

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40660  
Docket No. MW-39856  
10-3-NRAB-00003-060671  
(06-3-671)**

**The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.**

**(Brotherhood of Maintenance of Way Employes Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(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 (Holland Welding) to perform Maintenance of Way work (rail end welding) between Mile Posts 730.7 and 737.30 and between Mile Posts 753.5 and 764.50 on the Aberdeen Sub-Division beginning September 11 and continuing through October 16, 2000 (System File T-D-2200-W/11-01-0029 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a 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, Claimants E. Wald, C. Przybilla and T. Tate shall now each ‘. . . receive pay for two hundred fifty (250) straight time hours and any overtime pay that the contract employes received. Pay is to be computed at the current Head**

Welders rate of pay. We further request that Claimants be accredited for any and all other benefits which would have accrued to them, had the Company properly assigned the work to them.’”

**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 Carrier began in-track flash butt welding in 1983 when it subcontracted with the Holland Company which then had a monopoly on the process.<sup>1</sup> Holland used its own employees to run the machines. In 1985, the Carrier purchased one flash butt welder from Holland and manned it with BMW-represented employees with maintenance and training provided by Holland.<sup>2</sup> At the same time, the Carrier

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<sup>1</sup> Flash butt welding has advantages in application and durability over thermit and other older welding techniques. It applies electric resistance through a special welding head to fuse the end of one rail to forge two rails together without addition of filler material. In contrast, thermit welding ignites a foreign material placed in a void between two rails that, after cooling, is ground to specifications. The Carrier says a flash butt welder costs \$1.9 million new plus \$100,000/year for parts, is used six to eight months per year by rail gangs and lacks the newest advances available on leased equipment.

<sup>2</sup> By 1994, the Carrier owned three in-track flash butt welders that were used year round on projects other than those performed by joint elimination gangs.

continued to lease Holland equipment with Holland employees pursuant to Holland's then policy that required leased equipment to be operated by its own employees.

In 1994, Chemetron Railway Products began to offer flash butt in-track technology. The Carrier leased equipment and operators under Chemetron's policy requiring its equipment to be operated by Chemetron employees.

In 1995, at the Organization's urging, the Carrier attempted to negotiate leases with Holland and Chemetron that allowed Carrier forces to operate the leased equipment (perhaps under lessor supervision). Chemetron rejected the idea outright. Holland conditionally agreed provided BMW-represented Operators agreed to remain with the machines for the rest of the season. The Organization did not accept the condition and filed a claim against the Carrier for subcontracted work in 1995 and each year thereafter.

As it had since at least 1994, on December 22, 1999, the Carrier notified the Organization in writing:

“This is an informational notice that the Burlington Northern Santa Fe intends to enter into a contract for two mobile in-track welders to make electric flash butt welds. The contractor will supply BNSF with a fixed price for welding and will carry a warranty on all welds performed.

The in-track welders will be scheduled in the consist of rail relay gangs starting in January 2000. The expected average daily production per welder will be 12 welds per day.

The mobile in-track welders will be owned, repaired and operated by the contracting company. The contractor will provide one service technician and one operator for each welding machine. BNSF will schedule labor forces to support each welder with one welding foreman and 2 grinder operators. BNSF will benefit from having electric flash butt welds that have higher quality and are expected to last the life of the rail.

Attached is a tentative in-track-welding schedule for 2000. Obviously, this schedule is subject to change as the work season progresses.<sup>3</sup>

This letter is intended to inform you of our trackwork programs, and keep you and your membership abreast of our plans to accomplish this work, in the spirit of open dialogue between BNSF and the BMWE.”

The Organization objected to the blanket nature of the notice. The parties met but were unable to reach a mutual understanding.

Given the long history of virtually identical annual disputes, the Carrier's broad December 12 description of its intended subcontracting adequately informed the Organization of its intent so as to allow the Organization to meaningfully respond to it. Therefore, the Organization's assertion that the notice was deficient and in bad faith lacks merit.

From September 11 through October 16, 2000, under subcontract with the Carrier, Holland used three of its employees to operate a Holland owned in-track flash butt welder to weld rail on the Aberdeen Sub-Division between MP 730.7 and 737.30 and 753.5 and 764.50. Each Holland employee worked ten hours per day Monday through Thursday.

Welding is included in the Agreement's Scope Rule and the employees customarily do welding and have done flash butt welding utilizing the flash butt welding machines owned by the Carrier.

