

Award No. 7390
Docket No. MW-6053

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) The Carrier violated the effective Agreement on April 4, 1950, when it allocated the work of making repairs to a sand stove at Whitehall, to Boilermakers and Machinists;

(2) The individuals holding seniority as Plumbers and Plumber Helpers working at Whitehall, be paid at their respective straight time rate of pay for an equal proportionate share of the man-hours consumed by the Boilermakers and Machinists in repairing the sand stove referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On April 4, 1950, three Boilermakers and three Machinists performed six (6) hours' work each in connection with repair of a sand stove at Whitehall, New York.

Work of this character is contemplated in the Carrier's agreement with the Brotherhood of Maintenance of Way Employees and is properly assignable to Maintenance of Way Plumbers.

Award No. 4754 in Docket No. MW-4305, Third Division, National Railroad Adjustment Board, involving an identical claim, the same parties and the same agreement, sustained the Employees' Position, holding that the work of repairing a sand stove was work encompassed within the scope of the instant agreement and that it was a violation of said agreement for the Carrier to assign such work to Boilermakers.

Award No. 4754, Docket No. MW-4305 of this Division is hereby made a part of the Employees' Statement of Facts.

The agreement in effect between the two parties to this dispute dated November 15, 1943 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: As previously stated in the Employees' Statement of Facts, the Carrier assigned the work of repairing a sand stove at Whitehall, New York, to employees holding no seniority under the effective agreement.

The Carrier does not believe that the Board, like the Carrier, can state that the Maintenance of Way Employees only should have exclusive right to perform such duties. To do so would, in effect, mean an addition to the present rule which has been negotiated between the interested parties. Management does not believe the Board has the right to designate the Maintenance of Way Department as the only department to perform such duties as the records indicate that the repair and maintenance of sand stoves has been the duty of the Shop Craft Employees, particularly at Whitehall, New York. It is not disputed that this service has also been performed by the employees of the Maintenance of Way Department, but the Scope Rule, or other rules, do not sustain the exclusive use of Maintenance of Way Employees and it is Management's position that for the Board to do otherwise than deny this claim would be to write such duties into a rule which had not heretofore existed.

The Carrier respectfully asks denial of this claim.

Management affirmatively states that all matters herein referred to have been discussed with the Committee and made a part of the record.

(Exhibits not reproduced).

OPINION OF BOARD: This is another case where the Organization, relying upon the scope rule in its Agreement, claims that work which has been reserved to employees covered by that rule has been assigned to employees of a different craft or class, not covered by the Agreement. Here, the work of repairing a sand stove at Whitehall, N. Y., was assigned to boilermakers and machinists, whereas, according to Claimants, it should have been assigned to plumbers.

The determinative question in the case is whether this work has been done traditionally and customarily by plumbers. See Award 7387. The evidence is that sand stoves have been installed and maintained at Whitehall by Motive Power Department employees, while the stove pipes to the stoves have been installed by Maintenance of Way employees. Statements from a Boiler Inspector—Gang Leader and a Boilermaker that they have erected, dismantled, assembled and repaired sand stoves since 1940, and a statement from a Boilermaker Helper that he has made repairs on sand stoves since 1945, are included in the record. It is significant that two of these statements refer to times prior to the date of the current Maintenance of Way agreement, which was effective in November, 1943, as well as times after. There is no evidence that Maintenance of Way employees have done any repair work on the sand stove at Whitehall. On this state of the record, it appears obvious that the work in question—repairs to the sand stove at Whitehall—has not been done traditionally and customarily by plumbers.

However, Claimants rely on Award No. 4754 of this Division. In that Award, involving a similar dispute between the same parties under the same agreement, except that the sand stove in question was located in Binghamton, it was held that the work belonged to the Maintenance of Way employees under the Agreement. The Award was not based on evidence as to which craft or class had done the work in the past, but rather on the theory that the scope rule includes the Structures Department, and that sand facilities are structures and thus come under the rule. Since the Maintenance of Way employees are entitled to the work of repairing these facilities, and it was found that the sand stove is an integral part of the structure of the facility, the work of repairing the stove also belongs to the Maintenance of Way employees. It should be noted that there was a dispute in that case as to whether Boilermakers ever worked on the sand stove, and that it appeared that the sand stove at Binghamton had been installed by the Maintenance of Way employees.

Other than a picture of a representative sand stove and a statement that it is delivered by the seller to the Carrier in separate parts and there

assembled, there is no evidence in the record before us here of the physical nature of the sand stove, no description of the sand handling facility and its operations as a whole, and no discussion of the structural relationship between the stove and the rest of the facility. We are unable to conclude on this evidence that the sand stove is an integral part of the sand handling structure at Whitehall.

In view of this, and also of the difference in the evidence as to past practice at the location in question between this case and Award No. 4754, we cannot be governed here by the holding in that case. There is no evidence as to whether plumbers repair other types of stove in other locations or buildings on the property, or any similar evidence which might help to clarify and reduce the ambiguity of the scope rule. We believe that in the case of ambiguous scope rules, the principle of looking to see which craft has traditionally and customarily done the work in question is a sound one. In applying that principle to the facts of this case, the conclusion can only be that the work in question has not been exclusively reserved to the Claimants.

The question of notice to third parties, raised by the Carrier, is not considered. See Award 7387.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 27th day of July, 1956.

SPECIAL CONCURRENCE TO AWARD NO. 7390, DOCKET NO. MW-6053

The Majority properly held that the Maintenance of Way Agreement does not reserve the repairing of sand stoves exclusively to plumbers and denied the claim. The conclusion reached made it unnecessary to comment on the "due notice" required by Section 3, First (j) of the Railway Labor Act, because shop craft employees cannot be adversely affected by this denial award. See Awards 6269, 6363 and 6526. While we concur in the conclusion on the merits, because of the reference to Award 7387, the Carrier Members' Special Concurrence therein made is equally applicable here.

/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ J. F. Mullen