

**PUBLIC LAW BOARD NO. 7737
CASE NO. 1**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION - IBT RAIL CONFERENCE**

and

**BNSF RAILWAY COMPANY (FORMER BURLINGTON
NORTHERN RAILROAD COMPANY) _____ /**

**Carrier File No. 11-13-0006
Organization File No. B-M-2584-M**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Agreement was violated when the Carrier assigned outside forces (CW&W) to perform Maintenance of Way and Structures Department work (thermite welding and grinding) to eliminate rail joints at various locations on the Forsyth Subdivision of the Montana Division beginning on August 6, 2012 through August 10, 2012 (System File B-M-2584-M/11-13-006 BNR).**
- 2. The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper notice of its intent to contract out the aforesaid 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 55 and Appendix Y.**
- 3. As a consequence of the violations referred to in Parts 1 and/or 2 above, Claimants J. Balajadia and S. Toennis shall now each be compensated forty (40) hours’ straight time at their respective rates of pay.”**

OPINION OF THE BOARD:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934. Public Law Board 7737 has jurisdiction over the parties and the dispute involved herein.

The facts in this matter are not in dispute. On June 5, 2012, William A. Osborn, General Director, Labor Relations for BNSF Railway Company (“BNSF” or “the Carrier”) sent notice to Bruce G. Glover, General Chairman, Brotherhood of Maintenance of Way Employees Division (“BMWED” or “the Organization”) of its intent to contract for thermite welding crews:

Please consider this notice that BNSF proposes to contract for 2 2-man thermite welding crews for thermite welding at various joint locations on the following Sub-divisions, including necessary yard tracks:

Dickinson Sub - MP 0.0 to MP 215.8

Forsyth Sub - 0.0 to 209.900

Bighorn Sub - 599.600 to 829.900

Great Falls Sub - MP 0.4 to 67.5

Ft. Benton - MP 74.6 to MP 119.4

Zap Sub - MP 0.0 to 77 .6

Sidney Sub - MP 0.0 to 64.8

It is anticipated that this work will begin on June 21, 2011 and continue through the remainder of the year, weather permitting.

The notice states that it has been necessary to employ contract welders for several years to supplement BNSF forces and goes on to say, "This chronic problem of employees avoiding welding service leaves the BNSF inadequately equipped to perform the work and in a situation where it is not possible to complete the work without resorting to outside help."

The parties held a contracting conference on July 12, 2012, but were unable to reach agreement. Afterward, BMWED sent a letter summarizing the conference and stating its position as to why the Carrier needed to hire outside contractors:

We also believe that if the Carrier would train their employees and use the employees for what they are assigned, they could easily have performed all this work.

...Bottom line is you have not hired enough people! You have put [too] many requirements/qualifications on these position and not enough availability to the training, in order to properly train the employees in the time they need to be trained. You don't provide the needed track time to get the work done. You have welders assigned with other duties that take away their time for welding. Those are the reasons that you are now needing to bring [contractors] in to do this work.

The Carrier assigned outside forces (CW&W) to perform thermite welding and grinding to eliminate rail joints at various locations on the Forsyth Subdivision of the Montana Division beginning on August 6, 2012 through August 10, 2012 (System File B-M-2584-M/11-13-006 BNR). According to the claim filed by BMWED, Claimants Head Welder J. Balajadia and Grinder S.P. Toennis have established and hold seniority within their respective classifications. On the days involved herein, they were regularly assigned to their respective positions and retained the requisite seniority. The Organization filed a claim on Claimants' behalf on September 21, 2012, stating:

From August 6, through August 10, 2012 two (2) employees of CW&W, a contractor, using a by-rail truck, hand tools, and BNSF thermite welding supplies performed thermite welding and grinding work between Mileposts 104 and 158, on the Forsyth Subdivision, of the Montana Division. The contractors performed welds at Mileposts 104.100, 118.190, 118.195, 148.779, 148. 780, 156. 719 and 156.720. Work performed by the contractors is thermite welding and grinding to eliminate rail joints in the track. This work has historically and customarily been done by Carrier forces. As a result of this work being done by contractors, claimants have suffered a loss of work opportunity.

The claim was denied on November 16, 2012. The denial was appealed on January 11, 2013, and that appeal was denied on March 8, 2013. Afterward, the parties agreed to submit the matter to this special board of adjustment. Accordingly, it is properly before the Board for resolution.

