

**SPECIAL BOARD OF ADJUSTMENT  
BMWED-BNSF EFB WELDING ARBITRATION BOARD**

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE  
OF WAY EMPLOYES DIVISION/IBT**

**AND**

**BNSF RAILWAY, INC.**

**BACKGROUND**

**THE PARTIES to this Dispute established this Special Board of Adjustment and agreed to the following:**

**This Board is established to hear and decide the dispute between the Carrier and the Union concerning staffing of Electric Flash Butt Welding Gangs (“EFB Welding Gangs”): whether the December 9, 2009 Agreement requires BNSF to staff EFB Welding Gangs with a Grinder, EFB Welder, and Welding Foreman.**

**The Board shall have jurisdiction provided for under Section 3 First and Second of the Railway Labor Act to resolve the Dispute for all claims listed in Attachment “A” to this Agreement. It is agreed that such claims are properly before the Board and to be decided on the merits by the Board, and neither party will interpose any procedural or other arbitrability objection (such as timeliness, sufficiency of specificity, sufficient identification of claimants) to the Board’s ability to decide the claims on their merits.**

**The claims decided by this Board are deemed “lead” cases and will control the resolution of the Dispute for all future similar claims.**

**FINDINGS**

**UPON THE WHOLE RECORD and all the evidence after hearing, the Board finds:**

**The parties herein are carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.**

**This Board is duly constituted by agreement and has jurisdiction of the parties and subject matter.**

**The facts of this case are not in dispute; it is a case of contract interpretation.**

On December 9, 2009, (and as amended December 11, 2009 and November 2, 2010), BMWED and BNSF reached an agreement regarding EFB Welding Gangs (the "EFB Welding Agreement" or "the Agreement."). It begins,

The purpose of this Agreement is to provide for the operation of in-track electric flash butt welding units by BMWED-represented employees and to resolve disputes concerning the "Electric Flash Butt Welder positions" currently advertised on Region Gang Job Bulletin R1001 dated December 1, 2009 and District 100 bulletin N09012A-23. We agree that the Company currently leases electric flash butt welding trucks from various vendors, and that these vendors, require at this time one of its supervisors to accompany each welding truck; and we agree that this Agreement is not intended to eliminate that practice. It is agreed that the vendors' supervisors primary functions are 1) to perform maintenance of the in-track electric flash butt welder with the assistance of the assigned employees; 2) to train BNSF employees in the operation and maintenance of the in-track electric flash butt welder; and 3) to assist in the operation of the in-track electric flash butt welder, but not in lieu of the assigned employees. Given the specific issues discussed, the parties agree as follows:

1. Carrier will issue a "Bulletin Correction Notice" on December 9, 2009. This "Notice" will be distributed to the required bulletin posting locations using all available means of communication that are typically used when coverage and timing of job bulletin information are at issue.
2. The "Bulletin Correction Notice" will advise of changes to the Region-System Rail Production Gang welding positions "RW" positions (and District 100 Sickles Gangs RW-12 and RW-20). The "Bulletin Correction Notice" will advertise for each "RW" gang:

- A. Welding Foreman ...
- B. Welder (Rank B) ...
- C. Grinder ...

In December 2016, BNSF advertised open positions for EFB Welding Gangs for the 2017 work year. BMWED objected to bulletins on which gangs were to be staffed without a Welding Foreman or a Grinder, or both, claiming violation of the Electric Flash Butt Welder Agreement. The parties agreed to resolve the dispute in arbitration.

The Carrier, of course, has the right to manage its properties. This fundamental right is only restricted to the extent the parties have agreed to limit this

right in their collective agreement. The Organization is not challenging this principle, but contends that the parties have agreed to limit the Carrier's right in this instance.

The Organization contends that the clear and unambiguous language of the EFB Welding Agreement requires that all EFB Welding Gangs must be staffed with three positions: Welding Foreman, EFB Welder, and Grinder Operator. The Organization points to paragraph 8 of the Agreement, which reads, "Nothing in this Agreement will preclude the advertisement and assignment of additional welding positions on gangs working with electric flash butt welders where it is determined such additional positions are needed to perform related welding work." The Organization contends that this provision would have been unnecessary if the Agreement permitted the Carrier to staff EFB Welding Gangs with any number of employees. A review of the Agreement reveals that it gives the Carrier the right to assign additional positions but is silent as to the assignment of fewer positions.

