

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40661
Docket No. MW-39857
10-3-NRAB-00003-060672
(06-3-672)**

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

**(Brotherhood of Maintenance of Way Employees 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 Glasgow, Montana, Mile Post 277.18 and Williston, North Dakota, Mile Post 121.1 beginning April 28 and continuing through May 28, 2003 (System File B-M-1129-F/11-03-0255 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 D. Roebling, P. Najjar, P. St George shall now each ‘receive equal and proportionate pay that the contract employees received. Pay is to be computed at the respective rates 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.¹ 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.² At the same time, the Carrier 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.

¹ 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.

² 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.

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, the Carrier wrote the Organization on December 12, 2002, that it intended to outsource in-track electric flash butt welding during the upcoming work season. 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 April 28 through May 23, 2003, under subcontract with the Carrier, Holland used two of its employees to operate a Holland owned in-track flash butt welder to weld rail between Glasgow, Montana, MP 277.18 and Williston, North Dakota, MP 121.1. The two Holland employees each worked eight hours per day Monday through Friday.

Welding is included in the Agreement's Scope Rule and BMW-represented employees customarily do welding and have done flash butt welding utilizing approximately six flash butt welding machines owned by the Carrier in 2003.

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 BMW-employees; “exclusivity” is not the test; (2) BMW-employees customarily perform rail welding utilizing 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-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-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 the Board's jurisdiction; 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 that obtained in Award 37435. Since 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-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 more than one year after the disputed work occurred. It also 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.