Award No. 7790
Docket No. MW-7523

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, 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 that:

(1) The Carrier violated the Agreement when it required and/or permitted employes of the Motive Power Department to repair sand stoves at Oneonta, New York, on March 27 and 28, 1950;

(2) The four (4) senior plumbers employed on the Susquehanna Division each be allowed sixteen (16) hours' pay at their straight time rate account of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On March 27 and 28, 1950, four (4) employes of the Motive Power Department were assigned by the Carrier and performed work necessary in repairing sand stoves located at Oneonta, New York, Susquehanna Division. These Motive Power Department employes worked eight (8) hours each on March 27 and likewise on March 28, 1950, for a total of sixty-four (64) man hours.

Work of this type heretofore has always been performed by Maintenance of Way plumbers as covered in the effective Agreement.

Claim was filed in behalf of the four (4) senior plumbers and claim was declined by the Carrier.

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

POSITION OF EMPLOYES: Docket MW-4305, Award 4754, involved an identical dispute between the instant parties and the position of the Employes was sustained. Upon receipt of Award 4754, General Chairman Thomas W. McGuire tried to get the Management to apply the principles enunciated therein to the instant claim. General Chairman McGuire was advised that, in the Carrier's opinion, Award 4754 applied to Binghamton only, and that any other claims involving similar violations would have to be progressed in a like manner.

We respectfully request that the submissions of both parties in Docket MW-4305, Award 4754, together with the Opinion, Findings, and Award of your Board, be, by reference, made a part of this Docket.

Claim is not supported by agreement rules and practice thereunder and carrier respectfully requests that it be denied.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the Committee and made part of the particular question in dispute.

(Exhibits not reproduced)

OPINION OF BOARD: The locale of this dispute is Oneonta, New York, at issue is the alleged performance by employes of the Motor Power Department of work properly performable by employes covered by the Maintenance of Way Agreement. The work in question involves the repair of sand stoves.

It is asserted that sand handling facilities are structures which are built and maintained by Maintenance of Way employes and that sand stoves are an integral part of such structures. It was asserted that it was illogical to assume that the original installation of a sand stove, could, as here, belong to the employes covered by this Agreement without the repair and maintenance of such stoves likewise belonging thereunder. It was further asserted that past practice at this station substantiated the organization and that the contrary practice, if any, relied upon by the Respondent had to do with other facilities, at other stations than Oneonta. Award 4754 of this division was relied upon as controlling.

The Respondent asserted that while admittedly the sand handling facilities at this location had been constructed by B & B forces, and that while this sand stove was assembled by the B & B forces, it (the stove) was essentially a piece of equipment and not a part of the sand handling structure. It was further contended that Boilermen rather than B&B-M. of W. forces had done repair work on these stoves at this location since 1923 and that this distinction between Binghamton, the location involved in Award 4754 had been recognized by the employes at that time inasmuch as it (work at Oneonta) had not been made a part of that claim. It was further asserted that Award 7390 was controlling here since it had recognized the existence of different conditions and practices at different locations.

We are here once again confronted with the coverage and application of a Scope rule where the work encompassed thereby is not described. The Board has held in numerous cases that where this condition exists it is necessary to determine which craft has traditionally and customarily performed the work at issue, using as the criteria, past custom and practice. Here, likewise, we are confronted with two Awards, with diverse holdings. An examination of these Awards 4754 and 7390 reveal that different facts and circumstances existed and that in each different contentions were advanced by one or the other of the parties.

In Award 4754, as here, the sand stove was installed by Maintenance of Way forces and it was alleged that said stove was an integral, basic part of the sand handling facility. In Award 7390 it was found that the stove had not been installed by Maintenance of Way forces and that no evidence had been presented on the question of the stove being a part of the structure. In Award 4754 it was determined that the alleged custom and practice that crafts not coming within the Maintenance of Way Agreement had performed such work was concurrent with or after the filing of that claim, while in Award 7390 it was found that Boilermakers had in the past performed repair work.

Here, as was true in Award 4754, and unlike the situation in Award 7390 the sand stove was installed by Maintenance of Way forces, and here likewise, as in Award 7390 it is alleged that it was the custom and practice for others than B&B forces to repair sand stoves.

Thus it is evident that different facts and circumstances were presented to this Board in those two dockets. The same is likewise true here, so therefore, we must here, as was done in each of the other awards predicate our conclusions on the facts of record.

It is evident that the stove was not assembled when delivered to the Respondent. Such assembly was performed by B & B forces. While we have been presented with a picture of a sand stove, no evidence has been presented concerning the operation of this sand handling facility or the structural relationship between the stove and the structure.

As hereinabove stated where a scope rule is ambiguous past custom and practice is controlling. There is evidence of record that over the years sand stove repair has been accomplished by others than Maintenance of Way forces, so therefore, we cannot find that such work, at Oneonta, New York, belongs exclusively to those covered by the confronting Agreement.

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 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 15th day of March, 1957.