

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42545
Docket No. MW-42180
17-3-NRAB-00003-130129**

The Third Division consisted of the regular members and in addition Referee Roger K. MacDougall when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago
(and North Western Transportation Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Federated Craft welder helpers from Gangs 3707 and 3096 to perform the Maintenance of Way and Structures Department work of construction and installation of a diamond at Mile Post 31.9 on the Milwaukee Subdivision on September 12 and 15, 2011 (System File B-1101C-139/1561820 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants D. Dietrich, J. Paulson and D. Kaminski shall now each “*** be compensated for an appropriate share of all hours worked, reportedly fifty (50) hours, at the applicable rate of pay.”**

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 is a case involving contracting out the installation of a diamond. The Organization says the contracting out was improperly done.

The Rules in question are as follows:

“RULE 1 - SCOPE

* * *

B. Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common Carrier service on the operating property...

RULE 2- SUBDEPARTMENTS

The following Subdepartments are within the Maintenance of Way and Structures Department.

- A. Bridge and Building Subdepartment**
- B. Track Subdepartment**
- C. Roadway Equipment Repair Subdepartment**
- A. B&B Subdepartment**

- 1. B&B & Painter Foreman**
- 2. B&B & Painter Assistant Foreman**
- 3. Scale Inspectors**
- 4. Truck Drivers**
- 5. B&B Carpenters**
- 6. Masons**
- 7. B&B Helpers**

- 8. Bridge Tenders
- 9. Bridge Flagmen
- 10. Cooks
- 11. Machine Operators
- 12. Assistant Machine Operators

* * *

RULE 3 - CLASSIFICATION OF WORK

* * *

B. An employee directing the work of employees and reporting to officials of the Company shall be classified as a Foreman.

* * *

E. An employee assigned to construction, repair, maintenance or dismantling of buildings, bridges or other structures including the building of concrete forms, etc., shall be classified as a B&B Carpenter.

* * *

I. An employee qualified and assigned to the operation and servicing of machines used in the performance of Maintenance of Way and Structures Department work shall be classified as a Machine Operator.

* * *

K. An employee assigned to operate a truck used in the performance of Maintenance of Way and Structures Department work shall be classified as a Truck Driver.

* * *

D. Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Company.

* * *

RULE 5 - SENIORITY DISTRICTS

Seniority Districts are identified as follows: B&B Track

**B-2 T-2
B-3 T-3
B-4 T-4
B-7 T-7
B-8 T-8
B-9 T-9**

* * *

RULE 7 - SENIORITY LIMITS

A. Separate seniority in the B&B and Track Subdepartments shall be established in the following classes: B&B Subdepartment

- 1. B&B Foreman (including Classes 2&3)**
- 2. Assistant B&B Foremen (including Assistant Foremen - Truck Drivers)**
- 3. Truck Drivers***
- 4. B&B Carpenters (including Masons and Lead Carpenters)***
- 5. B&B Helpers, Bridge Tenders and Cooks**

* * *

TRACK - B&B MACHINES

H. The following machines, not listed as Class A, B, or C machines, are used in common in the B&B and Track Subdepartments, i.e., at times on Track work, at other times on

B&B work. In order to permit the assigned operator to stay with the machine, regardless of the Subdepartment in which working, a separate seniority roster shall be established for operators of such machines. Where there are no qualified bidders holding seniority on such roster for such machine operator positions, vacancies shall be bulletined to both B&B and Track Subdepartment employees who shall be eligible to bid for such positions. Assignment to the vacancy will be based upon the oldest retained seniority date.

**Cranes of less than 20-ton maximum lifting capacity Pettibone
Speed Swing
Earth Drill Blacktop Roller Car Top Unloader Crawler Crane
Crawler Loaders and Dozers Boom Truck
Motor Grader
Tie Cranes
Rubber Tired Tractor Trencher
Portable Air Compressor (Rail-Mounted) W-64 Derrick Car
Lo-Boy Backhoe
Idaho Norland Snow Blower Articulated Front End Loader
Hydro-Scopic Excavator Unimog
Fuel Service Truck
Truck With Plows and Salt Spreaders Skid Loaders with
Attachments Sheep's Foot"**

In addition, the Organization says that the "Berge" letter continues to apply to this day. The Carrier disagrees.

The Organization says that when the Carrier plans to contract out work contained within the Scope of the Agreement, i.e., work which is customarily performed by Carrier forces, it is required to give the General Chairman written notice of its plans to contract out the work as far in advance of the date of the contracting transaction as practicable and in any event not less than 15 days prior thereto and if the General Chairman or his representative requests a meeting to discuss matters relating to the intended contracting transaction, a representative of the Carrier shall promptly meet with him for that purpose, as required by Rule 1 (b), Paragraph 3 and the interpretation and amendments thereto embodied in the

December 11, 1981 Letter of Agreement. Rule 1 (b), Paragraph 3 and the December 11, 1981 Letter of Agreement, in pertinent part, read:

“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 Brotherhood 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. The Company and the Brotherhood representatives 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 Brotherhood may file and progress claims in connection therewith.”

* * *

“Dear Mr. Berge:

December 11, 1981

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”

On this property, the Federated Welders are a craft or class of employees of the Carrier, represented by a different labor organization. The Organization representing the employees in this claim says that the scope of the work involved is exclusive to them.

In this case, unlike many others, there is a dispute over the facts of the case. While there may or may not be any argument over the work ownership of putting in a diamond, the Carrier says that the two welding gangs named by the Organization in this claim were actually working elsewhere when the alleged installation was being done. They have provided payroll records which support their position. In response, the Organization provided handwritten statements by two of the Claimants, stating that the work involved was done by welder helpers from Federated Craft Gangs 3096 and 3707 performed the contested work on the days in question.

Therefore, the Board must resolve this factual dispute before getting to the merits of the case. In a claim, it is the Organization which bears the burden of proof. While the Claimants may have seen someone doing the work, the Carrier records show that it was not the people alleged. Or perhaps the work was done on different dates. In either respect, it appears to this Board that the Organization has been unable to meet its burden of proof.

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 6th day of March 2017.