On March 22, 2005, the Board issued Third Division Award 37435 which, over the Organization's partial dissent, denied a 1998 claim identical in all material respects to the present dispute. The Award held (1) subcontracting protections apply to work “customarily” performed by BMWE-represented employees; “exclusivity” is not the

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<sup>3</sup>The attached schedule, in relevant part, reads: “Holland #425 will work in conjunction with RP 22 for the complete work season of 2000.”

test; (2) BMW-represented employees customarily perform rail welding under various technologies, including in-track flash butt welders owned by the Carrier; however, (3) the 1998 subcontract conformed to Appendix Y and satisfied the "special equipment" exception in the Note to Rule 55 because (a) there was no proof the Carrier's flash butt equipment was idle or that subcontracted equipment was used in lieu of Carrier equipment; (b) the Carrier could not lease in-track flash butt welders unless operated by contractor employees; and, (c) the Carrier need not purchase this expensive special capital equipment for use by BMW-represented employees.

Award 37435 is recent and soundly reasoned. Stability, consistency and predictability reinforce its authority. It should be followed unless and until there are subsequent significant changes in material circumstances.

The Organization argues (1) its members customarily perform welding; (2) times have changed and there is no longer a valid, good faith reason to subcontract flash butt welding to outsiders; (3) Award 37435 recognized each claim is fact specific and the Carrier may not indiscriminately subcontract welding work; and (4) necessary flash butt welding equipment was available for the Carrier from equipment it owned or readily could have purchased or leased from Chemetron and/or Holland.

The Carrier asserts (1) BMW-represented employees have not exclusively operated flash butt welders; (2) it is not required to purchase flash butt welders; (3) any Board order requiring a purchase exceeds its authority; and, in any event, (4) the subcontract fits the exception to the Note to Rule 55 because the equipment is special and unavailable for lease without contractor operators.

The key issue is whether sufficient proof of changes in material circumstances between 1998 and 2003 compel a different analysis and result than that obtained in Award 37435. Because neither the Note to Rule 55 nor Appendix Y requires the Carrier to make substantial expenditures for specialized capital equipment, the more precise question is whether there is adequate proof the welding equipment could be leased for use by BMW-represented employees.

While processing this claim on November 15, 2005, the Organization presented the Carrier (1) a 1999 RT&S industry newsletter discussing the then current general

status and technological capabilities of the welding industry; (2) an undated Chemetron advertisement to sell or lease an on-track vehicle that performed flash butt welding; (3) an undated Holland advertisement for a self propelled flash butt welder soliciting inquiries about "contract, purchase or leasing information;" (4) another undated Holland ad for a flash butt welder, saying it could adapt "through a variety of options," including (a) supplying a Holland supervisor, welder operator or grinding personnel to operate and maintain the equipment or (b) Holland training customer employees; and (5) a number of agreements and arbitral decisions on other carriers.

The Carrier rejected the significance of the Organization's documents. It (1) referenced past subcontractor refusals to lease the particular equipment unless operated by subcontractor employees or under other conditions unacceptable to the Organization; (2) noted the documents were undated and indefinite regarding leasing conditions; and (3) cited Award 37435. It also produced March 24, 2004, letters from (1) a Holland Sales Manager saying its mobile welders were available as a contracted service or for purchase, but were not offered for lease without a Holland operator and (2) a Chemetron Sales Manager stating it then had no mobile welding trucks for sale or lease, but if any were available for lease, they only would be leased together with a crew to operate and maintain them.

The Organization notes the 2004 letters refer to a period some four years after the disputed work occurred and were not presented to the Organization for some five years after its claim. It suggests Holland and Chemetron Sales Managers would say or do anything the Carrier requested.

The record does not contain substantial reason to deviate from Award 37435. Evidence involving other carriers arises from different promises and circumstances. There is no showing Carrier owned in-track flash butt welders were available for this particular task. And, as a general rule, the Carrier is allowed to decide what welding technology it will use and can subcontract it under an express exception in the Note to Rule 55.

Lessor advertisements proffered by the Organization are undated (and, therefore, might post date this dispute) or were considered and rejected in Award 37435. They also contain no language necessarily inconsistent with the lease

limitations described by the Carrier and its subcontractors. A broad advertised offer to lease equipment does not foreclose certain non-negotiable conditions by the lessor. Organization allegations of deceit, conspiracy and duplicity between or among the Carrier, Holland and Chemetron are unsupported by any tangible proof.

Accordingly, the claim is 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 1st day of November 2010.