The Organization contends that the construction, maintenance and repair of track is work customarily performed by the Carrier's Maintenance of Way forces and is encompassed within the scope of the Agreement, and that Paragraphs 1 and 2 of the Note to Rule 55 specifically reserve work to Maintenance of Way forces. The Organization further contends that the Carrier violated the provisions of the Note to Rule 55 by its failure to properly notify the General Chairman, in writing, of its plans to assign outside forces to perform the work involved. Finally, the Organization contends that the Carrier cannot defend its decision on the basis of not being "adequately equipped" to perform the claimed work, because the Note to Rule 55 does not contain a manpower exception, and the Carrier's action was based on its own decision to not maintain an adequate work force. The Organization contends that the facts here are easily distinguishable from the facts considered in NRAB Third Division Award 41165 (Knapp).

The Carrier contends that this matter is controlled by past arbitral precedent, specifically Third Division Award 41165, which held that when the Carrier's efforts to fill its welding needs with its own qualified employees fail, the Agreement allows it to contract out that work. The Carrier contends that here, as in the previous Award, it is "not adequately equipped to handle the work" due to a lack of qualified Welders already on the payroll, and that it has made numerous efforts to fill welding positions without success. The Carrier further contends that it sent a contracting notice to the Organization in accord with the Agreement, and the parties held a contracting conference as required before it contracted for the work.

The first Claim made by the Organization is that the Notice it received did not fulfill the requirements of the Note to Rule 55 or Appendix Y, which state:

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 Organization 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.

Further, Appendix Y provides, in part:

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefore.

Here, the Organization contends that the Notice it received was inadequate and the Carrier responds that previous Awards have approved similar Notices. The Notice included the location, the time period the contracting out was expected to occur, and the amount of work that the contractors were expected to perform. As such, we find that the notice permitted a meaningful discussion to take place and satisfied the requirements of the Note to Rule 55 and Appendix Y.

The second claim is that the Carrier was not permitted to contract out this work. The Carrier does not dispute that the work is question is work customarily performed by employes represented by the BMWED and concedes that it is ordinary thermite welding work of the sort ordinarily performed by the Claimants. With respect this type of work, the Note to Rule 55 provides, in part:

By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors’ forces. However, such work may only be contracted provided that special skills not possessed by the Company’s employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company’s forces.

The Carrier presented evidence that it lacks sufficient forces to perform the work and thus, it meets the exception of the Note, specifically, that the present circumstances are “such that the Company is not adequately equipped to handle the work.” The Carrier points to the previous NRAB Third Division Award 41165, in which the Board found that “the Carrier made good faith efforts to have BMWED-represented employes perform thermite welding, but without success.” The Board described the factual background that led to that statement:

The Carrier regularly posted welding openings and was unable to fill enough positions to complete the work that it needed to get done on time. If qualified employees are not willing to fill the vacant positions that the Carrier needs filled to meet its maintenance needs, the Carrier is “not adequately equipped to handle the work” and may bring in an outside contractor to meet those needs. It really has no alternative. This is not “unavailability of forces” due to the Carrier’s failure to maintain an adequate work force. To the contrary, the record establishes that the Carrier made numerous efforts, starting in 2001, to fill welding positions, but without success.

The Organization’s attempts to distinguish this Award are not persuasive. Here, as in the facts considered by the previous Board, the Carrier has bulletined welding positions many times without takers. In addition, the Carrier has trained new welders. The Organization offered additional evidence purporting to show that the Carrier’s efforts were insufficient to even account for attrition and would not increase the workforce. The Organization charges that the Carrier has failed to plan for foreseeable circumstances. While these proofs may change the scope of the Carrier’s efforts, the basic facts remain unchanged. The Carrier has bulletined welding positions and offered training for welders and still it lacks sufficient trained welders to perform the work in question. It may also have shortages in other classifications, but that work is not an issue before this Board. As such, as found in the previous Award, the Carrier is not adequately equipped to handle the work, despite its efforts to maintain an adequate work force.

The Board has reviewed the submissions and accompanying documentation in this case with care. We find that the Agreement was not violated when the Carrier assigned outside forces to perform thermite welding and grinding to eliminate rail joints or by the notice that the Carrier provided to the Organization of its intent.


Consequently, the claim is DENIED.

AWARD


Claim denied.



Kathryn A. VanDagens, Chairman



Employee Member
Written dissent to fellow



Carrier Member

Dated: October 19, 2016