The Carrier contends that the EFB Welding Agreement does not limit its right to determine staffing other than the EFB Welder and that the establishment of the new position of EFB Welder only meant that previous bulletins had to be corrected. The Carrier asserts that it was only contractually obligated to comply with the EFB Welding Agreement for the work season following the Agreement.

The EFB Welding Agreement expressly states two purposes: to correct bulletins concerning currently advertised gangs and to provide for the operation of in-track EFB welding units. The parties amended the Agreement twice, both times expressly indicating the parties' intention that the December 9, 2009 Agreement remain "unchanged and in effect." The Board finds that the clear and unambiguous language of the EFB Welding Agreement establishes that the parties intended to do more than simply correct previously bulletined gangs; they also provided for the operation of in-track EFB welding units going forward.

The Carrier acknowledges that since the 2009 Agreement was reached, it has regularly bulletined EFB Welding Gangs with these three positions. However, it asserts that it has done so based on operational needs, not contractual obligation. It concedes that the Agreement requires it to staff each EFB Welding Gang with an EFB Welder, but denies that it is also required to include a Welder Foreman or Grinder. The Board finds that the Agreement does not differentiate between these positions in the operation of in-track electric flash butt welding units by BMWED-represented employees, except as to CDL requirements.

The Carrier further contends that now that weld-grinding duties are performed using a "hot-weld" rather than a "cold-weld," the EFB Welder can perform the incidental work of grinding, eliminating the need for a Grinder on the gangs. Other Boards have recognized that a technology change may permit a change in staffing, such as in *BMWED v. Consolidated Rail Corp.*, NRAB Third Division,

Award No. 39729 (June 26, 2009), which holds, “[O]nce there is new automated equipment that is installed that eliminates some aspects of work, the Carrier has a right to readjust its workforce to work with that new automated equipment.” The Carrier contends that the Agreement does not limit its right to assign only two BNSF employees to the crew now that a hot-weld can be made.

The Organization responds that because the Carrier continues to perform Electric Flash-butt Welding, grinding must still occur on the weld and the only change is how long after the weld is finished that grinding occurs. The Organization points out that the Carrier failed to provide notice to the General Chairman of a material change in work methods, as required by Appendix F. Further, the Organization contends that even if grinding the weld is “incidental,” Rule 78 does not permit the reassignment of incidental tasks where doing so would “alter the establishment and manning of work forces accomplished in accordance with existing....rules.”

While the Carrier asserts that the “hot-weld” rather than “cold-weld” justifies the elimination of the Grinder from the EFB Welding Gangs, it makes no similar claim regarding the Welding Foreman. As to the Grinder, the record clearly shows that the work continues on EFB welds and there is insufficient evidence that the amount of grinding has been reduced in a significant way. In contrast to the “technology change” Awards cited by the Carrier, the work here has not been eliminated (such as when an automated process rather than an employee raised a bridge). If a material change in work methods had occurred, presumably the Carrier would have given notice to the Organization as required by Appendix F. That did not happen here. Even if the new process means that grinding work could be considered “incidental” to the welding work, the parties’ Agreement states that an EFB Welding Gang will include a Welding Foreman, EFB Welder, and Grinder Operator.

With respect to remedy, the Organization seeks proportionate damages on behalf of Claimants for each gang and day the EFB Welding Agreement was violated. The Carrier responds that it would be absurd to award such an excessive remedy.

The Board recognizes that views diverge as to whether a claimant who worked during the time in question is entitled to an award of damages. No assertion was made that those affected were not otherwise fully employed. However, the Board finds that for those claims listed in Attachment A, Welding Foremen and Grinder Operators who “lost [their] rightful opportunity to perform the work” are entitled to share an award of the monetary claim.


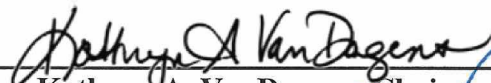
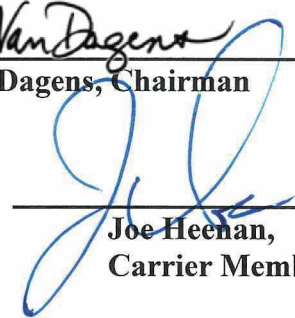
### **AWARD**

**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.

The Board will retain jurisdiction for the sole purpose of implementing this Award and resolving any questions that may arise under it.

 _____ Kevin Evanski, Organization Member	 _____ Kathryn A. VanDagens, Chairman	 _____ Joe Heenan, Carrier Member
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Dated: September 27, 2017