Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7747
Docket No. 7629
2-C&NW-CM-'78

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (System Federation No. 76, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Chicago and North Western Transportation Company

Dispute: Claim of Employes:

1. That the Carrier violated the controlling agreement, when on October 18, 19, 20, 21, 22, 25, 26, 27, and 28, 1976, it instructed and/or authorized employes of Okee Incorporated to make repairs and dismantle Chicago and North Western Transportation Company's automobile device cars at Okee Incorporated located at Bylsby Avenue, Green Bay, Wisconsin.

2. That the Carrier be ordered to discontinue these violations and pay Carman A. T. Demoulm eight (8) hours pay at rate of time and one-half for October 18, 19, 25, and 26, 1976; Carman C. B. Hendrickson eight (8) hours pay at time and one-half rate for October 25, 1976; Carman Scott Jensen, eight (8) hours pay at rate of time and one-half for October 20, 21, 27, and 28, 1976; Carman J. W. Kreuser eight (8) hours pay at rate of time and one-half for October 26 and 27, 1976; Carman T. A. Seiler eight (8) hours pay at rate of time and one-half for October 25, 1976; and Carman Bruce Voelker, eight (8) hours pay at rate of time and one-half for October 25, 1976.

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 involves repairs to 23 flat cars leased by the Carrier from the B.R.S. Railroad Equipment Associates (the "Lessor"). The Carrier determined that the cars required repair work. The cars were sent to Okee, Incorporated, by the Carrier for such repair. Okee is a firm selected for this purpose by the Lessor.

Claimants argue that this work should have been performed by Carmen employed by the Carrier, and claim pay because of the Carrier's failure to give them the work.

The sole thrust of the Carrier's defense is that the leased flat cars are the property of the Lessor and, as such, are under the Lessor's control as to the method and place of repair. In support of this, the Carrier relies on the terms of its lease agreement with the Lessor.

The Board has found in many previous instances that, where it is clear that work is beyond the control and direction of the Carrier, such Carrier cannot be held responsible for giving such work to employes covered by agreements with the Carrier. Award Nos. 4667 (Seff), 4129 (Anrod), and 4169 (Harwood) deal with instances in which the employer cannot be held accountable for work assignment where the work itself is the responsibility of another employer. Award No. 6884 and Third Division Award Nos. 20529 (Lieberman), 19369 (Edgett), and 5246 (Boyd) deal with the invulnerability of the Carrier in instances where the work is not for its benefit, was never controlled by the Carrier, and/or simply does not belong to the Carrier.

Such principles having been established, the Board nevertheless finds that the fact situation in the instant case simply does not rest comfortably in this niche. Carrier submitted, as its defense, the text of the lease agreement with the Lessor. The Organization raised objections to the use of such agreement in Carrier's defense, claiming it was not offered to the Organization on the property and further is an unsigned, undated document. Holding aside a ruling on such objection (for reasons which will become obvious below), the Board fails to find that the lease agreement says what the Carrier purports it to say -- namely, that all repair work to the leased cars is under sole control of the Lessor.

It is the Board's function to interpret and rule upon agreements between parties on matters properly before it under the Railway Labor Act. The Board is not the fount of all wisdom on leasing agreements or other business contracts in which a carrier may engage. In this instance, however, the Carrier relies entirely on such lease agreement for defense of its action under the agreement with the Organization, and so it must be examined by the Board. The Carrier refers in particular to the first sentence of paragraph 8 of the agreement, which reads:

> "Lessor shall be responsible for the cost and expense of all repair work which is imposed upon the Lessee (the Carrier) under interchange rules."

To the Board, this says that the Lessor is financially responsible for charges reaching the Carrier when repair work is performed by another carrier "under interchange rules". It is not definitive as to whether the Carrier or the Lessor has control of repair work when interchange rules and other carriers are not involved.

On the other hand, paragraph 6 of the same lease agreement reads as follows:

> "6. Lessee will preserve the cars in good condition and will not in any way alter the physical structure of the cars without the approval in writing of the Lessor. At the termination of this lease, Lessee will return all of the cars to the Lessor hereof empty, in the same good order and condition as the cars were in when they were delivered by the Lessor to the Lessee, ordinary wear and tear excepted." (Emphasis added)

This would appear to place responsibility to "preserve the cars in good condition" and to return them "in the same good order and condition" upon the Carrier. At the least, it does not say that repairs will be made as and where directed by the Lessor.

In the circumstances of this dispute, the Carrier has the burden of an affirmative defense to prove that its arrangement with its Lessor is what is says it to be. For the reasons advanced above, the Carrier has failed to provide such evidence, and its position cannot be upheld. See, similarly, Award Nos. 6529 (Shapiro), 7361 (Twomey) and 7374 (Weiss).

The Claim will be sustained, except that, following previous reasoning and decision by this Board, claim for pay shall be paid at the straight time rate, rather than at the punitive rate as claimed. The Organization and the Carrier are directed to determine the appropriate amount of work time involved under the Claim for assignment of pay to the Claimants.

A W A R D

Claim sustained as indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By _____
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of November, 1978.