

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45432
Docket No. MW- 47967
25-3-NRAB-00003- 221037**

The Third Division consisted of the regular members and in addition Referee Jeanne Charles when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(WINSTON-SALEM SOUTHBOUND 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 (American Track) to perform Maintenance of Way and Structures Department work (hauling a welding machine, assisting another contractor that was using the welding machine to weld switch points and frog in the tracks used by the Carrier in common service) on the WSSB Seniority District on March 30, 2021 (System File WSSB802821/21-10409 WSS).**
- (2) The Agreement was violated when the Carrier assigned outside forces (American Track) to perform Maintenance of Way and Structures Department work (hauling a welding machine, assisting another contractor that was using the welding machine to weld switch points and frog in the tracks used by the Carrier in common service) near Carrier’s Mile Posts 2.8, 27.2, 6.4 and 14.5 on the WSSB Seniority District on March 4, 2021 (System File WSSB802721/21-17060).**
- (3) The Agreement was further violated when the Carrier failed to provide advance notice and failed to confer and reach an understanding setting forth the conditions under which the work**

referred to in Parts (1) and/or (2) above would be performed as required by Rule 2.

- (4) As a consequence of the violations referenced in Parts (1) and/or (3) above, Claimant K. Fields shall now be paid ‘... fifteen and one-half (15.5) hours of pay at the proper overtime rate of pay, and that all time be credited towards vacation and retirement for the Claimant. ***’
- (5) As a consequence of the violations referenced in Parts (2) and/or (3) above, Claimant K. Fields shall now be paid ‘... twelve (12.0) hours of pay at the proper overtime rate of pay, and that all time be credited towards vacation and retirement for the Claimant. ***’

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 Claimant K. Fields (“Claimant”) established and maintained seniority within the Carrier’s Maintenance of Way Department at the time of this dispute. While the claim cites various rule violations, it is primarily based on the proper application of Rule 2 (Contracting) contained in the WSSB/BMWED collective bargaining agreement dated December 27, 1991 (“Agreement”), between the parties. At issue is whether the Carrier violated the Agreement when on March 4, 2021, when it allowed outside forces (American Track) to perform Maintenance of Way and Structures Department work (hauling a welding machine, assisting another contractor that was using the welding machine to weld switch points and frog in the tracks used by the Carrier in common

service) at various locations on the WSSB Seniority District and on March 30, 2021, when the same work was assigned on the WSSB Seniority District.

While the claim cites various rule violations, it is primarily based on the proper application of Rule 2 (Contracting) contained in the WSSB/BMWED collective bargaining agreement dated December 27, 1991 ("Agreement"), between the parties. At issue is whether the Carrier violated the Agreement when on March 4 and March 30, it allowed outside forces (American Track) to perform Maintenance of Way and Structures Department work.

The Organization contends that the disputed work is controlled by the WSSB Agreement and is specifically reserved to BMWED employees. In this instance, the Claimant's seniority rights were violated when the Carrier assigned employees who held no seniority to perform the subject work on the WSSB territory. Additionally, this is work historically and customarily performed by Carrier forces. Finally, the Carrier failed to hold the requisite conference with the General Chairman as required by Rule 2.

Conversely, the Carrier maintains that the work required special skills not possessed by the employees and the use of special equipment not owned or available to the Carrier. Further, the Carrier contends that it complied with the notice requirement of Rule 2.

By letter dated April 9, 2021, the Organization filed a timely claim on behalf of the Claimants. The claim was properly handled by the Parties at all stages of the appeal up to and including the Carrier's highest appellate officer. The matter was not resolved and is now before this Board for final adjudication.

In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. As the moving party, it was the Organization's responsibility to meet its burden to prove by a preponderance of evidence that the Carrier committed the alleged violation(s). After careful review of the record, the Board finds the Organization has met its burden with respect to Rule 2 of the Agreement.

Rule 2 states:

Way and Structures Department is to be performed by employees subject to this Agreement except it is recognized that, in specific instances, certain work that is to be performed requires special skills not possessed by the employees and the use of special equipment not owned by or available to the Carrier. In such instances, the Chief Engineering Officer and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed.

It is further understood and agreed that although it is not the intention of the Company to contract construction work in the Maintenance of Way and Structures Department when Company forces and equipment are adequate and available, it is recognized that, under certain circumstances, contracting of such work may be necessary. In such instances, the Chief Engineering Officer and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed. In such instances, consideration will be given by the Chief Engineering Officer and the General Chairman to performing by contract the grading, drainage and certain other Structures Department work of magnitude or requiring special skills not possessed by the employees, and the use of special equipment not owned by or available to the Carrier and to performing track work and other Structures Department work with Company forces.

