Award No. 2465
Docket No. MW-2476

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

St. Clair Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY

(Joseph B. Fleming and Aaron Colnon, Trustees)

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

(1) That the Carrier violated agreement in effect between itself and the Brotherhood of Maintenance of Way Employes by contracting the work of installation of sprinkler system in the Rock Island freight house at Brinkley, Arkansas, thus having this work performed by employes who had no seniority rights as water service employes, Arkansas Division, Rock Island Railway.

(2) That the Water Service Employes named below, be paid for time lost while this work was being performed:

Name	Occupation	Dates employes were laid off and time lost while this work was being performed. No. of hours claimed.	Rate Per Hr.	Amount Due
Bert Johnson	Water Service Mechanic	March 8 to March 20, 1940—107½ hrs.	.79	$ 84.93
Gus A. Popke	Water Service Mechanic	Feb. 19 to March 20, 1940—227½ hrs.	.79	$179.72
Love Bell	Water Service Helper	March 9 to March 20, 1940—99½ hrs.	.54½	$ 54.23
W. D. Harris	Water Service Helper	Feb. 19 to March 18, 1940—108 hrs.	.54½	$ 58.86
E. M. Carpenter	Water Service Helper	Feb. 19 to March 20, 1940—227½ hrs. Less 10 days worked at rate of $85.90 per month.	.54½	$123.99
				$ 28.60
				$ 95.39

EMPLOYES' STATEMENT OF FACTS: The Carrier entered into a contract with the Perkins Automatic Sprinkler Company of Little Rock, Arkansas, to install a sprinkler system in the Rock Island freight house at Brinkley, Arkansas.

Mr. Frey's reply dated July 26, 1940 addressed to Mr. Fisher follows:

"In connection with your letter June 7 pertaining to the construction of modern water service facilities at Marengo, Iowa:

"As explained in conference, this is a character of work that has always been contracted as such work could not be handled by our division forces. Also, in keeping with past practice, which you and Mr. Wilson have at various times indicated we were in agreement could be continued, it is proper to contract these large jobs. The work was somewhat similar to the erection of a new coal chute at Chicago, 47th Street roundhouse a few years ago.

"In keeping with past practice, concurred in by your organization, we consider we have a perfect right to contract the work at Marengo."

No further appeal was made in that case and the employes accepted the explanation of Mr. Frey as to the reason for contracting the work in that instance.

The work contracted in the instant case covered a special fire protection installation in the buildings specified and is a type of installation never contemplated as being included in Rule 1—Scope—of the agreement with the Brotherhood of Maintenance of Way Employes.

The evidence of record does not justify the instant claim and it should be denied by your board.

OPINION OF BOARD: The claim asserts that the Carrier violated its agreement with the Brotherhood of Maintenance of Way Employes by contracting the work of installation of a particular sprinkler system. The controversy requires us to apply settled broad principles to facts which are largely undisputed.

The well established general principle that such working agreements as we are here interpreting comprehend all of the work requirements of the Carrier of the character described by the contract is qualified and limited by an important exception. It is recognized that warrant for the implication that the parties did not intend that their contract should embrace particular work may be found from clear and convincing circumstances. Awards 757 and 2338. In Award 757 it was said:

"It is well settled by many decisions of this and the First Division of this Board and predecessor Boards, that as an abstract principle a carrier may not let out to others the performance of work of a type embraced within one of its collective agreements with its employes. See awards of this Division, 180, 323, 521 and 615; of the First Division, 351 and 1237. This conclusion is reached not because of anything stated in the schedule but as a basic legal principle that the contract with the employes covers all the work of the kind involved, except such as may be specifically excepted; ordinarily such exception appears in the Scope Rule, but the decisions likewise recognize that there may be other exceptions, very definite proof of which, however, is necessary to establish their status as a limitation upon the agreement. Mere practice alone is not sufficient, for as often held, repeated violations of a contract do not modify it."

Whether the circumstances exhibited by this record impliedly exclude the work in question from the working agreement is the issue we are called upon to decide.

It is the position of the Carrier that automatic sprinkler installation is a trade in itself; that such installations are not common to the railroad industry; and that its supervisors and mechanics are not trained and experienced in the making of such specialized installations. In support of this position it calls

attentiotn to the fact that such installations must meet the requirements of National Board of Fire Underwriters, and quotes Rule 105 of that agency reading: "Sprinkler installation is a trade in itself. Inspectors cannot be expected to act as working superintendents, or correct errors of beginners. Sprinkler work should be entrusted to none but fully experienced and responsible parties."

