organization failed to identify the specific Claimants in this dispute. In so doing, the Carrier argued, the Organization did not adhere to Section 3, First (i) of the Railway Labor Act, which requires that claims be handled "in the usual manner." We disagree. Unlike Third Division Award 33468, which held that the Organization's failure to identify the allegedly aggrieved employee barred further consideration of the claim, the Claimants herein are named and readily identifiable. There is no basis for a finding that the claim is void ab initio.

As to the substantive issues, the Carrier advances two principal arguments in defense of its decision to contract out the disputed work. First, it contends that the Organization failed to prove that its members have exclusively performed the

disputed work system wide on the Carrier's property. Our examination of the cases on the subject reveals that there are opposing viewpoints. We believe the better reasoned line of cases concluded that proof of exclusivity of work performance is not required. We base that finding on the fact that the Agreement language itself addresses work "customarily" performed by the employees; nowhere in the Note to Rule 55 or the December 11, 1981 Letter of Understanding (Appendix Y) is "exclusivity" mentioned or required. The clear language of the parties' Agreement must always be our guide.

The Board finds that the correct analysis is set forth in Public Law Board No. 4402, Award 20, a case relied upon by both parties herein. There, the Board stated:

> "...we disagree with the Carrier that in order to demonstrate a violation of the contracting provisions in the Note to Rule 55 and the December 11, 1981 letter that the Organization must show that work that has been contracted out has been previously performed exclusively by the covered employees. The negotiated language governs work 'which is customarily performed by the employees' - not work that is 'exclusively' performed...."

In the case at hand, we find that the Organization successfully established that the work at issue has been customarily performed by its members. Rail welding work has been performed by BMWE-represented forces using a number of methods, technologies, and tools, the record shows. More particularly, however, there is no dispute that BMWE-represented forces have performed the specific work of electric flash butt welding. The record shows that in-track flash butt welding was introduced on the Carrier in the mid-1980's, at which time the Carrier purchased in-track welding equipment from Holland Company. Carrier forces were trained to and did operate the equipment. Given the nature and extent of the work performed, the Board finds that the Organization demonstrated that the employees have customarily performed the welding work at issue.

We next turn to the Carrier's second argument. As the Carrier correctly points out, even work that is customarily performed by BMWE-represented forces can be contracted out if it falls within the enumerated criteria set forth in the Note to Rule 55. Here, the Carrier takes the position that the electric flash butt welding

equipment is "special equipment not owned by the Company" within the meaning of the Note to Rule 55. Moreover, the Carrier asserts that it was not possible to lease the equipment using Carrier forces as described in the December 11, 1981 Letter of Understanding (Appendix Y).

The Board concludes that the Carrier established its affirmative defense. It is clearly the case that BMWE-represented employees perform welding work, at times using specialized equipment designed for in-track electric flash butt welding. There is no evidence, however, that this equipment was idle at the time of the events precipitating the instant claim, nor is there evidence that the Chemtron equipment was used in lieu of the Carrier's equipment. Instead, the record indicates that the Carrier elected to lease additional electric flash butt welding equipment from Chemtron rather than commit itself to further capital investment for extra equipment. There is no Rule requirement that the Carrier must purchase the equipment for its own forces.

Equally important, documents from Holland and Chemtron, the two contractors who supply this specialized equipment, stated that they were unwilling to lease the units without their own personnel. The Organization argues that these statements, which date back to 1995, should not be afforded any probative weight due to the lapse of time. If the Organization seeks to refute an affirmative defense, however, it is obligated to demonstrate that Holland or Chemtron or another vendor will, in fact, lease the equipment without operators. Because no such evidence has been presented, we are not persuaded that the Organization demonstrated that the Carrier could have leased the equipment elsewhere as described in the December 11, 1981 Letter of Understanding (Appendix Y).

Under these circumstances, we find that the Carrier utilized "special equipment not owned by the Company" as set forth in the Note to Rule 55. Further, the use of an outside contractor where the equipment was unavailable for lease without the contractor's employees comes within the terms of the December 11, 1981 Letter of Understanding (Appendix Y) which requires the use of "maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by Carrier employees." This fact distinguishes the instant claim from Third Division Awards 35773 and 34981, upon which the

Organization relies. Concluding as we do in the instant case that the Carrier complied with the Agreement, the claim must be denied.

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 22nd day of March, 2005.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 37435, DOCKET MW-36422
(Referee Kenis)

This is a first for this Labor Member to concur and dissent to an award that was ultimately denied. The concurrence portion of this missive pertains to the subject of the so-called exclusivity principal. This Carrier is one of the few remaining carriers who argues the applicability of exclusivity in contracting out of work disputes. The neutral in this case followed the more reasoned line of opinions wherein the test in contracting out of work disputes require customary performance by the employes covered by this Agreement. Maybe, now this Carrier will retire its assertion that exclusivity must be proven by the Organization in contracting out of work disputes and join the modern world. Freeing the Carrier of the bonds of holding to such a worn out and dilapidated argument will provide it with more time to handle these types of cases in good faith. This brings us to the dissent of the award.

The DISSENT is directed towards the Majority's erroneous finding that the burden was on the Organization to refute the Carrier's affirmative defense that Holland or Chemtron would not allow Carrier's personnel to operate their equipment. First, it was undisputed that the Carrier had leased Holland rail welding equipment for operation by Maintenance of Way employes in the past. In fact, as the parties were discussing this case on the property, Maintenance of Way employes were operating Holland equipment on other portions of the Carrier's property. Hence, that portion of the Carrier's affirmative defense was clearly refuted. Second, the Organization presented a Chemtron

advertisement attached to our June 22, 2000 letter (Attachment No. 1 to Employes' Exhibit "A-5") wherein Chemtron announces:

> "*** The ATV offers optimum production for all rail sizes and metallurgies, and is a complete unit for **sale or lease**. ***" (Emphasis ours)

Someone here was not telling the truth and it was not the Organization. Clearly, the Chemtron equipment was available for lease to be operated by Carrier forces. Hence, the affirmative defense was clearly debunked by the General Chairman during the handling of this dispute on the property. At that point the burden shifted back to the Carrier to "gin-up" another bogus excuse for failing to comply with the Agreement. This, the Carrier failed to do. Because the Carrier's affirmative defense was shown to be without merit, the Majority should have sustained the claim. Because of these glaring errors in assessing the facts of record, Award 37435 is palpably erroneous and holds no precedential value.

Respectfully submitted,

Roy C. Robinson
Labor Member