In this case, there was no showing by the Carrier that special skills were needed for the assignment at issue. Based on the on-property handling, the email from Maxwell Hess explains that the work was assigned to outside forces because there was “insufficient manpower and equipment to complete the welding.”¹ Without more, this is not an exception provided for in Rule 2. The notice of contracting was issued on January 5, 2021. The work was performed over two (2) months later. There is no evidence to explain why the work could not have been assigned on an overtime basis or as a temporary assignment. All that is present is a mere assertion by the Carrier that insufficient manpower and equipment existed. (See, Award 11027). Accordingly, the claim must be sustained.

¹ Organization’s Submission, Exhibit A-2, Attachment No. 2.

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 13th day of February 2025.

CARRIER MEMBER'S DISSENT

To

**Third Division Award 45430; Docket 47965
Third Division Award 45432; Docket 47967
Third Division Award 45433; Docket 48036
Third Division Award 45434; Docket 48037**

(Referee Jeanne Charles)

A review of the Award issued by the Board indicates, without doubt, the Board erred in its decision when it asserted, incorrectly, that there was a violation by the Carrier of the Agreement when it contracted with an outside party to perform welding services on the Winston-Salem South Bound (WSSB) Railroad.

By long-standing practice and written agreement between the parties, Rule 2 of the July 1, 1985 Seaboard System Railroad Agreement reads as follows: *Contracting: This Agreement requires that all maintenance work in the Maintenance of Way and Structures Department is to be performed by employees subject to this Agreement **except it is recognized that, in specific instances, certain work that is to be performed requires special skills not possessed by the employees and the use of special equipment not owned by or available to the Carrier.** In such instances, the Chief Engineering Officer and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed.*

*It is further understood and agreed that although it is not the intention of the Company to contract construction work in the Maintenance of Way and Structures Department **when Company forces and equipment are adequate and available, it is recognized that, under certain circumstances, contracting of such work may be necessary.** In such instances, the Chief Engineering Officer and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed. In such instances, consideration will be given by the Chief Engineering Officer and the General Chairman to performing by contract the grading, drainage and certain other Structures Department work of magnitude or requiring special skills not possessed by the employees, and the use of special equipment not owned by or available to the Carrier and to performing track work and other Structures Department work with Company forces.*

The work in question required special skills not possessed by WSSB employees and WSSB does not possess the equipment necessary to complete the work. Service of the Notice was performed in accord with past practice and satisfied those notice requirements. Additionally, as no qualified employees were available, as there were none at the time of the dispute, the Carrier had the right to contract out the work to be performed. Even though Notice was served and discussed, this did not change the fact that the work in question required special skills not possessed by WSSB employees and WSSB does not possess the equipment necessary to complete the work.

The Board erred in its decision to sustain the claim by holding that Claimant's had the right to perform the work, even though they possessed neither the skills nor equipment to perform the tasks. The Board supports its finding by stating: *There is no evidence to explain why the work could not have been assigned on an overtime basis or as a temporary assignment. All that is present is a mere assertion by the Carrier that insufficient manpower and equipment existed.* The finding of the Board is an inversion of the burden required in a claim. It is upon the moving party, *i.e.* the Organization, to show Claimants were (1) qualified, (2) available to perform service when the Carrier determined it was time for the work to be perform, and (3) that equipment necessary was available.

To comply with the Board's finding, the Carrier would be required to train Claimants to perform the welding service, purchase additional equipment for use and employ additional persons to perform the work in a timely manner. The Board has no jurisdiction to direct the Carrier to override managerial decisions as to the manner in which necessary work is to be performed.

With incorporation by reference to the Carrier submissions in these cases, it must be noted Claimants received a windfall for service not performed and to which, by practice and language of the agreement, they have no right to. A plain language reading of the Agreement in relation to past-practice would produce a declination of the instant claim, which would be consistent with previous practice. The rationale by the Board for the result produced here is not supported by the information in the record.

To produce such a contrary and unfounded Award, the Board has created a negative reliance on precedent and produced an inconsistent result. Both the Carrier and the Organization rely on consistent awards in the industry and the Carrier in this circumstance relied on Board decisions to make managerial decisions. To produce such a contrary conclusion creates the expectation that further disputes will ensue. The Carrier will implement the decision of this Board even though it is in contradiction of prior decisions and past practice on this issue.

The Board is limited to determine issues authorized by the RLA, including the requirement that the Organization establish a violation of the Agreement actually occurred, which the Carrier maintains the Organization has failed to do. As the Board has clearly erred in its analysis and conclusion, the Carrier dissents and asserts this Award should carry no weight in future disputes of like kind.

John K. Ingoldsby

John K. Ingoldsby
Carrier Member