

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42582
Docket No. MW-42378
17-3-NRAB-00003-130384**

The Third Division consisted of the regular members and in addition Referee Robert A. Grey when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
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(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Bankhead Railway Services) to perform Engineering and Mechanical Department work (thermite welding and related work) on the Brunswick Branch and at various other locations on Pan Am Railway property beginning on September 21, 2012 through October 18, 2012 and continuing instead of assigning said work to Messrs. R. Parker and J. C. Hafford (Carrier’s File MW-13-02).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out the aforesaid work or to make a good-faith attempt to reach an understanding concerning said contracting as required by Article 3.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Parker and J. C. Hafford shall be compensated at their respective straight time and overtime rates of pay for all straight time and overtime worked by the outside forces in the performance of the aforesaid work beginning September 21, 2012 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.

The Board finds that on the record presented, the claimed work is arguably scope-covered under Articles 1 and 5 of the Agreement, thus requiring the Carrier to comply with the contracting requirements of Article 3.

Article 3 provides, verbatim:

“3.1 In the event the Company plans to contract out work within the scope of the Agreement, except in emergencies, the Company will notify the General Chairman involved, 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.

3.2 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 will promptly meet with him for that purpose. Said Company and Organization representatives will 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.”

The Carrier provided written notice to the General Chairman, dated August 2, 2012, that the Carrier intended to have a contractor perform “. . . thermite welding on portions of the Brunswick branch, beginning in early September” Pursuant to the General Chairman’s written request dated August 7, 2012, the parties discussed the contracting transaction on September 5, 2012. On September 13, 2012, the General Chairman wrote a detailed letter to the Carrier setting forth the Organization’s opposition to the contracting transaction. On September 21, 2012, the contracted work began.

The Board carefully reviewed the notice and subsequent correspondence between the parties. The Board finds that the notice contained substantial detail and was timely provided to the General Chairman. The content of the parties' post-notice, pre-claim correspondence demonstrates good faith attempts to reach an understanding concerning the contracting transaction. Therefore, the Board finds that the Carrier complied with Article 3.

Although the Organization proved that its members perform thermite welding, the Organization did not meet its burden to prove that performance of thermite welding is reserved to the Organization.

The Organization's assertion that Article 27 required the Carrier to establish a production crew for this short-term project is not persuasive. Article 27 states: "The Carrier may establish Production Crews" The parties' use of the word "may" in Article 27 renders the establishment of production crews optional at the Carrier's discretion, rather than mandatory. The Board finds the Organization's remaining arguments unpersuasive.

Therefore, under the facts and circumstances presented in this record, the Board does not find the Carrier in violation.

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 19th day of April 2017.

LABOR MEMBER'S DISSENT
TO
AWARD 42580, DOCKET MW-42365
AWARD 42582, DOCKET MW-42378
(Referee Robert A. Grey)

In these cases, the Majority erred in its decisions. Specifically, the Majority held:

“Although the Organization proved that its members perform thermite welding, the Organization did not meet its burden to prove that performance of thermite welding is reserved to the Organization.”

This holding is in serious error. To establish reservation of work, the Organization must establish customary and historical performance. The award itself recognizes that the Organization established that its members perform thermite welding. This finding would require the Board to also hold that the Organization established customary and historical performance, thereby finding the work was reserved to the Organization. Moreover, the Carrier acknowledged that its forces perform thermite welding on a routine basis. Accordingly, the Majority erred when it held that the Organization failed to establish that thermite welding reserved work. Therefore, I respectfully dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Zach Voegel', written in a cursive style.

Zachary C. Voegel
Labor Member

CARRIER MEMBERS' CONCURRING OPINION
to
Third Division Award 42580; Docket No. MW-42365
and Third Division Award 42582; Docket No. MW-42378

Referee Robert A. Grey

In its dissenting opinion, the Organization incorrectly opines that reservation of work is established by a mere showing of a customary and historical performance of the work. In order to establish reservation of work, system-wide exclusivity must be demonstrated. And in Award 42580 and Award 42582, the Majority properly determined that "...the Organization did not meet its burden to prove that performance of thermite welding is reserved to the Organization." Accordingly, Award 42580 and Award 42582 stand as important precedent on the property.

Anthony Lamanta
Carrier Member

Matthew R. Holt
Carrier Member

May 31, 2017