Award No. 7051
Docket No. MW-7033

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CENTRAL OF GEORGIA RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when it failed to assign the work of installing a gas-burning heating unit in the freight depot at Union Springs, Alabama, to employes holding seniority rights thereto under the effective Agreement and in lieu thereof assigned the work to outside forces;

(2) Water Supply Foreman G. W. Haynes and Roadway Tinner L. E. Hayes each be allowed eight (8) hours pay at their respective straight time rates account of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier entered into a contract with a contractor whose employes hold no seniority under the effective Agreement for the installation of a gas-burning heating unit in its freight house at Union Springs, Alabama.

The work consisted of the installation of the heating unit; the installation of approximately fifteen (15) feet of four-inch vent pipe; the installation of approximately thirty (30) feet of gas transmission line; and all other work incidental thereto. Approximately sixteen (16) man-hours were consumed by the contractor's forces in performing the work involved in this dispute.

The work of installing heating units, together with all other work incidental thereto, has been customarily and traditionally assigned to and performed by Employes holding seniority under the Agreement between the two parties to this dispute.

The Claimant employes were available and fully qualified to have performed all work necessary in connection with the installation of this unit heater, but the Carrier nonetheless assigned the work to outside parties without seeking the approval and concurrence of the Employes.

Claim was accordingly filed; the Carrier declining to allow it throughout all stages of handling.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

As we have pointed out in our Statement of Facts, we respectfully hold that the National Railroad Adjustment Board is bound by law to decide this dispute in accordance with the Agreement between the parties. Since there is no "Penalty Rule," upon what basis could a penalty possibly be brought?

Regardless of the merits of the case, in Third Division Awards 3839, 3255, 3254, 3219, 3215, 2701, 1610, and others, the Organization contended and recognized that all the claimant was entitled to under the contract was to be **made whole** for any wage loss suffered. These are but a few of the claims submitted by the Brotherhood of Maintenance of Way Employes before this Board on the theory that collective bargaining agreements contemplate only that employes adversely affected by alleged violations be **made whole, and not that they be awarded a penalty.** In this situation, the Brotherhood cannot in good conscience now demand that the Board construe the Agreement as meaning that penalties or fines are to be imposed.

No penalty should be made, and the claim should be denied in its entirety.

SUMMARIZING

Carrier respectfully submits that:

1. There is no rule to support the claim. None has been produced on the property and none can be produced before this Board.

2. There is no "Work Classification Rule" in the effective Agreement. Therefore, there is nothing the Employes can produce to show a violation of such a rule.

3. Past practice sustains the Carrier. Certainly the 34 installations listed where gas-burning heating equipment was installed through the years proves that this work does not belong to the Employes, and that they are "reaching out" for something.

4. This is an "All to gain and nothing to lose" claim, and the Board's decisions in the past sustain the Carrier. The Employes have not attempted to negotiate the work in question under their Agreement. They simply filed claims, and are apparently hoping to circumvent the Railway Labor Act by attempting to obtain a favorable Award from this Board. This "all to gain and nothing to lose" claim should, therefore, be declined in its entirety.

5. No employes were adversely affected. These claimants were working on their regular maintenance jobs—they haven't lost a thing.

6. A penalty claim cannot be awarded under the effective Agreement. There are no provisions for such double pay as the Employes are here demanding. Organization has recognized this in past awards.

Under these facts and circumstances the claim is baseless and devoid of any merit, and Carrier respectfully urges that it be declined.

All relevant facts and arguments involved in the dispute in this case have heretofore been made known to the Employe representatives.

OPINION OF BOARD: This dispute arose when the Carrier entered into a contract with a contractor, whose employes hold no seniority under the Agreement, for the installation of a gas-burning heating unit in its freight house at Union Springs, Alabama.

The work consisted of the installation of the heating unit; the installation of approximately 15 feet of 4-inch vent pipe; the installation of approximately 30 feet of gas transmission line; and other work incidental thereto. Approximately 16 man-hours were consumed by the contractor's forces in performing the disputed work.

FIRST. The Scope Rule in generality covers "employes in the Maintenance of Way and Structures Department" with six exceptions (Signal, Scale, Engineering, etc.). The Agreement also creates 13 sub-departments among which are "Water Supply" and "Tinners." And Rule 34 sets forth the positions of "Foreman Water Supply" and "Roadway Tinners"; and Claimants are occupants of these positions.

Scope rules of this nature reserve all work usually and traditionally performed by the class of employes who are parties to the Agreement.

Work on a heating unit may involve original installation and also maintenance thereafter. It is conceded that all maintenance work on heating systems, which consists of repairs, replacements in kind or conversions, has in practice been traditionally performed by employes covered by the Agreement. On the other hand, the Carrier contends that new installations have in practice been contracted out to strangers and 40 instances are specified in the record as follows:

1947	1
1948	none
1949	1
1950	1
1951	2
1952	9 (two claims filed Oct. & Nov.)
1953	23 (1 claim filed Aug.)
1954	3

The first claim filed in October of 1952 challenged the tenth installation scattered over a five to six year period.

The Carrier's argument is that new installations, as such, are outside the scope of the Agreement and that the foregoing evidence of practice is determinative of the claim.

We are unable to conclude that all new installation or construction work is necessarily outside the scope of the agreement. It is "not a matter of principle but a matter of degree" (Award 4158). If the maintenance, repair, replacement in kind and conversion of heating units is within the scope of the Agreement, it is difficult to comprehend why the installation should stand on any different footing.

Nor are we able to conclude that the evidence of practice disclosed by this record is determinative. Practice under an agreement may be a useful guide to what the intention of the parties was, when the agreement is indefinite as this Scope Rule is. Evidence of practice may have controlling effect if the practice is consistent and well established. The difficulty with the evidence here is that the Organization challenged the practice practically at the outset.

SECOND. It is well settled by numerous awards that, as a general rule, a carrier may not contract out to strangers work covered by its collective bargaining agreement. The question is one of managerial judgment which is entitled to weight, but the burden of proof is on the Carrier to establish by factual evidence that the work was justifiably contracted out in all the circumstances (Awards 2338 and 4671). The Carrier has not sustained this burden.

The installation in dispute was minor in scope like a kitchen stove, and involved no great capital outlay. Nor did it involve the use of special tools, special equipment or special materials. The work was not novel. Nor did it require special skills not possessed by Claimants, as is attested by the conceded fact that all maintenance work on heating systems is performed by employes covered by the Agreement. It can hardly be said, therefore, that this installation was an undertaking of such magnitude or intricacy as to be clearly outside the contemplation of the Agreement or beyond the capacity of the Carrier's forces like a heating system for a large office building.

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

The Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 8th day of July, 1955.