Award No. 10
Docket No. 10

PUBLIC LAW BOARD NO. 76

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Roy R. Ray, Referee

STATEMENT OF CLAIM:

1. The Carrier violated the effective Agreement when it assigned the work of welding and other related work at Denison, Texas, to a contractor, The Holland Welding Company, whose employes hold no seniority rights under the provisions of this Agreement, particularly Rule 6, Article 1 - Scope, Letter No. 4 - DP-21, contained on Pages 40 and 41 and Article 5, Rule 1 of the current Agreement.

2. It is our claim that the Welding Department Employes, namely; J. C. Griffin, C. C. Withrow, P. C. Harrell, W. T. Click, H. B. Dorsey, K. W. Richardson and W. H. Schneickert, be allowed pay at their respective straight time rate of pay for an equal proportionate share of the total man hours consumed by the contractor's forces in performing the work referred to in Part 1 of this claim.

3. That the senior Machine Operator, Mr. L. W. Ainsworth, be allowed pay at his respective straight time rate of pay for an equal proportionate share of the total man hours consumed by the contractor's forces in performing the work referred to in Part 1 of this claim.

4. That Track Laborers F. A. Jones, E. D. Jones, J. O. Daugherty, J. L. Jones, Leonard Coffman, N. A. Jones and R. F. Boney be allowed pay at their respective straight time rate of pay for an equal proportionate share of the total man hours consumed by the contractor's forces in performing the work referred to in Part 1 of this claim.

5. That the Welding Foreman which shall be determined after the application of Rule 1 of Article 5 is complied with, be allowed pay for an equal proportionate share of the total man hours consumed by the contractor's forces in performing the work referred to in Part 1 of this claim.

6. That Track Foreman N. A. Jones be allowed pay at his respective straight time rate of pay for an equal proportionate share of the total man hours consumed by the contractor's forces in performing the work referred to in Part 1 of this claim.

OPINION OF BOARD: In connection with its program of rebuilding its main line trackage, Carrier in 1966, purchased some 35 miles of 115 pound rail for installation at three locations. It decided to install the rail in continuous welded lengths, known as "ribbonrail". To do this it was necessary to join some 4740 lengths of 39 foot rail into continuous lengths of approximately 1400 feet each. In August 1966 Carrier employed an outside contractor, the Holland Company of Chicago, Heights, Illinois, to do this work by a process known as "flash-butt" electric welding. Flash butt welding is a forging process by which two rail ends after being subjected to intense heat for a period of time are fused together through the application of extreme pressure by hydro-electric machinery. No metal is added as is done in the arc or acetylene process. For flash-butt welding a special welding plant, complex and expensive is required. Carrier had no such machine. Flash-butt welding had never been performed on Carrier's property before and none of its employees had ever operated such equipment. To handle the 1400 foot length of rail special equipment had to be prepared. This was accomplished by coupling together permanently twenty five coal cars with the ends removed and with racks equipped with rollers installed for handling the rail. As each length of rail was joined it was pushed by special hydro-electric machinery into the loading racks as the welding progressed. All of the work involved was done by employees of the Holland Company.

On November 8, 1966 the Organization filed the present claim on behalf of the employes listed therein, charging that the contracting out of the welding to the Holland Company was a violation of Article I, Rule 6 (Scope Rule), Letter No. 4 - DP-21 on pages 40 and 41, and Article 5, Rule 1 of the Agreement. The Organization contends that the work which was contracted out here belongs to welders by virtue of the Scope Rule and Letter No. 4, which it asserts makes it a part of the Agreement that all welding on this property will be done by the welder group. It says that track welding has always been done by the company welders. The Organization also asserts that the

Carrier has failed to show that it was necessary to employ outside forces to weld the rail. It also says that even if all of the work could not have been performed by Maintenance of Way employes, they should have been assigned the parts they could have performed.

