

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43227  
Docket No. MW-43327  
18-3-NRAB-00003-150498**

**The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.**

**(Brotherhood of Maintenance of Way Employes Division -  
IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(BNSF Railway Company (Former St. Louis - San  
Francisco 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 (Railworks Railway Service) to perform Maintenance of Way work (rail welding and related work) at various locations between Oklahoma City, Oklahoma to Gainesville, Texas beginning on June 1, 2014 and continuing (System File 361-FR99-1475/12-14-0151 SLF).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman 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 of its intent to contract out said 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 99 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 S. Petree and C. Cornish shall now each ‘... be paid all hours worked by Railworks at their respected (sic) rates of pay as settlement of this claim.’”**

**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 Organization filed a claim alleging the Carrier violated the terms of the Agreement when it assigned work to outside contractors. In support, the Organization states the work is contractually reserved, and has customarily, historically, and traditionally been performed by MOW employees. The Organization need not show exclusive reservation of scope covered work when the dispute involves assignment of work to outside contractors. Further, the Agreement requires that work reserved to employees may only be contracted out under specific conditions. Rule 99 requires the Carrier provide proper notice of its intent along with a good faith attempt to reach an understanding. The Carrier's failure to do so created a violation of Rule 99.

The Organization denies the Carrier's January 3, 2014 letter provided advance notice of the contracting. The letter contained no mention of the specific work or location. Further, the Carrier had no valid reasons for assigning the work. The Claimants suffered a loss of work opportunity because they could have performed the work with overtime, weekend overtime, or deferring other work. The Carrier may not assign MOW work that is customarily and historically performed by the Claimants to outside contractors and claim that no work opportunity has been lost.

The Carrier argues that it properly notified the Organization on January 3, 2014 that it was necessary to contract several two-man welding teams to assist existing MOW welding forces. The contractor work became necessary due to an unwillingness of sufficient qualified MOW employees to accept and retain

assignments on the Texas Division. The Carrier claims that the Claimants were fully engaged in ongoing work and have suffered no loss of work opportunity or damages.

The Carrier continues to state that the Organization received proper notification of the intent to contract in compliance with Rule 99 requirements, of BNSF's intent to contract. According to the Carrier, it provided reports to the Organization showing numerous bulletined welding positions offered to BMWED-represented employees with welding seniority which they did not accept. The Carrier states that it was not a Carrier failure that forced the contracting of the welding work, but rather the refusal by qualified MOW employees to bid on the bulletin welding positions. The Carrier states that it cannot force work upon the Claimants.

The Carrier claims that it correctly determined outside forces were required to supplement its own employees and the Organization has offered no evidence of a violation of the rules. Further, the Carrier states the Claimants have not suffered damages because of their significant overtime pay, in addition to their regular assignments during the claimed period.

This Division has reviewed the record. The Organization alleges a violation of the December 11, 1981 National Letter of Agreement, which provides:

**“Rule 99. Contracting Out:**

- (a) In the event the Carrier plans to contract out work within the scope of the applicable schedule agreement, the Carrier shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.
- (b) If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Carrier may nevertheless proceed

with said contracting, and the Organization may file and progress claims in connection therewith.”

The critical issue in the instant matter is the notice to the Organization. The Carrier’s January 3, 2014 letter provided:

“Once again, as in the past few years, BNSF is faced with the need to use contractor welders to fill gaps and supplement its welding forces for Seniority District 800. The unwillingness of a sufficient number of qualified employees to accept and retain assignments to welding positions in key areas of District 800 has resulted in a mounting backlog of welding work that is not possible to complete without resorting to outside help. To avoid endangerment to the safe and efficient operation of freight and commuter rail traffic, to prevent projects from not being completed, and to prevent BNSF from failing to meet both the public and our shippers’ needs, the BNSF must act quickly on this matter. Unfortunately, this combination of events has led to an ever increasing number of critical welding issues on the Dalhart, Boise City, Fort Worth, Red River, Red Rock, Wichita Falls, Lampasas, Madill, Galveston, Conroe, DFW, Houston, Lafayette, Hereford, Slaton, Clovis, El Paso, and Dalhart Sub-Divisions. BNSF’s current available welding forces are not able to keep up with the number of welds required to remove rail joints, retired insulated joints, and rail defects detected by the rail detector cars. Due to the increasing number of welds required on the above-listed sub-divisions, BNSF will contract Four 2-man welding crews to augment BNSF forces.

It is anticipated that this work will begin on approximately January 20, 2014, and continue for the remainder of the year.”

In the instant matter, the Organization points to fault with the notice because it identifies the wrong seniority district. The work done affected the 900 seniority district, whereas the notice specifically discusses welder shortages in the 800 seniority district. Rule 99 exists as a vehicle for discussion of contracting with the Organization and provides a framework for those discussions. The notice begins the process. Here, the Organization could not discuss the 900 district because the 900 district was not noticed. The Organization was not made aware of contracting on

the 900 district and could not request a meeting to discuss other options with the Carrier.

Due to the inadequacy of the notice, the Board sustains the claim.

**AWARD**

Claim sustained.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

Dated at Chicago, Illinois, this 26th day of June 2018.