It is the position of the Employes on the other hand that the work was not highly technical in nature, but was of the exact character described in Rule 1, Group 3, of their contract, and that its actual execution involved nothing more than the reading of blue prints, following of specifications, the cutting, threading, coupling, pitching, and bracing of pipe to hold and convey water, and was in fact less difficult to do than certain work they customarily do in connection with plumbing installations. In support of their view they introduced a day to day description of the work performed by the mechanics who installed the sprinkler as well as a Journeyman Plumber's certificate of one of the claimants who they assert was qualified to supervise the work. In substance they contend that the fact, if it is a fact, that the engineering staff was not qualified to prepare the plans and specifications does not justify the contracting or farming out of the work.

The scope of the exception with which we are to deal has not and probably cannot be defined. Such definition as it may ultimately receive will be pricked out by a slow process of inclusion and exclusion as particular submissions receive consideration. Some indications of its scope are revealed by the awards we have cited.

In Award 757 the contract had to do with the replacement of culverts. The Opinion contains this significant language. We quote. "We are not informed as to the reason for contracting the work; the employes state that the work was 'of the same class ordinarily done by regular Bridge and Building forces.' If this is so it is an invasion of their contract unless some valid reason can be shown to the contrary, * * *." Implicit in this language is a holding that the fact that the work involved is of the same class as that embraced by the contract is not of conclusive significance. Thus the postulate is erected that unusual circumstances may justify farming out of work of the class embraced in the working agreement.

The same award suggested that replacement of a large Missouri river bridge fell within the exception. It was said "Work of this character is generally let out by contract for many reasons, among others, the erection of such bridges requires a plant, a highly skilled force, and other incidents which the carrier probably could not provide, and in any event would not be justified in continuously maintaining for the few rare occasions when they would be required. Again, quite commonly the contract for such a job embraces not only the erection of the bridge but the furnishing of the material as well, as a lump sum contract."

This suggestion furnished the basis for the holding in Award 2338. A contract to repair a large bridge pier was there held not to be in violation of the working agreement. It was there said. "One of the exceptions may be said to exist when it appears that the work requires equipment and skill which the Carrier itself cannot otherwise provide." Thus it is further postulated that an unusual or special installation may be contracted if the task involves the development and use of special skills and the purchase of equipment of rare utility to the carrier.

From this background we turn to the instant circumstances. It cannot be questioned but what the installation required work of the class or character described in the working agreement, and such as was customarily performed by the employes. It should next be noted that these installations are usually made by specialists. We further note that such installations are not common in the railroad industry. The carrier has made three prior installations in a

period of twenty-five years but in each instance it followed the common practice of referring the matter to specialists in that trade. The present instance did not arise because the carrier had changed its policy. It had not determined to make a number of these installations over its system. One of its connecting buildings was under lease to a tenant who requested a sprinkler system to effect a reduction in its insurance rating. To achieve the desired result both connected buildings had to be so equipped.

We next note that the project did not involve any substantial investment in working tools or equipment. That element is not here.

We now turn to look at the qualifications of workers and staff of the carrier. We think an impartial mind can reasonably reach no other conclusion than that the over-all project required the exercise of knowledge and experience not possessed by plumbers and construction engineers, but that because of their basic training and experience these classes of employes could be qualified to plan, superintend, and execute such a piece of work without an extreme outlay of effort and money. In this connection we pause to observe that we think the employes make too broad a contention when they assert that the fact that the staff of engineers of the company are not qualified to plan and superintend an installation is not of significance. In other circumstances, we might agree. If the carrier, by reason of a change of policy was faced with the necessity of making a number of these installations, we doubt whether the qualification of its engineering staff would be of great significance in determining whether the work could be farmed out.

The last circumstance we deem of significance is that the installation was of very small dimensions.

Thus there is painted this factual picture. The carrier had need for a small specialized installation, uncommon to the industry. To do the work itself it would be required to put forth an effort disproportionate to the size of the project in order to qualify its staff and workers to do specialized work of very rare utility in its over-all operations. This, we think it was not required to do. The work in our opinion falls within the exception to which we have adverted.

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 employes involved in this dispute are respectively carrier and employes 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 carrier did not violate the contract.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of February, 1944.