

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43769  
Docket No. MW-42571  
19-3-NRAB-00003-140255**

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

**(Brotherhood of Maintenance of Way Employes 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 outside forces work (Holland Welders) to perform Maintenance of Way Track Subdepartment work (prepare and make rail welds) at locations between Mile Posts 16.25 and 16.50 on the Tara Subdivision on February 11, 12 and 13, 2013 (System File G-1301C-01/1583083).**
- (2) The Agreement was violated when the Carrier assigned outside forces (Holland Welders) to perform Maintenance of Way Track Subdepartment work (prepare and make rail welds) at locations between Mile Posts 84 to 243.7 on the Mankato and Worthington Subdivisions beginning on or about February 14, 2013 through February 27, 2013 and on March 4, 2013 (System File B-1301C-122/1583694 CNW).**
- (3) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance notice of its intent to contract out the work described in Parts (1) and (2) above and failed to make a good-faith effort to reduce the incidence of**

contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 1 and Appendix '15.'

- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants J. Foth and M. Kellner shall each ' ... be compensated for all the hours worked by the Holland Welders on the dates cited earlier in the claim, at the applicable rate of pay.
- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants A. Haupt, S. Pettis, J. Popp and A. Hartman shall each ' ... be compensated for an equal share of *all man/hours* worked by contractor Holland on the dates cited earlier in the claim, at the applicable rate of pay.' (Emphasis in original)."

**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 case presents two claims that have been combined because they present similar facts and circumstances arising under the same rules in the parties' Agreement. The underlying facts are not in dispute. On February 11, 12, and 13, 2013, Holland Welders made track welds at locations between Mile Posts 16.25 and 16.50 on the Tara Subdivision. Beginning on or about February 14 and continuing through March 21, 2013, Holland Welders made track welds between Mile Posts 84 and 243.7 on the Mankato and Worthington Subdivisions.

The Organization contends that the work of construction, maintenance, repair and dismantling of tracks, including welding and related duties, has customarily, historically and traditionally been performed by Maintenance of Way forces and is contractually reserved to them. Contracting may occur pursuant to the terms agreed in Rule 1B of the Agreement, which requires notice in advance and an opportunity to meet to discuss ways to reduce the amount of contracting before Scope-covered work may be assigned to outside forces. Rule 1B also establishes the circumstances under which work may be contracted: special skills, special equipment, or special material; work such that the Carrier is not adequately equipped to handle it; time requirements that are “beyond the capabilities of Company forces to meet”; and emergencies. The Carrier failed to provide notice of its intent to contract out the welding in dispute here, and it did not provide a basis that would justify contracting the work under Rule 1B. MoW forces were fully qualified and readily available to make rail welds and perform related duties as they had done historically.

The Carrier objects first to the two Claims having been combined, because the circumstances under which they arose were distinctly different: the welding in the first claim, which took place on February 11, 12 and 13, 2013, occurred in the ordinary course of business. The welding in the second claim, which took place February 14, 2013, and thereafter, occurred in response to an emergency derailment. In either case, the Organization has not established that the work at issue was Scope-covered. Holland Welders owns a special In-Track Welder that makes flash-butt welds automatically. The Carrier does not own a similar machine. The In-Track Welder must be rented with Holland employees to operate it. Carrier Maintenance of Way forces have never performed these welds, although they are assigned to do all of the related work *but* the actual weld. Because the work is not Scope-covered, the Carrier may contract it out without regard to Rule 1(B). In the case of the second claim, the Carrier’s right to bring in Holland Welders was further justified by the emergency exception in Rule 1(B).

“Rule 1(B) of the parties’ Agreement states:

- 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. This paragraph does not pertain

to the abandonment of lines authorized by the Interstate Commerce Commission.

By agreement between the Company and the General Chairman, work as described in the preceding paragraph, which is customarily performed by employees described herein, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or time requirements must be met which are beyond the capabilities of Company forces to meet.

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.

Nothing contained herein shall be construed as restricting the right of the Company to have work customarily performed by employees included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible."

In contracting claims, the Organization must first establish that the work occurred as alleged and that it is Scope-covered work under the Agreement. The next issue is whether the notice was sufficient under Rule 1(B). If it was, the Carrier must establish that the proposed contracting falls under one of the exceptions established in Rule 1(B): special skills, equipment, or materials; the Carrier is not adequately equipped to handle the work; special time requirements “beyond the capabilities of the Company”; or emergency conditions.

