Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7236
SECOND DIVISION Docket No. 7103
2-MP-CM-'77

The Second Division consisted of the regular members and in addition Referee C. Robert Roadley when award was rendered.

Parties to Dispute: (System Federation No. 2, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Missouri Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Missouri Pacific Railroad Company violated the controlling agreement, particularly Rule 117, when they permitted employes of Best Welding Company to perform carmen's work on the property beginning in October, 1974.

2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carmen J. J. Hughes, W. E. Kirkes, R. L. Abernathy, G. E. Yarberry, D. F. Green, H. D. Westbrook, G. S. Burr and J. L. Wilcox in the amount of 142.2 hours each at the pro rata rate as they are skilled in the performance of the type work contracted out and were available to perform the work during the hours the carmen's work was performed.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

This dispute alleges violation of Rule 117, Carmen Classification of Work, contained in the controlling Agreement, account Carrier allowing non-carrier employees to perform certain work on carrier owned hopper cars, the work having been performed on carrier owned property.

The record shows that the Bethlehem Steel Company purchased hopper outlets for 300 cars from the Morrison-Knudson Company which cars were manufactured for the carrier. After said cars had been in service for approximately two years it was found that the hopper outlets had not been properly designed thus preventing the doors from closing properly. As a

result, material being hauled in the cars leaked out on the right-of-way. Carrier avers that since these cars were built under warranty the manufacturer was required to correct the defects without cost to the carrier. Therefore, arrangements were made by the carrier with Morrison-Knudson whereby carrier would lease certain tracks in the North Little Rock Terminal to the manufacturer where the necessary work could be done. Morrison-Knudson contracted with Best Welding Company to correct the defect. It is this performance of work that gave rise to the subject claim.

At the outset, in its submission to this Board, Petitioner has stated that Carrier Exhibit #1 (letter from Morrison-Knudson to carrier relating to the warranty arrangements) and Carrier Exhibit #2 (copy of Leasing agreement between Carrier and Morrison-Knudson covering the use of certain section of carrier's tracks for the performance of the work) are improper exhibits and should not be considered by the Board. Petitioner alleges that these two exhibits were not a part of the record of handling on the property and has cited a number of prior awards in support of their position regarding acceptability. We accept the position of Petitioner on this point.

However, although the actual documents identified as Exhibits #1 and #2 were not presented to the Organization on the property as such, the record is crystal clear that their existance was noted and thoroughly discussed on the property for it is the application of these documents by the carrier that framed the dispute. The carrier assertions on the property that such documents existed were not denied by the organization. Therefore, we will accept the carrier's assertions as being factual and correct. See Award No. 11660 (one of several) which stated, in part:

> "Not having denied Carrier's allegations and having produced no evidence to the contrary, we are obliged to presume them correct."

In other words, it is clear from the record of handling on the property that the Organization was well aware of the fact that the work complained of was done under warranty, without cost to the carrier. It is the fact that said work was performed on tracks leased by the Morrison-Knudson Company from the carrier that is the basic issue here. Since said work was performed on carrier property Petitioner avers that such work belonged to the Carmen, under Rule 117 of the Agreement, leasing arrangements notwithstanding. Petitioner has cited a number of prior Awards in support of that position. We have reviewed those Awards carefully and note, in particular, Second Division Award No. 4830 as being illustrative of those cited awards treating with disputes involving violation of the scope of an agreement. That award stated in pertinent part:

> "The Carrier argues that the Scope Rule limits the Agreement to the Carrier's own work; but it does not do so specifically, and reasonable inference would equally well include work on its property and within its control, as emphasized in Award 4570. Certainly in the absence of proof to the contrary, the presumption should include such work."

In applying the above cited principle to the subject case one would have to find that the work was not only done on the carrier's property but that it was work within the carrier's control. Such a contention is not supported by the record in the subject case. Petitioner points out that the work was actually performed by a fourth party (Best Welding Company) with the inference, therefrom, that since it was not done by the warrantor, as such, it was contracted out as being under the carrier's control. However, the record shows that in performing the work the Best Welding Company was functioning as agent of the warrantor (Morrison-Knudson Company) and not the carrier. Under such circumstances it could not be said that the carrier had control of the work; the work was performed as directed by the warrantor.

There is no question that the work performed was to correct a defect recognized as such by the manufacturer, and not a modification or repair as those terms are generally used, and it is our view that the carrier had the right to seek and expect recourse under the warranty. The Board is cognizant of the diligence of all the Organizations in policing their labor-management contracts so as to preserve the integrity of their scope rules, but, in the instant case, the Board finds that the contentions of the Organization are tantamount to an encroachment upon the prerogatives of management. The Board stated, in Third Division Award No. 5044, in pertinent part:

> "It seems to us that a Carrier, in the exercise of its managerial judgement, could properly decide to purchase the engineering skill of the seller of railroad equipment, ..., and a guarantee that it would operate efficiently and economically."

The Board could hardly recognize a carrier's right to purchase a piece of equipment covered by warranty as to performance and then deny a carrier the right to seek the benefits of the warranty if need be. Under the circumstances in this case we find that the controlling Agreement Rule 117 was not violated by carrier.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 4th day of March, 1977.