

**Award No. 13666**

**Docket No. MW-14684**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Daniel Kornblum, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**THE DELAWARE AND HUDSON RAILROAD CORP.**

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

(1) The Carrier violated the Agreement when it assigned or otherwise permitted employees outside the scope of the Agreement to perform the work of cutting, threading, bending and welding pipe on or about August 13, 1962. (System Case No. 2.63 MW.)

(2) Plumbers Rodolphe Turcotte and Robert Preteau each be allowed twenty (20) hours' pay at their straight time rate because of the violation referred to in Part (1) of this claim.

**EMPLOYEES' STATEMENT OF FACTS:** On or about August 13, 1962, the Carrier assigned employees outside the scope of the Agreement to perform the work of cutting, threading, bending and welding pipe used for the construction of a locomotive wash rack. The work was performed on the Carrier's property at Colonie, New York, and the locomotive wash rack was then shipped to Oneonta, New York for use at that point.

All measurements and specifications for the wash rack were copied by the outside forces from a locomotive wash rack which the bridge and building forces had built and installed at Colonie, New York.

The claimants were available, fully equipped and qualified to perform all of the work and would have done so if the Carrier had assigned them to it.

Claim was timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest appellate officer.

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

**POSITION OF EMPLOYEES:** The scope rule reads:

"The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employees in any and all

had been violated when these portable devices were constructed by Equipment Department employees. The correlation between the claim involved in Case No. 9.52 MW and the present dispute is readily apparent, i.e., each dispute concerns the claim of B&B employees when mechanical department employees constructed portable devices to be used in the performance of solely shop work. Neither the protective screens nor the portable wash rack became a part of any building or structure, nor were they attached to a building in any manner.

Based on the Awards referred to herein, the facts involved in the present dispute and the failure of the complainant Organization to pursue an almost identical claim based on the same agreement on this property, it is the position of the Carrier that the Organization cannot prove that the work involved was exclusively their work by any rule of the applicable agreement or practices thereunder. Therefore, their claim must fail.

**OPINION OF BOARD:** The work at issue in this dispute involved the construction of a locomotive wash rack. It was performed by a plumber employed in the Carrier's Equipment Department at Colonie, New York. The Organization contends that under the Scope and Seniority provisions of the Agreement between the parties, the exclusive right to perform this work belonged to plumbers of the Bridge and Building Department of the Maintenance of Way (M/W) Employees. It, therefore, makes claim on behalf of the two named M/W plumbers with appropriate seniority in this class at Colonie for twenty hours' pay because of the alleged violation.

It appears without dispute in the record that over a period of time there were three locomotive wash racks constructed at Colonie, New York, the Carrier's main locomotive repair point. The first, admittedly built by M/W plumbers of the Bridge and Building Department, was permanently installed by that Department's employees in the Wash Shed, Building No. 1, Colonie Shops. A second wash rack was later also built at Colonie, but not permanently installed there. While at the outset it was used for "run through" cleaning service in Bay 2 of the Colonie Diesel Shop, it was later removed and shipped to the Diesel House in Whitehall, New York, where it is presently in use. This rack was constructed by employees of the Equipment Department, apparently without objection or protest by M/W Employees. Lastly, the rack in dispute was built at Colonie, identical to the second, and also by an employee of the Equipment Department. It, too, like the second rack, was not intended for permanent installation, but, rather, was shipped on completion to Oneonta, New York, for use at the locomotive terminal there. All three racks were constructed from designs devised by the Equipment Department.

The Organization's basic contention in support of its claim of exclusivity is that this was work "accruing" to plumbers under the Scope and Seniority provisions of the Agreement and, as such, could not be assigned to employees outside the coverage of that Agreement.

The Carrier contends that (1) the two "portable" wash racks, including the one in dispute, both constructed by Equipment Department employees, are to be distinguished from the "permanent" one built and installed by the M/W employees; and (2) in any event the Claimants did not sustain the burden of proving that the disputed work is reserved exclusively to them.

The gravamen of the first argument of the Carrier is that as a portable piece of equipment the wash rack in question became part of the working inventory of the Equipment Department, especially since "it was not and has not been made an integral part of any structure." In view of the basic

functional and structural similarity of all three racks, to venture here into the dubious refinements of what is or is not a permanent fixture would be a hairsplitting exercise (Cf. Award 13045, citing Awards 10687, 4610, 4779, 10256).

Rather, in terms of the less debatable facts in this case and the more ample and apposite precedent of this Board, the much stronger and persuasive argument is the second one urged by the Carrier. It has been held in a long line of cases decided by this Board, a number involving the same contracting parties and Agreement as in this claim (e.g., Awards 7387, Cluster; 9001, Murphy; 9552, Bernstein; 7790, Smith; 8755, Sempliner, that where, as here, a Scope Rule does not specify or describe the items of work covered by the Agreement, it is then incumbent upon the Claimant to show not only that his craft or class "has traditionally and customarily performed the work at issue, using as the criteria, past custom and practice" (Award 7790, *supra*), but also that the practice is "consistent" and "of sufficient duration" (Award 12905, Coburn; see also, among others, Awards 12972, 12021, 12022, 11791, 11988, 11956, 11907, 11755, 11720, 11581, 11401, 111784, 11707, 11658, 11645, 11231, 11118, 11081, 10903, 9953.)

The most that the Organization shows here is that but one of the three racks was constructed by employees under the coverage of its Agreement, a showing hardly sufficient to give it the dignity of denominating it a "practice" under the precedents of this Board (Cf., Awards 7031, Carter; 7784, Lynch; 8001, Bailer; 8755, Sempliner; 9565, Rose; 10014, Weston, 10515, Dolnick). Moreover, the Carrier points out that the other two racks were also built by its own employees, rather than contracted to "outside concerns", thus differentiating Awards 2701 (Carter) and 6305 (L. Smith) cited by the Organization.

In sum, the evidence in this record does not sufficiently establish the claim, and it, therefore, must be denied.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June 1965.