The evidence in the record is that in both claims, Carrier forces performed all pre- and post-welding work, such as grinding the new welds and reinstalling previously removed anchor clips. So the work being challenged is solely the actual welding that was done by the Holland Welding In-Track Welder. The Organization is correct that historically, MoW forces have been assigned to weld tracks. But new technology in welding has yielded machines that automatically make the welds that were previously done by hand. In its responses to the two claims, the Carrier set forth its basis for concluding that the work done by the Holland Welding truck was not Scope-covered:

“... Holland Welding utilizes a flash-butt welding truck that is specialized equipment and not owned by the Carrier. Carrier employees have not historically operated and maintained the sophisticated electric flash-butt welding trucks, and Claimants have not been trained to properly use a specialized, electronic automated welding truck. The skills and knowledge required to operate such equipment are different from those possessed by our present work force. Specialized training and experience is essential for the operation of the computerized parts of this equipment.

The . . . Holland Welding truck is solely operated by a technician and helper of the same company. Their duties require them to drive maintain and operate the truck in accordance with their company policy’s and procedures. At no time do they engage to do any work other than what is required for the procedures required to their operation of the welding head and alignment jacks of the truck. They simply calibrate the machine and ensure that is [sic] making quality welds. Holland Technicians do not perform any scope covered welding work. Since the technical duties performed by employees of Holland Welding are not scope covered, the Carrier is not required to provide the Organization with advanced notice.

The Organization is well aware that when the Carrier elects to utilize electric flash-butt welding trucks, the trucks are not Carrier owned and the technician's duties are to ensure that the welding machine remains calibrated and working properly, and to oversee and assist in the welding operation of the machine. The truck technicians' simple act of pushing a button to initiate the automated welding process does not fall within the realm of "scope covered" work."

Having considered the evidence in the record and the arguments from the parties, the Board is of the opinion that while ordinary welding is scope covered, flash-butt welding with a special computerized and automated in-track welding machine of the sort utilized in these two claims is not. Maintenance of Way forces have never performed such welds. They are not trained on or capable of operating the automated welding machine. The Carrier does not own such a machine. Moreover, the machine is used to perform a very narrow task, that of making the automatic welds, while Carrier forces are assigned to perform all other work associated with the welding. The Carrier did not violate the Agreement when it utilized Holland Welders and its in-track welding machine to perform the welds in either of these claims.<sup>1</sup>

**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 16th day of July 2019.

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<sup>1</sup> Because of its conclusion that flash-butt welding is not scope covered, it is not necessary for the Board to address the emergency nature of the welding that was performed in the second of the two claims.

LABOR MEMBER'S DISSENT  
TO  
AWARD 43769, DOCKET MW-42571  
(Referee Andria S. Knapp)

The Majority erred in its findings in this case. Specifically, the Board incorrectly held that "... while ordinary welding is scope covered, flash-butt welding with a special computerized and automated in-track welding machine of the sort utilized in these two claims is not. \*\*\*" This holding is contrary to decades of arbitral precedent. This Board has routinely held that collective bargaining agreement covers the character of the work performed, not the method or material utilized to perform it. Among the numerous awards holding to such effect are Third Division Awards 864, 867, 1092, 3746, 4033, 4078, 4688, 5117, 6448, 7349, 7575, 7770, 8217 and 11881. Typical thereof is Third Division Award 7349, which held:

"The work that is the subject matter of these Agreements and reserved by the scope rules is class of work and not so much the manner, method, or detail for its performance. \*\*\*"

Moreover, it is an equally established principle that a change in the method of performing work or a technological change in the machine or device being used to perform it does not, in and of itself, operate to make a new or different operation or to remove it from the Scope of the Agreement. Typical of the numerous awards holding to such effect are Third Division Awards 8217 and 10498. In any event, the Carrier's agreement with its employees is for work and not equipment. In this connection, we invite attention to Third Division Awards 10229, 19657 and 20090.

Accordingly, this award should be given no precedential value.

Respectfully submitted,

*Zachary C. Voegel*

Zachary C. Voegel  
Labor Member