The controlling issue presented by this claim is whether Claimants have any contractual rights to the work involved. Primary reliance is placed upon the Scope Rule. This rule is general is nature, listing positions without any specific designations of items of work accruing to the positions. In a long line of Awards the Third Division has held that such a rule does not of itself contract an exclusive right to the performance of any work. Some eleven of these Awards were rendered in claims arising between the present parties, and involving the identical scope rule we have in this case. They are 5869, 5870, 6151, 6190, 11477, 12098, 12236, 12425, 12502, 14313 and 14687. Under such a rule and in the absence of any other rule in the Agreement expressly granting particular work to employes they can establish a right to the work only by showing that the work has, in the past, been consistently performed by the employes to the exclusion of others. Award 16112 (Third Division) where Referee McGovern said:

> Confronted with such a general Scope Rule, it is axiomatic that not only does the Petitioner have the burden of proving by a preponderance of evidence that the work involved has traditionally and customarily been performed by them, but also that it constitutes work which they have performed to the exclusion of others, including outside contractors.

The present Referee stated the principle as follows in Award 11081 (Third Division):

> In order to establish a right to the work in question and sustain the present claim, Petitioner has the burden of proving by specific evidence that it has been the practice for the work to be performed exclusively by Maintenance of Way welders. While Petitioner alleges this, proof in support of the proposition is wholly lacking.

Those words are peculiarly applicable here. The Organization has no concrete evidence, much less a preponderance of evidence, tending to show that the work involved

has in the past been performed exclusively by the employes represented here. It has only unsupported assertions in letters from Claimants' representatives. Mere assertions are not evidence and have no probative value. See Awards 11224, 11231 and 11834 of the Third Division. In fact the Organization has referred only to one instance of alleged past practice where acetylene welding of rail was performed at Hillsboro between 1951 and 1955.

In the handling of the claim on the property Carrier pointed out that this welding had been done by the Oxweld Company, an outside contractor, and this was not denied by the Organization. There is no indication in the record that any employe of Carrier operated the machine used by the Oxweld Company at that time or what, if any, of the welding work was done by Maintenance of Way employes. They apparently did handle rail from loading racks to railroad flat cars. It is not disputed by the Organization that flash-butt welding was a new type of process which previously had not been performed on this Carrier. Nor does the Organization claim that employes of Carrier had ever done this type of welding. The only reasonable conclusion from the record is that Claimants have established no right to the work through past practice.

In support of its position that the work belonged to the Welder's classification the Organization relied especially upon two relatively recent Awards of the Third Division: Awards 12632 and 13224. Neither is persuasive here. Both were on the same Carrier and were specifically based upon a "Special Welders Rule" in the Agreement. The Agreement between the present parties has no such rule. Furthermore, we do not think Letter No. 4 (pages 40-41 of the Agreement) can be interpreted as granting employes any exclusive right to welding on this property.

The Organization has contended that the Carrier must justify the contracting out of the work and that it has not shown that use of an outside contractor was necessary.

As we said in an earlier Award this burden shifts to Carrier only after the Organization has established an exclusive right to the work. It has not done that in this case and no burden of justification rested upon Carrier. But even assuming that such were the case Carrier's assertions which are not denied supply that justification. It had neither equipment nor trained personnel for the flash-butt welding. In such situations the Third Division has consistently held that work may be contracted out. Carrier owned no electric welding plant of the type required. It was an expensive and complex machine, which required for its operation specially trained personnel. There were no such personnel in Carrier's employ. Because of problems caused by expansion and contraction of steel rail it was important to do the work as quickly as possible and during the Fall of the year. This could be accomplished only by contracting the work to an outside firm with equipment and personnel capable of doing the job in a limited time.

For the several reasons expressed above we find that Carrier did not violate the Agreement by contracting out the welding work to the Holland Company.

A W A R D

The claim is denied.

Public Law Board No. 76

Roy R. Ray
Neutral Member and Chairman

A. J. Cunningham
Employe Member

A. F. Winkel
Carrier Member

Dallas, Texas
June 19, 1968