

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45133
Docket No. MW-42861
24-3-NRAB-00003-220891**

The Third Division consisted of the regular members and in addition Referee Sarah Miller Espinosa 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 outside forces (Holland Welders) to perform Maintenance of Way Department work (prepare, adjust and weld rail) between Mile Posts 77.4 and 77.2 and between Mile Posts 35.45 and 35.2 on the Mankato Subdivision on September 3, 4, 5 and 6, 2013 (System File B-1301C-169/1594535 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance notice of its intent to contract out the aforesaid work and when it 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 the December 11, 1981 National Letter of Agreement (Appendix ‘15’).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Pettis, D. Balow, J. Popp and A. Hervey shall now each ‘... be compensated for an equal share of all man/hours, worked by contractor Holland on all 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 claim was made on behalf of the named Claimants. At the time of the dispute, the Claimants established and held seniority within various classifications.

In this case, on October 10, 2012, the Carrier provided notice of its intent to contract work "at various locations on the Twin Cities Service Unit". The notice identified the specific work as "providing any and all fully operated, fueled and maintained and or non operated equipment necessary to assist with program work, emergency work, and routine maintenance commencing November 1, 2012 thru December 31, 2013.

Rule 1B is central to the determination of this claim. Rule 1B states:

Rule 1 – SCOPE

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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 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 contract's forces. However, work may only be contracted provided that special skills not possessed by the Company's Employees, special equipment now 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.

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

B. Track Subdepartment

1. Track Supervisors
2. Track Foremen
3. Assistant Track Foremen
4. Truck Drivers
5. *Welders
6. *Welder Helpers
7. Trackmen and Crossing Watchmen
8. Machine Operators
9. Assistant Machine Operators
10. Track Walker

The above listed titles do not include employees governed by the provisions of existing agreements between the Company and other labor Organizations. This pertains to all jobs and specifically those identified by an asterisk (I).

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.
- C. An employee assigned to assist a Foreman or Track Supervisor in the performance of his duties shall be classified as an Assistant Foreman.
- D. An employee assigned to perform the work of constructing, repairing, maintaining or dismantling of roadway and track and other similar type work shall be classified as a Trackman.

- G. An employee assigned to the operation of any welding device used in the performance of such work as repairing, tempering, and cutting rails, frogs and switches, bridge welding, and such other welding in the Maintenance of Way Department, shall be classified as a Welder.

In addition to the Rules cited by the Organization, the Berge-Hopkins letter, which is located at Appendix 15 in the Agreement, is also referenced by the Organization in support of its position.

In the instant matter, the Organization established that the work at issue, welding, is within the scope of Rule 1. The Carrier argues in part that because the welding in question was precision welding, also known as flash-butt welding, and performed by the Holland Mobile In-Track Welder, it is not within the scope covered work. While this may be an argument forwarded as to why an automated welder may be considered a specialized piece of equipment, it does not exempt welding from the scope of Rule 1B.

In the instant matter, the Organization asserts that the notice was deficient. The substantial evidence contained in the record supports this contention. The notice provided by the Carrier would essentially cover all work – “program work, emergency work, and routine maintenance.” Moreover, the type of equipment identified in the purported notice was overly broad – “any and all fully operated, fueled and maintained and or non operated equipment.” Additionally, the notice purported that contracting out may occur over a thirteen-month period, from November 1, 2012 through December 31, 2013.

Here, the notice provided to the Organization was so vague and/or overly broad, as to the equipment, type of work, and time period, that the notice was essentially without meaning. Because the Carrier failed to provide adequate notice, there is no need to address the question of whether the work would have been permitted under an exception specified in Rule 1B. Thus, the record establishes no proper notice was provided and, therefore, a violation of the Agreement was established.

Concerning remedy, as the Board stated in Third Division Award 43727 (Referee Vohnhof):

The Carrier’s argument that the Claimant was full-employed elsewhere has been rejected by this Board as a reason to deny a monetary remedy. In Third Division Award 40819, (Referee Gerald E. Wallin), this Board ruled,

“If full-employment was allowed to serve as a defense to a monetary remedy, the defense would effectively allow the Carrier to violate the Agreement with impunity.”

The Claimants shall therefore be compensated for the hours worked by the contractor on September 3, 4, 5, and 6, 2013.

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 28th day of November 2023.