

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42228
Docket No. MW-42030
15-3-NRAB-00003-120400**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 Welders) to perform Maintenance of Way work (weld track) on the Mason City Subdivision and continuing on other Subdivisions beginning on April 4, 2011 and continuing (System File G-1152U-63/1556081).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out the aforesaid work and failed to make a good-faith attempt to reach an understanding and to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 National Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Berding and A. Wheatley shall now each be compensated at their respective and applicable rates of pay for all straight time and overtime hours expended by the outside forces in the performance of the aforesaid work beginning April 4, 2011 and continuing.”**

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.

This claim arose when the Carrier utilized Holland Welders to weld track at various locations on the Mason City and Fairmont Subdivisions, beginning on April 4, 2011, and continuing for some period of time thereafter. The Organization contends that welding is scope-covered work under Rule 9, and the Parties' Agreement was violated because the Carrier failed to provide any notice of the proposed contracting transaction and because the work met none of the exceptions under Rule 52. Conversely, the Carrier's position is that Appendix II, negotiated by the Parties in 1991, covers the use of the computerized in-track welding machine that the contractor used. Under Appendix II, the Carrier is relieved of the Rule 52 contracting requirements. Appendix II permits the Carrier to use the computerized welding machine without prior notice to the Organization. In response to the Carrier's position, the Organization contends that the contractor's Welders were performing more duties than those permitted under Appendix II.

The Parties entered into Appendix II in 1991 to address the use of computerized track welding machines, which is the equipment at issue in this case. Appendix II reads, in relevant part, as follows:

“August 1, 1991

File: U-210-52

**MR. R. B. WEHRLI
GENERAL CHAIRMAN, BMW
1453 CHESTER ST
AURORA, CO 80010**

Dear Sir:

This is in reference to our previous conversations and exchange of correspondence concerning the Union Pacific Railroad’s utilization of the new Plasser Rail Welding superjack machines.

As indicated during our discussions and witnessed during our on-site inspection in Corpus Christi, Texas, the machine employs a new technology for in-track welding never before used on this carrier’s property. Skills and knowledge, different from those possessed by our present work force, are essential for the operation of the computerized parts of this equipment.

To justify the purchase of these expensive machines, the Carrier received assurances from the Plasser Company indicating it would meet specified production goals. As a contingency to meeting these goals it was necessary to include one Plasser Company technician or UPRR Company’s technician in the operation, maintenance and repair of the equipment with Maintenance of Way employees.

This technician will establish no seniority and will not be covered by the Maintenance of Way Collective Bargaining Agreement. He will be primarily involved with any adjustments to and maintenance and repair of the computerized equipment. Additionally, he will oversee and assist in the welding operation of the machine.

In connection with the other personnel assigned to work with this machine, including the support gangs, it is understood that System Gang employees will be utilized when the machine is being used in conjunction with system rail relay projects, i.e. working with system rail or curve gangs. In conjunction with the other projects involving the utilization of the Plasser Welding machine, the employees assigned thereto, including the support gangs, will be comprised of division seniority personnel.” (emphasis added)

Appendix II clearly permits the use of an outside Technician by the contractor. The third paragraph of Appendix II references the Technician being included “in the operation, maintenance and repair of the equipment with Maintenance of Way employees.” (emphasis added) The fourth paragraph indicates that the Technician “will be primarily involved with any adjustments to and maintenance and repair of the computerized machine. Additionally, he will oversee and assist in the welding operation of the machine.” (emphasis added) Appendix II, therefore, permits the Technician to perform a number of tasks, including operating the welding machine. In terms of the work that a human being is needed to perform, the actual process of welding with the machine involves pushing a button, and the machine does the weld automatically. There is, of course, other work that needs to be performed both before and after the actual weld, such as positioning and aligning the machine correctly, and so on.

The statements from various members of Gang No. 9645 indicate the employees’ belief that the Technicians were performing more duties than those permitted under Appendix II. The statement from Manager Chase Nichols indicated that Carrier forces worked in partnership with the Technicians to perform all of the pre- and post-weld track preparation. Specifically, Nichols mentioned de-anchoring, cutting rail, lining rail, re-anchoring and grinding rail. The claim is for two individuals to be paid for the work that the two Technicians performed. Even if the Technicians did perform some work outside of that which is permitted by Appendix II, they also performed some work that was included in Appendix II, so the claim is excessive, at least in part. More problematic, however, is that the record does not indicate just what it was that the Technicians were doing that was outside the scope of Appendix II. There were 15 employees on Gang No. 9645 and two contractor Technicians. Two Technicians could not have performed the work of 15 BMWE-

represented employees. As it is, the record lacks sufficient detail for the Board to conclude that any of the work the Technicians performed was not within their recognized right under Appendix II to operate, maintain, repair, oversee and assist in the operation of the welding machine. As a result, the Board must conclude that the Organization failed to meet its burden of proof to establish a contract violation.

In addition, Appendix II also permits the Carrier to use the computerized track welding machine, with a Technician, without providing notice to the Organization. Accordingly, the Organization's notice claim must fail as well.

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 17th day of November 2015.